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Prison Inmates' Right to Hunger Strike: Its Use and Its Limits Under the U.S. Constitution

Naoki Kanaboshi[1]

Abstract

Hunger strikes have long been used as a means of protest, as a last resort, especially by those in prison. Recently, government officials have responded to hunger strikes with force-feeding, an approach that has generated considerable international attention. The purpose of this article is to analyze the nature and the scope of the right to hunger strike in prisons in the United States under both the First Amendment and the Due Process Clause, and to provide a policy recommendation for prison administrators based on a review of case law. This article stresses the nature of hunger strikes as symbolic speech protected by the First Amendment, an analysis that has yet to be extensively discussed by either criminal justice or law scholars. This article argues that retaliatory force-feeding or punishment of hunger strikers generally violates the First Amendment, regardless of the prison officials' professed justification. This article further argues that, given the inherently peaceful nature of hunger strikes, force-feeding for the supposed purpose of prison safety may lack a reasonable basis and therefore may well violate the inmates' right to refuse medical treatment. Hunger strike policy recommendations are also provided.

Keywords

courts/law, legal issues, institutional corrections, corrections

Introduction

A hunger strike, though controversial, comprises one of the most effective methods of protest used by inmates in prisons across the world. Although not limited to inmates, hunger strikes are often used to focus attention on an issue, to force negotiations and to implement reforms (Scanlan, Stoll, & Lumm, 2008). In the past two decades, inmates and detainees in various prisons in the United States and in the detention camp in Guantánamo Bay, Cuba, have staged hunger strikes to protest deplorable prison conditions, to highlight restrictive and harsh prison policies, and to call attention to

[1] Grand Valley State University, Grand Rapids, MI, USA

Corresponding Author:
Naoki Kanaboshi, Grand Valley State University, 245C DeVos Center, 401 Fulton St. W, Grand Rapids, MI 49504, USA.
Email: kanabosn@gvsu.edu

various other issues. Most recently, inmates in Pelican Bay Prison in California held a hunger strike to demand improvement of conditions of confinement (Dayan, 2011; Goode, 2011).

Recently, inmates' hunger strikes and the decision to force-feed in Guantánamo Bay have received a considerable amount of international attention. An inmate filed a suit in the federal district court, claiming force-feeding of hunger strikers in Guantánamo was unconstitutional (*Al-Adahi v. Obama,* 2009). This court held that it did not have preliminary jurisdiction, citing section 7 of Military Commissions Act of 2006. But the court also made a substantive ruling, aside from the jurisdiction issue, that the government's force-feeding policy did not violate the Eighth Amendment. The government conceded in this case that the way to force-feed is "to strap a hunger-striking detainee into a restraint-chair, with straps tightly restraining his arms, legs, chest, and forehead, and to administer a nutritional formula via a feeding tube inserted through one nostril" (*Al-Adahi*, 2011, p. 115. See also Schmitt & Golden, 2006). Aside from its constitutionality, some commentators suggest that this practice violates Common Article 3 of Geneva Conventions (Annas, 2006, 2007; Crosby, Apovian, & Grodin, 2007), which was held applicable to Guantánamo detainees (*Hamdan v. Rumsfeld*, 2006).

Recent hunger strikes by inmates and detainees in the United States have also occurred in California, Connecticut, New York, Ohio, Texas, and Washington. In 2011, over 1,000 prison inmates in California participated in a hunger strike to protest restrictive and harsh prison policies. The strikers protested prolonged solitary confinement and conditions of such confinement (Dayan, 2011; Goode, 2011). Officials did not use force-feeding, but warned that a prisoner's participation in hunger strike would result in disciplinary actions (Goode, 2011). In Connecticut, a prisoner engaged in a prolonged hunger strike (*Lantz v. Coleman*, 2010). Also, immigrant detainees in New York staged a hunger strike over jail conditions (Bernstein, 2010). In an Ohio hunger strike, the strike ended when prison officials met some of the strikers' demands for changing their visitation, recreation, and phone policies ("Hunger-striking inmates," 2011). A number of inmates in Texas (Blumenthal, 2006) went on a hunger strike because of poor prison conditions in 2006.

Hunger strikes are, of course, not unique to the United States or limited to incarcerated persons. The method has long been used as a way of protest. The historical origin of hunger strikes in the Western world can be found in ancient Irish civil law, Senchus Mor. According to this law, when a creditor demanded payment from a debtor who was of a chieftain rank, the creditor had to notify him of the demand and fast in front of the door of the debtor. If the debtor refused to pay the debt in a certain period of time, the creditor could collect twice the amount of the debt (Ginnell, 1894; Gorman, 1901).

Protests in a form of hunger strikes have been well known since the British Suffragettes' well-known hunger strike in prison in the early 20th Century. Also Mohandas Gandhi's hunger strikes in a jail in 1932 in protest against British colonialism and his 1947 and 1948 strikes demanding peace between Hindus and Muslims are well known (see Merriam, 1975, for the list of Gandhi's hunger strikes). One of the most notable hunger strikes in a prison outside of the United States was the 1981 Irish hunger strike that resulted in the deaths of 10 inmates. More recently in 2006 in Iraq, Saddam Hussein conducted a hunger strike but gave up after 19 days, due to the lack of popular support for his protest (Cave, 2006). In 2009, a Nobel Peace Prize nominee, Aminatou Haidar, also engaged in a hunger strike at an airport in Lanzarote, Spain. Her hunger strike was intended to protest Morocco's refusal to recognize the independence of West Sahara (Rice, 2009a). She was refused entry to her home country West Sahara when she refused to write "Moroccan" as her nationality when returning from overseas. After 32 days, when she was admitted to hospital, Moroccans accepted her demands to enter West Sahara (Rice, 2009b). In 2010, an incarcerated human rights advocate conducted a hunger strike in Cuba, demanding recognition as a prisoner of conscience and protesting the requirement to wear a prisoner uniform. He died after 83 days (Nordlinger, 2010).

In some cases, the demands of the inmate are met. In other circumstances, a government rejects the demands of the inmate and lets the strike run, resulting in the striker's death, or the striker being fed after losing consciousness. The government also responds to hunger strikes with force-feeding. As is the case with the term "force-feeding," there seems no single authoritative legal definition. Dictionaries have defined force-feeding to be "forc[ing] (a person or animal) to eat food" (*Oxford English Dictionary* Online, n.d.), "feed[ling] (as an animal) by forcible administration of food" (*Merriam-Webster's Collegiate Dictionary*, 2003, p. 489), or "compel[ling] to ingest food; feed forcibly, especially by mechanical means" (*American Heritage Dictionary of the English Language*, 2000, p. 687). As the phrase itself suggests, force-feeding involves administration of nutrition into the stomach by use of force against the subject's will. Prison officials have fed the strikers by what seems to be a brutal method—forcefully restraining the striker and inserting a nasogastric feeding tube, or by prying the striker's mouth open using a steel gag, and then supplying nutrition (Purvis, 1995). In Guantánamo, the hunger strikers are placed on a six-point restraint chair and fed through a nasogastric tube (Annas, 2007). Because of its forceful and invasive nature, some commentators call force-feeding "an oral rape that violates the essence of the self" (Ellmann, 1993, p. 33. See also Miller, 2009; Purvis, 1995). A judge also stated, "[I]t would be difficult to imagine a greater intrusion upon one's right to bodily integrity and self-determination than force-feeding" (*In re Caulk,* 1984, p. 99, Douglas, J., dissenting).

In the United States, in the early 1980s, legal commentators discussed hunger strikes as a constitutional right (e.g., Ansbacher, 1983; Bennett, 1983; Greenberg, 1983; Ludwig, 1983; Powell, 1983; Sunshine, 1984; Tagawa, 1983). There are a few recent legal articles as well (e.g., Annas, 2007, 2011; Ohm, 2007; Silver, 2005). The commentators in these articles discussed the constitutional issues regarding hunger strikes mostly pertaining to the right to privacy—the substantive personal autonomy right under the Due Process Clause. Similarly, a recent law review article on the role of food in prison system posits that hunger strikes can destabilize the social structure of the prison in the context of the inmate culture and power dynamics, while the article is not conducting constitutional analysis (Brisman, 2008).

These previously mentioned incidents and subsequent practices by correctional administrators raise a variety of policy-related issues. In this context, correctional personnel need to balance policy with the inmates' constitutionally protected rights. The purpose of this article is to analyze the nature and the scope of the right to hunger strike in prisons in the United States as First Amendment right and the right to refuse medical treatment under Due Process Clause. Based on the analysis, this article also recommends an informed model policy for prison administrators.

For example, when the government uses force-feeding for the purpose of stopping or punishing a prison inmate's protest in the United States, the courts should apply a heightened level of scrutiny, rather than the so-called *Turner* test (see *Turner v. Safley*, 1987), and under this standard of review force-feeding should be held unconstitutional under the First Amendment. Even when the courts apply the *Turner* test, this article argues, force-feeding can be held unconstitutional if it is employed at least before the striker loses mental competence. While this article also reviews hunger strikes conducted in military detention facilities and/or in foreign countries, and the strikes by unincarcerated individuals, its primary focus is on the rights of inmates in American civilian prisons.

Hunger Strike and Force-Feeding

While there is no single authoritative definition for a hunger strike, a review of literature reveals common components of a "hunger strike." The World Medical Association's (WMA's) Declaration of Malta on Hunger Strikers of 1991 (1992, as revised) defined a hunger striker as a person "who has indicated that he has decided to embark on a hunger strike and has refused to take food and/or fluids for a significant interval." While the 1992 definition limited the strikers to "mentally competent"

person, the 2006 version (WMA, 2006a) does not contain the 1992 version's definition. It suggests that a person who lost competence or consciousness can continue the hunger strike through an advance directive. Meanwhile Reyes (1998), writing for the International Committee of Red Cross, equates "hunger strike" with "voluntary total fasting," but recognizes that "[h]unger strikes have always been associated with some form of protest" (n.p.). For the purpose of discussion, this article defines it as fasting or refusal of food (sometimes along with water) for the purpose of achieving compliance with a particular demand, with the intention or assertion that the fasting will continue until the demand is met.

The first well-known hunger strikers in the United States were force-fed by the government. In 1917, Alice Paul and other American activists of women's suffrage who picketed the White House were convicted of obstruction of traffic and imprisoned. Paul started a hunger strike in prison, supporting another inmate's request for a cup of milk per meal and an egg a day, while demanding political prisoner status. Prison officials responded with force-feeding. Prison officials threatened that she would be transferred to the psychopathic ward if she did not stop the hunger strike; upon her refusal to stop, they transferred her to the prison's psychopathic ward located in an "Insane Asylum" and force-fed her 3 times a day (Adams & Keene, 2008).

Hunger strikes of and force-feeding against American suffragists were preceded by British suffragists. In 1909, Marion Wallace Dunlop began a hunger strike, demanding political prisoner status (Miller, 2009; Williams, 2008). This was the first hunger strike for political protest in Britain and its colonies (Vernon, 2007). While Dunlop was released after 91 hours of her strike (Miller, 2009), and 37 suffragists were released in the next 10 weeks, the government used force-feeding on other hunger-striking women (Dolan, 1998). While prison officials claimed that force-feeding was necessary to save the strikers' lives (Miller, 2009; Vernon, 2007), or prevent suicide (Vernon, 2007), the strikers asserted that the force-feeding was started far before the strike caused the ill-health (Miller, 2009; Ward, 1982). Moreover, the British government depicted the hunger-striking women as unbalanced and hysterical, and sought to justify the force-feeding based on the same rationale used for mentally impaired persons who could not eat by themselves (Vernon, 2007). The suffragettes countered by arguing that the force-feeding method was brutal and a far-from-ordinary medical procedure (Vernon, 2007). Indeed, force-feeding caused more problems than it solved (Miller, 2009). It was "a painful, degrading, and unnecessary procedure" (Miller, 2009, p. 365). A metal gag was forcefully placed on the striker's mouth, and the operation caused vomiting. Force-feeding caused subsequent ill-health. For example, a striker, after release, experienced congestion and inflammation in her throat, and weakness and loss of weight. A striker died in prison of heart disease after being force-fed. Another force-fed striker committed suicide after being released. Another striker also suffered from mental disorder (Miller, 2009). However, in a later civil case filed by a former striker, a court upheld the force-feeding in *Leigh v. Gladstone* (Eng. 1909). The force-feeding ended when the government enacted the "Prisoners (Temporary Discharge for Ill Health) Act" (1913; also known as "Cat and Mouse Act") which authorized the temporary release of hunger strikers who became ill because of the hunger strike.

Today, force-feedings against the suffragists are considered by many to be retaliation or punishment for hunger strikes (Geddes, 2008; Jorgensen-Earp, 1999; Ziarek, 2008). Some, for example, argues that the force-feeding of suffragists was intentionally designed to be painful and degrading and terrifying (Miller, 2009). Despite the government's attempted justification, force-feeding of suffragists caused wide debate over its appropriateness as a medical procedure. Medical commentators Savill, Moulin and Horsley (1912) pointed out that force-feeding caused great pain, and many inmates had to be released because of health risks caused by the use of a nasal tube for force-feeding. Further, the feeding caused physical injuries in nose and mouth, irregularity in heartbeat, collapse, subnormal body temperature, agonizing stomach pain, vomiting that continued for hours, indigestion, dyspepsia that continued for weeks or months after release, acute delirium, insomnia,

neurasthenia, cerebrospinal neurasthenia, and nervous prostration. The commentators concluded by stating, "We cannot believe that any of our colleagues will agree that this form of prison torture is justly described . . . as 'necessary medical treatment' or 'ordinary medical practice'" (p. 508). Others also criticized the force-feeding of suffragists as being unnecessary, brutal, and torturous (Miller, 2009). Moreover, 116 doctors signed a memo against force-feeding of the suffragists (Dolan, 1998).

In 1973, Irish Republic Army (IRA) members Dolours and Marian Price, along with two other men, went on a hunger strike, demanding transferring to an Irish prison after they were imprisoned for a car bombing in London. During their 200-day fasting, the government force-fed them. Then, the government repatriated them (Beresford, 1997; O'Malley, 1990). In 1974, two more IRA members held a hunger strike. One of them, Michael Gaughan, apparently died of complications caused by force-feeding. His death triggered the British government's policy change in force-feeding. The other inmate once stopped his hunger strike, but then resumed it and died of starvation in 1976.

In March 1981, imprisoned IRA members implemented hunger strikes, resulting in the death of 10 strikers. In 1976, the British government had changed its policy so that the convicted IRA members would be treated like ordinary criminals, not political prisoners. In this context, the 1981 strikers demanded political prisoner status. The prisoners started the strike at a few days interval in order to maximize the length of the strike and its impact. When a striker died, a new striker replaced him. Ten strikers died before the strikes ended on October 3, 1981. The government did not force-feed the strikers. However, when some strikers went into unconsciousness, their family members chose to intervene in some circumstances (O'Malley, 1990).

Prison officials did not force-feed competent strikers during the 1981 Irish hunger strike, due to a 1974 policy against force-feeding (Zellic, 1976). In January of that year, the then Home Secretary of the government, Robert Carr, justified force-feeding as the last resort to save the life of the hunger strikers. However, later that year, the new Home Secretary, Roy Jenkins, set a new policy that did not order force-feeding of competent inmates. The new policy left it to the physician's sole discretion whether to force-feed inmates. This sudden change of the government's position toward hunger strikers and force-feeding was explained to be as a result of public opinion against force-feeding, as well as being due to the risks of force-feeding, especially when the inmate resists, and its painful nature. The death of the 1974 striker, Michael Gaughman, was also a factor (Zellic, 1976). The British Medical Association Central's Ethical Committee (1974) also stated that force-feeding of inmates is allowed but only based on the doctor's individual judgment.

More recently, the force-feeding of hunger striking detainees in Guantánamo Bay is being debated. Hundreds of detainees there have engaged hunger strikes since 2002; in fact in September 2005, 131 inmates were on hunger strike (Annas, 2006). According to Rubenstein and Annas (2009), at least since 2005, military physicians have force-fed the strikers; and as stated earlier, restraint chairs with eight-point restraints (both ankles, wrists, shoulders, head, and a lap belt) and a nasogastric tube for feeding have been used. The restraint chair is used for up to two consecutive hours. The force-feeding is conducted in a central location rather than in individual cells. When the striker refuses to leave the cell, he is forcefully extracted by nonmedical personnel. The government claimed that force-feeding serves the interest in preservation of life and health of the strikers. In the regular federal prisons that conduct force-feeding of hunger strikers, physicians have the ultimate authority to decide whether or not to force-feed, whereas in Guantánamo, the military Commander Joint Task force does the decision making.

Force-feeding at Guantánamo is routinely initiated when it is not yet medically necessary (Rubenstein & Annas, 2009). Even when the physical condition of the striker deteriorates, force-feeding does not serve the "best interest" of the inmate when the striker is competently choosing not to eat (Annas, 2006). The government's rationalization for force-feeding is that the process is consistent with the procedure outlined in the federal regulations regarding force-feeding. According to the regulations, "[w]hen . . . a physician determines that a medical necessity for immediate

treatment of a life or health threatening situation exists, the physician may order that the treatment [i.e., force-feeding] be administered without the consent of the inmate'' (28 C.F.R. §549.65(c)). Here, Annas (2006, 2007) and Rubenstein (Rubenstein & Annas, 2009) criticize, while the federal regulation gives the physician the discretion on whether or not to force-feed, the decision-making power in Guantánamo is in the hands of the military commander.[1]

Hunger Strike as First Amendment Right

Hunger Strike as Symbolic Speech

A hunger strike can be considered a form of symbolic speech, as long as the purpose of the hunger strike is to protest or convey some message. While the U.S. Supreme Court has not yet formally determined whether hunger strikes meet the constitutional standard of symbolic speech, this article argues that hunger strikes meet the standard already established by the Court for deciding whether certain conduct or activity constitutes symbolic speech under the First Amendment. Justice Brennan of the Supreme Court once stated, ''a hunger strike . . . conveys an emotional message that is absent in a letter-to-the-editor, a conversation with the mayor, or even a protest march'' (*FTC v. Superior Court Trial Lawyers Association,* 1990, p. 450, Brennan, J., dissenting).

The First Amendment provides, ''Congress shall make no law . . . abridging the freedom of speech.'' How does hunger strike fall into the category of ''speech'' under the First Amendment? The First Amendment protects not only spoken or written ideas but also ''symbolic speech'' or ''symbolic conduct.'' The Court has recognized as symbolic speech conduct such as displaying a red flag (*Stromberg v. California,* 1931), wearing a black armband to show antiwar message (*Tinker v. Des Moines Independent Community School District,* 1969), saluting or refusing to salute a national flag (*West Virginia State Board of Education v. Bernette,* 1943), flag burning (*Texas v. Johnson,* 1989; *United States v. Eichman,* 1990), and cross burning (*R.A.V. v. City of St. Paul,* 1992).

When does conduct become symbolic speech and thus covered by the First Amendment? The Supreme Court in *Spence v. Washington* established a two-part test. According to the Court, conduct constituted symbolic speech when (1) ''[a]n intent to convey a particularized message was present'' and (2) ''in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it'' (*Spence v. Washington*, 1974, pp. 410–411).

It is well recognized that hunger strikes are used as a means to express anger or protest most vehemently against some social or governmental policy or action (e.g., Alempijevic, Pavlekic, Jecmenica, Nedeljkov, & Jankovic, 2011; Crosby et al., 2007; Sweeney, 1993). Therefore, it is likely that the *Spence* two-pronged test will be met, because the person who engages in hunger strikes has generally such intent and there is a strong likelihood that the people who view it will recognize the intended message, especially when it is combined with a statement for the purpose of fasting.

A hunger strike is generally combined with verbal statement of demand. As Ellmann (1993) writes, ''Somehow [hunger strikers] must persuade the people whom they fast against to take responsibility for their starvation'' (p. 54); ''In [Irish 1981 hunger strike] word and flesh supported one another, parallel and complementary, because it was their verbal protest that conferred their wasting bodies with their eloquence]'' (p. 72). Even the Guantánamo commander concedes the expressive nature of hunger strike by calling it ''propaganda'' (Golden, 2007, p. 12).

However, when an inmate is simply fasting to bring himself to death, without any particular expressive intent, this does not meet the standard of symbolic speech. For example, in *Lee v. Burke* (2007), a lower court found that the inmate did not allege or prove that he was trying to convey a message by fasting. In the *In re Garrett* (1988) case, the court found no expressive aspect when the inmate who suffered severe depression and delusion stopped eating.

The *Spence* test does not require a particular message to be limited to any specific issue or be political or religious in nature. For instance, inmates have conducted hunger strikes for the purpose of protesting conviction, incarceration, persecution, or individual prison policies conditions (Bernstein, 2010; Blumenthal, 2006; Williams, 2001). Hunger strikes for these purposes are clearly symbolic conduct under the *Spence* test, because the protestor has intent to convey a message, and, when the protestor expresses the cause of the protest, the viewer is likely to understand the message (see Tagawa, 1983). Already several lower courts have recognized that, at least under some circumstances, a prisoner's hunger strike can be a symbolic speech. For example, a federal court of appeals stated, "a hunger strike may be protected by the First Amendment if it was intended to convey a particularized message" (*Stefanoff v. Hays County,* 1998, p. 527. See also *In re Garrett*, 1988; *In re Sanchez*, 1983; *In re Soliman*, 2001; *Lee v. Burke*, 2007).

The Limit of Prison Inmates' Symbolic Speech

Nevertheless, not all symbolic speech is free from government restriction. The concept of "symbolic speech" is by itself not limited to peaceful acts; and thus some violent conduct, such as riot for the purpose of protest, may well satisfy the two-part test. This does not mean, of course, that the government cannot restrict such violent activities.

The First Amendment does not protect killing or injuring people as an expression of one's political, religious, or any other personal conviction. The Supreme Court, in *United States v. O'Brien* (1968), established the standard to address under what circumstances the government restrictions on symbolic speech violate the First Amendment. In *O'Brien,* defendant O'Brien was prosecuted for burning a draft card under the federal statute provisions that prohibit knowingly destroying draft cards. O'Brien claimed that his conduct was symbolic speech and the statute that banned his conduct violated the First Amendment. The Court disagreed and upheld the conviction. The Court did not deny that his conduct constitutes symbolic speech. However, the Court concluded that the conviction did not violate the First Amendment. To reach this conclusion, the *O'Brien* Court established a test that is applicable when symbolic speech is restricted by a regulation that is not aiming at the suppression of the message. According to the test, the restriction on symbolic speech is unconstitutional unless the regulation (1) "furthers an important or substantial governmental interest . . . unrelated to the suppression of free expression" and (2) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest" (*O'Brien*, p. 377).

Applying that test, *O'Brien* upheld the criminal statute that prohibited draft card burning. According to the Court, the ban serves the important governmental interest in "preventing harm to the smooth and efficient functioning of the Selective Service System." The Court claimed this interest was not related to the suppression of speech, because government was only targeting "the noncommunicative aspect of O'Brien's conduct" (pp. 381–382), rather than aiming at suppressing the message.

However, what about the constitutionality of prison regulations that prohibit inmate symbolic speech in the form of hunger strikes? As discussed previously, the *O'Brien* test is applicable to the government's restrictions when the regulation is not targeting the message conveyed by the symbolic speech. In contrast, when the government restriction is targeting the message itself the applicable test should be a heightened scrutiny (see *Texas v. Johnson,* 1989). Accordingly, when the government's purpose of banning hunger strike is to suppress the message it conveys, the applicable test is a strict scrutiny. Under this scrutiny, a government restriction of a First Amendment right is unconstitutional, unless the government can prove that there is a compelling goal to achieve and that the restriction is the least restrictive means to achieve the goal.

In prison settings, however, the Supreme Court has established that the applicable test for prisoners' First Amendment claims is the so-called *Turner* test, established in *Turner v. Safley*

(1987). Under this test, a prison's restriction of First Amendment rights becomes unconstitutional only when the restriction is not reasonably or rationally related to the prison's rehabilitative and security goals. This test, a variation of a reasonable relationship test, is generally more favorable to the government than the other two tests because it requires only a showing of (1) a legitimate (as opposed to significant or compelling) governmental interest, and, more importantly, (2) just some reasonable relationship between the government interest and the restriction (as opposed to the close, narrowly tailored relationship required by the higher level of scrutiny).

The *Turner* test requires the courts to consider several factors in order to determine the relationship between prison regulations and the rehabilitative or security goals of the prison. In this context, the courts weigh four main issues. First, there must be a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it" (*Turner*, p. 89, internal quotation marks omitted). The second factor is "whether there are alternative means of exercising the right that remain open to prison inmates" (p. 90). The third factor comprises "the impact accommodation of the asserted constitutional right will have on guards and other inmates and on the allocation of prison resources generally" (p. 90). The fourth factor is whether the inmates can show "the existence of obvious, easy alternatives . . . that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests" (pp. 90–91).

If a court applies the *Turner* test, the prison regulations at issue are likely to be considered constitutional. Applying this test, the U.S. Supreme Court has frequently denied inmates' First Amendment challenges to prison regulations in a series of cases. For example, in *Turner,* the Supreme Court upheld the prison's restrictions on prisoners' correspondence with those in other prisons, while in *O'Lone v. Estate of Shabazz* (1987), the Court upheld the constitutionality of the prison policy that required inmates to work off-site all day long, including the hours the inmates wished to attend religious services. Additionally, in *Jones v. North Carolina Prisoners' Labor Union, Inc.* (1977), the Court upheld prison regulations that prohibited solicitation of other inmates to join the union, banned all the union meetings, and denied delivery of its publications mailed in bulk. In *Shaw v. Murphy* (2001), the Court upheld the prison's restrictions on inmates' providing legal advice to others.

Nevertheless, there is a good reason to consider that the *Turner* test may not be applicable to the question of a ban on an inmate's hunger strike. The Supreme Court in *Turner* suggested that, like with the *O'Brien* test, the *Turner* test is not applicable when the goal of the governmental restriction is to suppress the message itself. The Court in *Turner* stated, "[T]he governmental objective must be a legitimate and *neutral* one" (p. 90, emphasis added by the author). In other words, "prison regulations restricting inmates' First Amendment rights [must be] operated in a neutral fashion, without regard to the content of the expression" (p. 90). Therefore, if the restriction is targeting the content of the speech, then there is no application of *Turner*.

There is a good argument that a ban on hunger strikes in fact targets the speech's content. Of course, the government agency that attempts to defend the ban could come up with a "neutral" reason unrelated to the content itself. The issue is whether such a facially neutral justification is pretext, in other words, "a smokescreen for censorship" (Amar, 1992, p. 138).

Arguably, the strongest "neutral" justification a prison administration can give is that force-feeding is for prison safety and the health and well-being of the inmate that conducts the hunger strike (Crosby et al., 2007). However, this argument is unpersuasive. For instance, a hunger strike that has not gone on for a prolonged period of time is not necessarily life threatening—although prison officials may argue that the ban serves as a precaution to avoid ill-health. Hunger strikes are passive, peaceful act, which are unlikely to provoke violence or some other security breach.

On the other hand, it has been pointed out that government intervention in inmates' hunger strikes is a form of retaliation. Indeed, as observed previously, the force-feeding of suffragettes was undoubtedly punishment for their protests, despite the government's attempt to justify the practice as serving governmental interests in protecting the lives and health of the strikers. The U.S.

government's reaction to hunger strikes by means of force-feeding in Guantánamo Bay has been criticized as punitive or retaliatory in nature (see, e.g., Annas, 2006, 2007; Crosby et al., 2007). A lower court recognized that retaliation to a hunger strike is a First Amendment issue (*Bruce v. Woodford,* 2009).

If the court determines that the *Turner* test is inapplicable because the restriction is targeting the message, the applicable standard is same as that applicable to the ban on free persons' hunger strike.[2] And for a government's restriction of symbolic speech based on its message, the applicable standard is not the *O'Brien* test. If the *Turner* test is not applicable because of the content-based nature of the restriction, it is likely that the *O'Brien* test is also inapplicable, because the Supreme Court has suggested both tests apply to only content-neutral restrictions. When *Turner* is inapplicable, courts would perhaps apply strict scrutiny or heightened scrutiny of some kind. Under this test, the government must justify the restriction by proving the presence of a substantial or compelling governmental interest and by proving that the means (the ban) is the least restrictive way (or is at least narrowly tailored) to achieve the goal. Assuming that the government has a compelling need to suppress the message of the hunger strike in order to maintain prison security, is a ban on hunger strikes the least restrictive measure to achieve the goal? It is unlikely. Unlike riots, hunger strikes are inherently a peaceful way of expression. Thus, except in a circumstance where the government can show a clear and imminent danger (see *Shenck v. United States,* 1919), the ban would be unconstitutional under the heightened scrutiny standard. In fact, lower courts invalidated prison regulations partly because they aimed at the suppression of particular message (see, e.g., *Abu-Jamal v. Price*, 1998; *Leonard v. Louisiana*, 2010).

Because hunger strikes for the purpose of protest constitute symbolic speech, they are inherently covered by the First Amendment. If prison regulations pertaining to hunger strikes are targeting suppression of the message, the proper test is not the *Turner* test but rather a heightened scrutiny. Under the latter test, the regulations are more likely to be unconstitutional. However, even if the courts determines the regulation does not violate the First Amendment under the *Turner* test or a heightened level of scrutiny, prisoners still have a separate constitutional right—the right to bodily integrity or the right to refuse medical treatment.

Force-Feeding and Inmates' Constitutional Right to Refuse Medical Treatment

Prisons are not free to force-feed every hunger striking inmate in every circumstance. Aside from the First Amendment liberties, the Constitution protects the right to refuse medical treatment under the Due Process Clause of the Fourteenth Amendment. Thus, even if a ban on hunger strikes is upheld under the First Amendment, this does not necessarily allow the government to force-feed the inmates. If a ban is found to be constitutional under the First Amendment, prison administrators may discipline the strikers through common disciplinary means, such as deprivation of good time, revocation of privileges, and administrative segregation; however, if prison administrators seek to be allowed to force-feed or otherwise medically intervene against the hunger striker's will, the government must have additional justification for this measure because of the inmates' right to refuse medical treatment.

This right to refuse medical treatment is one of various important personal autonomy rights protected under the Due Process Clause. This group of rights is referred to as "constitutionally protected liberty interest[s]" (*Cruzan v. Director, Missouri Department of Health*, 1990, p. 278), "right of privacy" or "right to privacy" (*In re Quinlan,* 1976, p. 40; *Superintendent of Belchertown State School v. Saikewicz,* 1977, pp. 739–740; see Shepherd, 2001; Rao, 2000), "unenumerated rights" (Tribe, 2007, p. 484), or "fundamental rights" (Chemerinsky, 2005, p. 585). The choice of whether to accept medical treatment is covered by individual personal autonomy rights, which also encompass

other personal choices, such as child-rearing (*Meyer v. Nebraska,* 1923; *Pierce v. Society of Sisters,* 1925), the decision to procreate or not to (*Eisenstadt v. Baird*, 1972; *Griswold v. Connecticut,* 1965; *Skinner v. Oklahoma,* 1942), marriage (*Loving v. Virginia,* 1967; *Turner v. Safley*, 1987; *Zablocki v. Redhail*, 1978), abortion (*Planned Parenthood of Southeastern Pennsylvania v. Casey,* 1992; *Roe v. Wade,* 1973), family living (*Moore v. East Cleveland,* 1977), and homosexual conduct and relationships (*Lawrence v. Texas,* 2003).

The importance of the right to refuse medical treatment can be explained not only by the value of personal autonomy but also by the importance of one's bodily integrity. In various contexts, the Supreme Court has recognized the importance of protecting the bodily integrity of an individual from unwanted invasion. For example, in 1905, the Court recognized a constitutional interest in refusing the smallpox vaccine, which must be weighed against the state interest (*Jacobson v. Massachusetts,* 1905). In *Rochin v. California* (1952), police conduct that involved a struggle to open a suspect's mouth and forcibly extract the contents of his stomach by means of a stomach pump was held to violate the Due Process Clause. In *Youngberg v. Romeo* (1982), the Court held that an individual in a mental health facility has a constitutional "liberty from bodily restraint." In *Chavez v. Martinez* (2003), the Supreme Court suggested that the Due Process Clause of the Fourteenth Amendment substantively protects people from governmental torture. Primarily based on the concept of bodily integrity, the U.S. Supreme Court recognized the right of an individual to refuse medical treatment, including life-sustaining or life-saving nutrition and hydration in *Cruzan v. Director, Missouri Department of Health* (1990). The Court also repeatedly recognized that there is a significant constitutional interest in refusing antipsychotic treatment (*Riggins v. Nevada*, 1992; *Sell v. United States*, 2003; *Washington v. Harper*, 1990).

Other Court decisions have been directly related to custodial settings. In *Washington v. Harper* (1990), the Court recognized the importance of an inmate's constitutional interest in refusing antipsychotic medications. In this case, a prisoner suffering from manic-depressive disorder refused antipsychotic medications. Despite his severe mental illness, the inmate was still considered to be legally competent. The issue in that case was whether a competent inmate could successfully use the Constitution to justify refusing the unwanted medication. The Court upheld the forced medication, applying a variation of the *Turner* test, which required an additional showing that the involuntary medical intervention must be "in the inmate's medical interest" (p. 227). Furthermore, *Sell v. United States* (2003) is a relatively recent case involving forced antipsychotic medication to render a defendant competent to stand trial. In this case, the Court established that involuntary medication of the defendant for trial competency purposes is allowed "only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests" (p. 179). A claim of inmates' constitutional right to refuse forced medication can thus find a strong basis in these precedents of the Supreme Court. Therefore, inmates on hunger strikes should have a constitutionally protected right to refuse force-feeding which is, in effect, medicating the condition of starvation by means of artificial nutrition.

Some relatively recent lower court cases regarding hunger strikes have used the *Turner* test and upheld the force-feeding (e.g., *In re Soliman,* 2001; *Lantz v. Coleman*, 2010; *People ex rel. Illinois Department of Corrections v. Millard,* 2003; *People ex rel. Illinois Department of Corrections v. Fort,* 2004; *Stefanoff v. Hays County,* 1998). However, these rulings have several serious flaws. First, as noted previously, the ban on hunger strike may be for the purpose of suppression of a message. If so, force-feeding violates the First Amendment unless the government can show that the hunger strike is likely to cause a serious imminent threat to prison security. However, one or a small number of inmates conducting a hunger strike have not generally been considered to be a serious security threat. Even those courts that allowed hunger strikes to be stopped via force-feeding do not generally find that the hunger strike itself was a potential serious threat to security (see *In re*

Soliman, 2001; *People ex rel. Illinois Department of Corrections v. Millard,* 2003; *Stefanoff v. Hays County,* 1998). Even under the *Turner* test, the automatic force-feeding is generally not justifiable, because such a policy has little legitimate, logical connection with the government's security or rehabilitation goals. There is certainly a possibility that an organized large-scale strike or the death of the striker might cause a security risk for a prison. Such a risk should be individually assessed (see *Lantz v. Coleman*, 2010).

Second, some lower courts stated that hunger strikes are an indirect threat to prison security because they are viewed as a "manipulation" of the system that takes away limited prison resources—therefore, force-feeding can be rationalized under the *Turner* test (*In re Soliman*, 2001; *People ex rel. Illinois Department of Corrections v. Fort*, 2004; *People ex rel. Illinois Department of Corrections v. Millard,* 2003). In these cases, the courts found that prison officials can force-feed the hunger-striking inmates, because the inmates were considered to be "manipulating" the system by carrying out hunger strikes. However, the essence of the *Turner* test requires that it be applicable only when the prison is not targeting suppression of a message. It can be fairly argued that those prison officials who stop hunger strikers via force-feeding are tacitly admitting that they were force-feeding inmates because the officials do not like the "manipulative" nature of the message. If the government restricts an inmate's right because it wants to suppress the message, then the applicable test is not the *Turner* test, but a heightened scrutiny. Under this heightened scrutiny, a prison's policy of force-feeding is likely to be unconstitutional.

Another point is that these courts did not recognize the lack of an alternative means to express a message. If a message is intended to be conveyed only to prison officials, then inmates may have other ways to express it by, for example, speaking out and writing grievances (see *In re Fattah,* 2008). In contrast, if the message of a hunger strike was sought to be conveyed to the media and general public, then there may well be no other meaningful alternative ways for inmates to express the message. One could counter this point by arguing that inmates are generally free to send letters to the media that express what they would otherwise convey by hunger strikes. Even when inmates are allowed to send letters relatively freely, the media may not believe or take seriously complaints by confined criminals. Hunger strikes are usually a last resort by inmates who desire immediate attention to their issues (Annas, 2006; Dayan, 2011; Oguz & Miles, 2005; Scanlan et al., 2008; Sweeney, 1993). Additionally, under the *Turner* test, the financial cost of accommodating an inmate's rights is a factor that is considered. The cost of accommodating an inmate's right to refuse medical treatment and food is not a financial burden to prisons. Therefore, force-feeding cannot normally be justified on the basis of the excessive cost to the government.

Finally, courts must consider the medical appropriateness of force-feeding. As *Harper* and *Sell* indicated, forced medical treatment should comport with medical interests. There is ample evidence that force-feeding is not a proper medical procedure. The American Medical Association has criticized the force-feeding of hunger strikers in prison (Cady, 2006). Also the National Committee on Correctional Healthcare suggests that the hunger strike should not be stopped when the striker is competent (Ohm, 2007). Force-feeding of hunger strikers has also been recognized internationally as a violation of medical ethics. The WMA's Declaration of Tokyo of 1975 (2006b, as revised) provides that physicians must respect prisoners' informed refusal of nourishment. It states: "Where a prisoner refuses nourishment and is considered by the physician as capable of forming an unimpaired and rational judgment concerning the consequences of such a voluntary refusal or nourishment, he or she shall not be fed artificially." The WMA's Declaration of Malta on Hunger Strikers of 1991 (2006a, as revised) also declared that "Forced feeding contrary to an informed and voluntary refusal is unjustifiable" (Declaration 6. See also Wilks, 2006; Pont, 2006). Moreover, it is claimed that the use of restraint chair for force-feeding should not be used even when an inmate is incompetent and the artificial feeding is justifiable (Annas, 2006).

Even supposing a court applies the *Turner* test in the cases where prisons force-feed hunger striking inmates, such force-feeding should not be justified at least when the strikers are competent and the strike is not causing a cognizable threat to prison security. In this regard, the federal regulations that authorize force-feeding of inmates could be held unconstitutional, as applied to force-feeding of competent inmates. As discussed previously, the regulations allow a physician to force-feed hunger strikers when "a life or health threatening situation exists" (28 C.F.R. § 549.65(c)). Notably, this regulation allows force-feeding based on mere "health threatening situation." Unlike life-threatening condition which generally occurs in the advanced stage of hunger strike, in which the striker's competence may well be compromised, a "health-threatening" situation can occur in a few days after starting hunger strike.

Refusal of Life-sustaining Treatment Is Generally Not Attempted Suicide

Hunger strikes generally do not constitute attempted suicide. The government has traditionally retained interest in the prevention of suicide (see *In re Quinlan*, 1976; *Vacco v. Quill,* 1997; *Washington v. Glucksberg*, 1997). Thus, if a hunger strike constituted an attempted suicide, then the government could intervene. However, hunger strikes for protesting should not be considered as suicide or attempted suicide. Those who continue a hunger strike to a point that it becomes a life-threatening condition may know that continuance might cause death, but this recognition is not enough to be suicide. The courts have considered that suicide requires (1) specific intent to die and (2) purposeful setting in motion of the death-producing agent (see, e.g., Byrn, 1975; *Superintendent of Belchertown State School v. Saikewicz,* 1977). The U.S. Supreme Court has also stated, when distinguishing between refusal of life-sustaining treatment and physician assisted suicide, "a patient who commits suicide with a doctor's aid necessarily has the specific intent to end his or her own life, while a patient who refuses or discontinues treatment might not" (*Vacco v. Quill,* 1997, p. 802).

Thus, at least without specific intent to end life, a hunger strike cannot legitimately be characterized as an attempted suicide. People engaged in hunger strikes know that they are encountering a substantial risk of death; but that is not sufficient to be considered attempted suicide. For example, in *Singletary v. Costello* (1996), an appellate court in Florida found that the hunger strike in this case was for protest purposes and not intended for terminating life itself. Thus, the hunger strike was not ruled to be attempted suicide. In contrast, if the purpose of fasting is simply for the termination of life, such conduct may well satisfy the first component of the two elements of suicide (see *In re Caulk*, 1984; *Von Holden v. Chapman,* 1982).

Hunger strikes are also unlikely to meet the second component of suicide. A hunger strike is passive and does not require affirmative action. In this respect, it is unlike jumping off of a bridge, or pulling a trigger of a gun pointed one's own head, but it is more like a person who refuses blood transfusion because of personal conviction. The refusal of lifesaving or life-sustaining medical treatment has not been considered a suicidal act (see, e.g., *In re Quinlan*, 1976; *Quill*, 1997; *Superintendent of Belchertown State School v. Saikewicz,* 1977), even when the individual is not suffering from terminal illness (e.g., *Bouvia v. Superior Court*, 1986; *Lane v. Candura*, 1978; *Thor v. Superior Court*, 1993).

Moreover, even assuming that refusal of food constitutes an affirmative act, this is not an act sufficient to be a suicidal act or attempted suicide until the death of the striker is imminent. Unlike a person who is about to pull a trigger without an intervention, hunger strikers who fast are similar to a person who is threatening to shoot himself or herself days, weeks or months later, if the demand is not accepted. Their conduct and the death are not proximate enough for it to constitute an attempt at suicide, but rather they are merely threatening to it.

Conclusion and Policy Recommendations

The intent of this article is to suggest that, in the view of the author, hunger strikes for protest purposes should be primarily perceived as symbolic speech, protected by the First Amendment. When prison officials in the United States seek to ban hunger strikes in order to suppress the strong messages conveyed by the strikers, then the courts should weigh the ban under a heightened scrutiny test. Even supposing that a prison's ban on hunger strikes is not found to violate the First Amendment, force-feeding of prisoners can be a violation of their right to refuse medical treatment under the Due Process Clause of the Fourteenth Amendment. Under this Clause and the deferential *Turner* test, force-feeding may well violate the inmates' right to refuse medical treatment as an intervention without a reasonable basis, given the inherently peaceful nature of hunger strikes. Moreover, even when the courts allow the restrictions on inmates' rights to engage in a hunger strike, they should consider the medical appropriateness of force-feeding. Here, the courts generally should not allow force-feeding because it does not comport with the medical interest of the inmate, unless death is imminent.

Based on the author's analysis presented in this article, some sound policy elements emerge. First, hunger strikes should generally be allowed when the striker has the intent to convey a message where a viewer reasonably understands the message that is symbolically being conveyed through the person's hunger strike initiative. In this context, the policy should be based on the First Amendment. Prison administrators should first determine if a message is truly being conveyed. This intent can be determined through actual written and verbal statements made by the hunger striker. If it is determined that a message is being conveyed, then prison officials cannot engage in any disciplinary activities because of the message or the protest. After this is determined, then these actions constitute an expressive hunger strike under the First Amendment and, the inmate should be allowed to continue the strike without interference.

Second, policies regarding the relationship between hunger strikes and prison security need to be addressed. For example, the cognizable threat of safety caused by a prolonged hunger strike or the resulting death of the striker can be a reason for intervention, since the resulting product of the strike could lead to an unstable custodial environment, jeopardizing the safety and security of correctional staff and prisoners. These threats to safety and security can include objective prison intelligence that suggests a risk of violence against staff and inmates or actual incidents of violence that can be attributed to the hunger strike. Without such elements, intervention without a cognizable threat for prison safety may well be considered as unjustifiable retaliatory intervention. These objective justifications, however, cannot be used to disguise retaliation. And, when there is no such security risk, an inmate's strike should be allowed to continue at least until the striker loses his or her competent decision-making capacity.

Third, policy needs to be developed regarding the issue of when the striker loses his or her decision-making capacity or consciousness. In this context, surrogate decision making can exist. At the time of the writing of this article, the academic discussion and case law regarding intervention after an inmate-striker falls into incompetency is very limited (see, e.g., Annas, 2006, 2007; Crosby et al., 2007, for limited discussions). One way to honor the striker's wish is to have a prison policy where the striker's wish is clearly and voluntarily articulated (i.e., an advanced directive) and, if there is no such directive, prison administrators should follow the inmate's best interests, which are based on factors including the inmate's values, and the wishes of family members (see Crosby et al., 2007; WMA, 2006a). However, where no directive exists and it is in the inmate's best interests to feed him or her, prison officials can allow a health care provider to feed the inmate until he or she regains competence.

Medical issues also need to be considered in policy development. Even when medical intervention is legally justifiable, appropriate medical measures should be undertaken by qualified health

care providers. Additionally, prison policy should clearly articulate that this treatment is medically appropriate. As such, these actions should be based on the discretion of medical professionals. Since such actions are medical in nature, they should conform to standard medical practices and be conducted in a medical setting. Also, all procedures should be conducted in a manner not more painful than medically necessary. Finally, clear and articulate medical records should be maintained, demonstrating that all procedures used were not in any way punitive in nature.

Finally, prison officials also need to determine if the hunger striker has freely and voluntarily engaged in the hunger strike. Here, officials need to assess that the inmate's refusal of food is not caused by medical or psychiatric conditions, or by coercion or threat. If so, these factors supersede the continuation of the hunger strike, whereas the prison staff can seek appropriate remedies, including medical and psychiatric care, and even the use of administrative segregation to alleviate aggressive actions by other inmates. For those inmates who are freely and voluntarily engaged in a strike, careful monitoring and daily recording should be maintained that clearly documents that the inmate has voluntarily refused food. Even when this is a voluntary hunger strike, officials can and should try to persuade or negotiate with the strikers to end the strike, rather than threatening them. Also they can seek the cooperation of family members to aid in persuasion. If the hunger striker has not used the formal grievance procedure to address the subject of the protest, officials can certainly persuade the striker to use the procedure first. The officials should leave the striker the opportunity to obtain food in case the striker changes his or her mind.

In conclusion, due to the nature of a hunger strike occurring in a free and democratic society, and regardless of the fact that the strike is occurring in a custodial setting, prison administrators should develop constitutional and ethical procedure. This requires a proactive, careful, and deliberate analysis of the situation, oftentimes, on a case-by-case basis, where administrators need to balance the strong expressive needs of the inmates with the security needs of the facility. In doing so, the needs of both parties in this issue will be met.

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Notes

1. The Supreme Courts' view on the applicability of constitutional rights to Guantánamo detainees is not clear, with an exception of the constitutional privilege of habeas corpus (*Boumediene v. Bush,* 2008). Thus, the applicability to the Guantánamo detainee of this article's discussion on the inmates' right to hunger strike depends heavily depends on the applicability of other various constitutional rights to these detainees.
2. If a free person conducts a hunger strike in a location where she has a right to be, the government's intervention likely violates the First Amendment under a heightened/strict scrutiny applicable to content-based restrictions. The government's fear of possible violence outside of a prison caused by the death of the free striker, though it be a legitimate concern, is not sufficient to justify intervention unless such danger is clear and imminent (see, e.g., *Brandenburg v. Ohio,* 1969; *Cantwell v. Connecticut,* 1940; *New York Times Co. v. United States,* 1971, Stewart, J. concurring; *Shenck v. United States,* 1919). Moreover, as discussed in the subsequent part, a free person has a stronger right to refuse medical treatment than inmates. While restrictions on this right retained by an inmate are subject to the rather deferential *Turner* test, a competent free person's right to refuse medical treatment has been considered near absolute. The courts have almost consistently held a free competent person's right to refuse medical treatment, including lifesaving nutrition and

hydration, outweighs the government's interests (see, e.g., *Bouvia v. Superior Court,*1986; *Satz v. Perlmutter,*1978; *Thor v. Superior Court,*1993). Thus, the government's force-feeding and other unwanted medical intervention on competent and unincarcerated hunger strikers should not be warranted.

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Author Biography

Naoki Kanaboshi is an assistant professor in the school of criminal justice at Grand Valley State University, Grand Rapids, Michigan. His research interests include constitutional law, criminal procedure, prison inmates' rights and comparative law.