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## Comment

### THE RIGHT TO REFUSE: SHOULD PRISON INMATES BE ALLOWED TO DISCONTINUE TREATMENT FOR INCURABLE, NONCOMMUNICABLE MEDICAL CONDITIONS?

DANIEL R. H. MENDELSON\*

*“Constitutional rights should not be shunted aside by such a frail reed of supposition.”*<sup>1</sup>

In July of 2007, Troy Reid was a very sick man. Reid was suffering from high blood pressure, and his kidneys were shutting down due to end-stage renal failure.<sup>2</sup> Reid’s treatment required him to undergo kidney dialysis three times a week.<sup>3</sup> In April 2008, after spending nine months shuttling back and forth from dialysis treatments, Reid decided he had had enough, and he made the difficult and personal decision to end his medical treatment, and let nature take its course.<sup>4</sup>

Howard Andrews’s story is even more tragic. After falling from a wall, Andrews became a quadriplegic.<sup>5</sup> His injuries left him without “any physical sensation or control of his body below the shoulders.”<sup>6</sup> His condition required “[m]edical personnel [to] assist in the performance of all bodily functions.”<sup>7</sup> And because Andrews’s condition was irreversible, he would have to live like that for the rest of his life.<sup>8</sup>

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1. Polk Cnty. Sheriff v. Iowa Dist. Court, 594 N.W.2d 421, 434 (Iowa 1999) (Snell, J., dissenting).

2. *Stouffer v. Reid*, 413 Md. 491, 495 & n.1, 993 A.2d 104, 105–06 & n.1 (2010). Reid was also HIV-positive, but this condition played no part in the court’s decision. *Stouffer v. Reid*, 184 Md. App. 268, 273 n.1, 965 A.2d 94, 98 n.1 (2009).

3. *Stouffer*, 413 Md. at 495, 993 A.2d at 105–06.

4. *Id.*, 993 A.2d at 106.

5. *Thor v. Superior Court*, 855 P.2d 375, 379 (Cal. 1993) (en banc).

6. *Id.*

7. *Id.*

8. *Id.*

So Andrews decided that he wanted all medical attention to stop, and for medical personnel to simply leave him alone and let him die.<sup>9</sup>

Although the United States Constitution provides free citizens a general right to refuse treatment, Andrews and Reid were both convicted felons serving extended sentences.<sup>10</sup> Luckily for both men, the courts in *Stouffer v. Reid*<sup>11</sup> and *Thor v. Superior Court*,<sup>12</sup> respectively, rejected prison officials' speculative evidence and allowed these inmates to execute their constitutional right. However, in past cases, prison officials had successfully used speculative security threats and nonspecific claims of system manipulation to force inmates suffering from incurable, noncommunicable conditions to undergo treatment against their will.<sup>13</sup> The Supreme Court of the United States in *Turner v. Safley*<sup>14</sup> enacted a universal standard of review for constitutional challenges to prison regulations and articulated a doctrine of deference that places the burden on inmates to prove that a specific prison regulation is unconstitutional.<sup>15</sup> But the application of this standard to an inmate's legitimate request to refuse medical treatment while incarcerated demonstrates its potential for abuse. While designed as a universal standard, the *Turner* test developed around interpersonal rights that are different in kind from the right to refuse medical treatment.<sup>16</sup>

Courts typically borrow the reasoning used to compel medical treatment from inmate hunger-strike cases, a topic with significantly more jurisprudence. Some courts have incorrectly analogized an inmate's refusal of medical treatment to situations involving inmate hunger strikes, an inappropriate comparison when considering the two situations' foundational differences in choice.<sup>17</sup>

The unique characteristics of the right to refuse treatment in the prison setting should inspire courts to apply an analysis similar to that

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9. *Id.*

10. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1989); *Stouffer v. Reid*, 413 Md. 491, 495, 993 A.2d 104, 105 (2010).

11. 413 Md. 491, 993 A.2d 104 (2010).

12. 855 P.2d 375 (Cal. 1993) (en banc).

13. See, e.g., *Polk Cnty. Sheriff v. Iowa Dist. Court*, 594 N.W.2d 421, 431–32 (Iowa 1999) (Snell, J., dissenting) (“As viewed by the majority, th[e] possibility [of a threat to prison security] is enough to tip the scales under the balancing test and necessitate a jettisoning of the liberty interest of the United States Constitution. A possibility of fallout is all that the sheriff puts forth as evidence.”).

14. 482 U.S. 78 (1987).

15. See *infra* Part I.B.3–4.

16. See *infra* Part II.A.

17. See *infra* Part II.B.

used in *Stouffer v. Reid* and *Thor v. Superior Court*, where the Maryland and the California courts refused to accept prison officials' claims of speculative security threats.<sup>18</sup> Applying the *Stouffer* standard would enable courts to demonstrate an appropriate level of respect for inmates' personal autonomy while not jeopardizing prison security.

## I. LEGAL BACKGROUND

All citizens have a nonabsolute right to refuse medical treatment,<sup>19</sup> but the nature of the penal system inherently limits an incarcerated individual's ability to effectuate his constitutional rights. Over the last forty years, the United States Supreme Court has taken a deferential posture toward prison officials' decisions because of the complex and dangerous nature of institutionalized confinement. Although a strong minority of the Court has repeatedly argued for a heightened respect of inmates' rights, *Turner v. Safley* effectively synthesized the Court's past decisions and established a reasonableness standard applicable to all constitutional challenges brought by inmates.<sup>20</sup> State courts hearing treatment refusal cases have generally combined the jurisprudence of *Turner* and its progeny<sup>21</sup> with the majority's understanding in hunger-strike cases<sup>22</sup> in deciding to compel treatment. Only two courts, *Thor* and *Stouffer*, have rejected the state's evidence as unconvincing and allowed an inmate to refuse medical treatment based on a heightened respect for the inmate's right to refuse treatment.<sup>23</sup>

### *A. The Supreme Court Has Established Individuals Possess a Nonabsolute Right to Refuse Medical Treatment, Even if Doing So May Result in Death*

Courts have held that individuals have a constitutional right to refuse medical treatment regardless of the potential effect doing so could have on their health. This idea evolved around the concept that "[o]ver himself, over his own body and mind, the individual is sovereign."<sup>24</sup> Over time, state courts incorporated this concept in the common law doctrine of informed consent, requiring doctors to dis-

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18. *See infra* Part II.C.

19. *See infra* Part I.A.

20. *See infra* Part I.B.

21. *See infra* Part I.B.4.

22. *See infra* Part I.C.

23. *See infra* Part I.D.

24. JOHN STUART MILL, ON LIBERTY 69 (Gertrude Himmelfarb ed., Penguin Group 1974) (1859).

cuss the material risks of potential treatments with patients but leaving the final decision on whether to proceed with the patient.<sup>25</sup>

The Supreme Court eventually established the right to refuse treatment as constitutional in *Cruzan v. Director, Missouri Department of Health*.<sup>26</sup> The *Cruzan* Court determined that the liberty prong of the Fourteenth Amendment grants all individuals a right to refuse unwanted medical treatment,<sup>27</sup> presumably, even if refusal will result in death. Since *Cruzan*, free citizens have generally been able to refuse treatment without much restriction from the state.<sup>28</sup>

This right, however, has never been absolute, and the state has always maintained a limited regulatory authority based on certain state interest factors.<sup>29</sup> The state interest factors developed organically in an effort by the judiciary to balance patient autonomy with medical ethics.<sup>30</sup> In *Superintendent v. Saikewicz*,<sup>31</sup> the Massachusetts Supreme Judicial Court succinctly aggregated the relevant state interest factors thirteen years before the United States Supreme Court constitutionalized the right to refuse treatment in *Cruzan*. *Saikewicz* dealt with a severely mentally retarded sixty-seven-year-old ward of the state

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25. There are essentially two schools of thought on the legal standard of informed consent. The first is the *Prudent Patient* standard. See *Canterbury v. Spence*, 464 F.2d 772, 787 & n.84 (D.C. Cir. 1972) (quoting Jon R. Waltz & Thomas W. Scheuneman, *Informed Consent to Therapy*, 64 NW. U. L. REV. 628, 640 (1970)) (requiring physicians to divulge all information “a reasonable person, in . . . the patient’s position, would be likely to attach significance to”). Other jurisdictions apply the *Prudent Physician* standard. See *Culbertson v. Mernitz*, 602 N.E.2d 98, 103 (Ind. 1992) (requiring that physicians “do that which [they are] trained to do, namely, conduct [themselves] as a reasonably prudent physician in taking a history, performing a physical examination,” etc.). *Culbertson* also criticizes the *Prudent Patient* standard, contending that it essentially requires physicians to read their patients’ minds to avoid liability. *Id.* It is important to note that the Supreme Court has denied certiorari in these cases, leaving the states to decide which standard to follow. See, e.g., *Spence v. Canterbury*, 409 U.S. 1064 (1972).

26. 497 U.S. 261 (1990).

27. *Id.* at 278 (explaining that the right to refuse treatment “may be inferred” from past cases). Interestingly, the Court cited its inmates’ rights cases when it decided to base the right to refuse treatment in the U.S. Constitution. See *id.* at 278–79 (citing *Washington v. Harper*, 494 U.S. 210 (1990) and *Vitek v. Jones*, 445 U.S. 480 (1980) as cases demonstrating a “significant liberty interest in avoiding . . . unwanted [medical treatment]” both acutely and generally).

28. For an example of how courts have applied the reasoning of *Cruzan* in prison cases, see *Polk Cnty. Sheriff v. Iowa Dist. Court*, 594 N.W.2d 421, 426 (Iowa 1999) (majority opinion) (citing *Cruzan*, 497 U.S. at 278) (“In *Cruzan v. Dir., Mo. Dep’t of Health*, the United States Supreme Court inferred from its prior decisions that ‘a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment.’”).

29. See *Cruzan*, 497 U.S. at 270–71 (discussing cases where state courts have held that an individual’s right to refuse treatment must be balanced against asserted state interests).

30. See *id.* (discussing the evolution of the right-to-refuse-treatment jurisprudence).

31. 370 N.E.2d 417 (Mass. 1977).

who had developed terminal leukemia.<sup>32</sup> The state brought an action to forego potentially life-sustaining medical treatment due to the painful nature of the procedure, Saikewicz's inability to understand the situation, and the "hopeless" nature of his condition.<sup>33</sup>

Although Saikewicz died before the Supreme Judicial Court issued its decision,<sup>34</sup> the court used *Saikewicz* to lay the doctrinal foundation for future cases dealing with an individual refusing life-sustaining or life-prolonging medical treatment. Importantly, the court provided a nonexhaustive list of state interest factors distilled from other cases for future courts to apply in evaluating whether to allow a patient to refuse medical treatment.<sup>35</sup> Specifically, the court listed four interests which states have asserted in prior cases: "(1) the preservation of life; (2) the protection of the interests of innocent third parties; (3) the prevention of suicide; and (4) maintaining the ethical integrity of the medical profession."<sup>36</sup> Further, while *Saikewicz* dealt with an incompetent individual, the court explained that the delineated state interest factors as well as the right to refuse medical treatment extended to both competent and incompetent individuals equally.<sup>37</sup> Today, most jurisdictions use the *Saikewicz* factors as a starting point in evaluating whether a patient's right to refuse treatment outweighs the interests of the state.<sup>38</sup>

The United States Supreme Court constitutionalized the right to refuse treatment in *Cruzan*, explaining that "[i]t cannot be disputed that the Due Process Clause protects . . . an interest in refusing life-sustaining medical treatment."<sup>39</sup> *Cruzan*, however, also explained that in all constitutional cases, the right to refuse treatment was not absolute and courts must "balanc[e individual] liberty interests against the

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32. *Id.* at 420 (describing Saikewicz as "profoundly mentally retarded," labeling his disease as "acute myeloblastic monocytic leukemia," and explaining that this disease is "invariably fatal").

33. *Id.* at 419. Chemotherapy over the course of several weeks was the only viable form of treatment for Saikewicz. *Id.* at 420–21 & n.5. The chemotherapy process typically requires full cooperation on the part of the patient, something Saikewicz was unable to provide because of his severe mental retardation. *Id.* at 421 & n.5. Further, chemotherapy typically causes significant and painful side effects and has a zero percent chance of actually curing the disease. *Id.* at 421.

34. With the leukemia left untreated, Saikewicz died painlessly. *Id.* at 422.

35. *See id.* at 424–25 (listing dozens of cases across the country that had dealt with this situation in divergent ways).

36. *Id.* at 425.

37. *See id.* at 427 ("[W]e recognize a general right in all persons to refuse medical treatment in appropriate circumstances.").

38. *See, e.g.,* Mack v. Mack, 329 Md. 188, 210 n.7, 618 A.2d 744, 755 n.7 (1993) (recognizing that the four *Saikewicz* factors are "uniformly" used in informed-consent cases).

39. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 281 (1990).

relevant state interests.”<sup>40</sup> Specifically, the Court mentioned the preservation of life as a clear state interest, explaining that states are not “required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death.”<sup>41</sup> And although the Court did not formally adopt each *Saikewicz* factor in *Cruzan*, its subsequent cases have recognized the *Saikewicz* factors as important in a court’s constitutional analysis.<sup>42</sup> Thus, *Cruzan* and subsequent cases demonstrate all individuals possess a nonabsolute right to refuse medical treatment but courts must weigh that interest against relevant state interest factors.

*B. Under the Standard Established in Turner v. Safley, Courts Generally Defer to Prison Administrators on Restrictions Concerning Inmates’ Constitutional Rights Due to the Nature of Institutionalized Confinement*

The specialized nature of institutionalized confinement led the Supreme Court in *Turner v. Safley* to establish a clear standard under which courts must evaluate all constitutional challenges to prison regulations. Over time, the Supreme Court has adopted an understanding that inmates do not forfeit all constitutional rights as a result of their incarceration.<sup>43</sup> However, the needs of penal institutions

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40. *Id.* at 279 (quoting *Youngberg v. Romero*, 457 U.S. 307, 321 (1982)).

41. *Id.* at 280.

42. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 730–31 (1997) (recognizing the prevention of suicide and maintaining the ethical integrity of the medical profession as legitimate state interests). While the protection of innocent third parties is not mentioned specifically, its inclusion as a relevant state interest factor can be assumed from the Court’s discussion of vulnerable groups. *Id.* at 731–32.

43. Currently, the Court recognizes inmates’ right to access the judicial system for the purpose of adjudicating legitimate grievances, see *Johnson v. Avery*, 393 U.S. 483, 485–86 (1969) (explaining that the Court would violate its constitutional duty by upholding regulations that prevented prisoners from challenging potentially unconstitutional regulation); their right to protection from “invidious racial discrimination under the Equal Protection Clause,” see *Lee v. Washington*, 390 U.S. 333, 333–34 (1968) (per curiam) (affirming the district court’s decision that an Alabama statute requiring racial segregation in prisons violated the Equal Protection Clause); and their right to communicate with individuals outside the prison system, see *Procunier v. Martinez*, 416 U.S. 396, 415 (1974) (striking down a prison regulation which banned prisoners from communicating with free individuals). Additionally, the Court has placed affirmative duties on penal institutions to ensure that these institutions do not deprive inmates of specific needs such as “adequate” medical care. *See Estelle v. Gamble*, 429 U.S. 97, 103–05 (1976) (explaining that “deliberate indifference” to an inmate’s serious medical issues constitutes cruel and unusual punishment and establishing that the Eighth Amendment obligated prisons to provide inmates with adequate medical treatment). Justice Marshall, who authored the *Estelle* opinion, repeatedly argued for a substantial increase in inmates’ rights during his tenure on the Court. *See generally* Melvin Gutterman, *The Prison Jurisprudence of Justice Thurgood Marshall*, 56 MD.

have generally outweighed inmates' interests in asserting their constitutional rights and led the Supreme Court to uphold prison regulation abrogating these rights.<sup>44</sup> Although a minority of Justices and jurisdictions argued the burden should vary depending on the situation at hand,<sup>45</sup> *Turner v. Safley* established an extremely deferential approach towards prison administrative decisions. It mandated that courts uphold all prison regulations that are "reasonably related to legitimate penological interests."<sup>46</sup> As noted by the dissenters in *Turner*, allowing prison officials to curtail fundamental rights based on speculative evidence essentially puts up an impenetrable wall for inmates looking to assert substantive due process.<sup>47</sup>

*1. The Pre-Turner Supreme Court Deferred to Prison Administrators but Never Established a Universal Standard of Review and Recognized That Prisoners Do Not Forfeit All Constitutional Rights*

Although the Supreme Court has recognized that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country,"<sup>48</sup> courts have founded this concept on the realization that incarceration naturally restricts an individual's ability to effectuate his constitutional rights.<sup>49</sup> While the Court enunciated a deferential attitude toward prison administrative decisions even before *Turner*,<sup>50</sup> no universal standard for reviewing a prisoner's constitutional claims existed.<sup>51</sup> Specifically, the Court had established that "maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained

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L. REV. 149 (1997) (explaining Justice Marshall's problems with the Court's deferential posture toward prison officials' decisions and detailing his attempts to eliminate the degradation and humiliation of inmates through his judicial rulings).

44. *See infra* Part I.B.1.

45. *See infra* Part I.B.2.

46. *Turner v. Safley*, 482 U.S. 78, 89 (1987).

47. *Id.* at at 100–01 (Stevens, J., concurring in part and dissenting in part).

48. *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974).

49. *See Price v. Johnston*, 334 U.S. 266, 285 (1948) ("Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.").

50. *See Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 137 (1977) (Burger, J., concurring) ("The federal courts, as we have often noted, are not equipped by experience or otherwise to 'second guess' the decisions of state legislatures and administrators in this sensitive area except in the most extraordinary circumstances.").

51. *See, e.g., Rhodes v. Chapman*, 452 U.S. 337, 361–62, (1981) (explaining that the Court has often given prison officials the benefit of the doubt when safety or security regulations impinge on inmates' individual rights).

constitutional rights of both convicted prisoners and pretrial detainees.”<sup>52</sup> Cases before *Turner* placed the burden on inmates alleging a violation to establish that the prison regulation inappropriately restricted their constitutional rights in an unreasonable manner.<sup>53</sup>

*Pell v. Procunier* marks one of the first instances where the Court explained its deferential position.<sup>54</sup> *Pell* dealt with a prison regulation that restricted journalists’ ability to conduct interviews with inmates.<sup>55</sup> This regulation gave prison administrators sole authority to select the interview subjects, and as a result effectively “prohibited inmates from having face-to-face communications with journalists.”<sup>56</sup> Justice Stewart, writing for the Court, upheld the regulation, explaining that courts should trust the judgment of state correction officials, unless those challenging regulations provide “substantial evidence . . . to indicate that the officials have exaggerated their response.”<sup>57</sup> The Court determined that because the regulation “limit[ed only] one of several means of communication by an inmate,” while leaving open other avenues of communication, it was more inclined to show deference to prison administrators.<sup>58</sup> Additionally, Justice Stewart, while deferring to prison officials, included language that potentially calls for differing levels of deference depending on the right at issue and the ability of the inmate to exercise that right in a variety of ways.<sup>59</sup>

The Court also expressed its deferential posture toward prison administrator’s actions in *Jones v. North Carolina Prisoners’ Labor Union, Inc.*<sup>60</sup> In *Jones*, the Court upheld a regulation barring prisoners from soliciting other inmates for membership in a prisoners union or holding union meetings.<sup>61</sup> Recognizing the regulation infringed on in-

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52. *Bell v. Wolfish*, 441 U.S. 520, 546 (1979) (footnote omitted).

53. *See Pell v. Procunier*, 417 U.S. 817, 822 (1974) (explaining that prisoners may exercise First Amendment rights that do not interfere with “the legitimate penological objectives of the corrections system”).

54. 417 U.S. 817, 827 (1974) (“[I]n the absence of substantial evidence . . . courts should ordinarily defer to [prison officials’] expert judgment in such matters.”).

55. *Id.* at 819–20.

56. *See id.* at 819 (“prohibit[ing] face-to-face interviews between press representatives and individuals whom they specifically name and request to interview”).

57. *Id.* at 827–28.

58. *Id.*

59. *See id.* at 827 (determining that a significant level of deference was appropriate where “the issue involves a regulation limiting one of several means [to effectuate a constitutional right],” while noting that courts “cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties”).

60. 433 U.S. 119 (1977).

61. *Id.* at 121.

mates' First and Fourteenth Amendment rights,<sup>62</sup> the Court gave deference to the testimony of prison officials in that given the nature of institutionalized confinement, "the concept . . . of a prisoners' labor union was itself fraught with potential dangers."<sup>63</sup> The Court again expressed a deferential position toward prison officials' determinations,<sup>64</sup> suggesting a rational basis-type standard of review for constitutional claims proffered by inmates against their jailers.<sup>65</sup> Although *Jones* did not explicitly provide an evaluation standard for courts to apply in all cases, its language insinuated that deference to prison officials should be the norm.<sup>66</sup>

Even in cases where a majority of the Court established an affirmative obligation for prison officials, it did so in a manner that generally allows prison administrators to perform their duties with little judicial oversight. For example, in *Estelle v. Gamble*<sup>67</sup> the Court conclusively established that the government has a constitutional obligation to provide inmates with medical treatment and health care during incarceration.<sup>68</sup> However, the standard for violations the Court established made it difficult for an inmate to bring a claim against his jailers and still demonstrated a significant level of deference towards prison administrators.<sup>69</sup>

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62. *See id.* at 129–30, 133 (explaining that although this regulation "barely" implicates the First Amendment, it may violate the Equal Protection Clause of the Fourteenth Amendment).

63. *See id.* at 126–28 (determining that petitioners failed to rebut prison official testimony asserting "[t]he creation of an inmate union will naturally result in increasing the existing friction between inmates and prison personnel").

64. *See id.* at 136 (citing *Procunier v. Martinez*, 416 U.S. 396, 405 (1974)) ("The District Court's further requirement of a demonstrable showing that the Union was in fact harmful is inconsistent with the deference federal courts should pay to the informed discretion of prison officials.").

65. *See id.* at 129 (stating that prison regulations are valid if they are "rationally related . . . to a legitimate penological interest").

66. *See id.* at 125 ("The District Court, we believe, got off on the wrong foot in this case by not giving appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement.").

67. 429 U.S. 97 (1976).

68. *See id.* at 103 (holding that the government is obligated by the Eighth Amendment to "treat [inmates'] medical needs" during incarceration).

69. *See id.* at 105–06 (explaining that in order to state an Eighth Amendment claim under *Estelle v. Gamble*, inmates must demonstrate that the jailer's actions amounted to "deliberate indifference to [an inmate's] serious medical needs, and a mere misdiagnosis or accident, although it may produce added anguish," would not create a constitutional claim under *Estelle*).

Further, in *Procunier v. Martinez*, a case dealing with the rights of inmates and free men in conjunction,<sup>70</sup> the Court agreed that deference to prison officials was appropriate but explained that the level of deference owed depended on the nature of the restriction and the right at issue.<sup>71</sup> While each of these cases held that prison administrators' decisions should receive deference, until *Turner*, the Supreme Court never established the standard by which courts should evaluate the constitutionality of those decisions, rather choosing to approach each situation individually as it came.

2. *A Minority of the Supreme Court and the Second Circuit in Abdul Wali v. Coughlin Advocated for Differing Levels of Judicial Deference Depending on the Situation at Hand*

At the same time the Court's majority was repeatedly deferring to prison administrators, a minority of Justices and certain appellate courts—specifically the United States Court of Appeals for the Second Circuit in *Abdul Wali v. Coughlin*<sup>72</sup>—advocated for differing levels of deference depending on the right at issue and the situation at hand.<sup>73</sup> A strong minority of the Court also attacked the idea of general deference as inappropriate because of the potential for abuse by prison administrators.<sup>74</sup>

In *Jones*, Justice Marshall—writing for himself and Justice Brennan—authored a dissenting opinion describing the majority's holding as “a giant step backwards” in inmate rights jurisprudence.<sup>75</sup> Justice Marshall concluded the Court's deference conflicted with the judiciary's role as an independent arbiter, arguing traditional First

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70. See 416 U.S. 396, 408–09 (1974) (deciding that the regulation allowing prison officials to censure the mail inmates were receiving naturally implicated the rights of both the recipient and the sender).

71. See *id.* at 412–13 (determining that prison officials had the burden of demonstrating that their censorship furthered an important government interest and was no greater than necessary).

72. 754 F.2d 1015 (2d Cir. 1985).

73. See *id.* at 1033 (“Our reading of the cases suggests a tripartite standard, drawn by reference to the nature of the right being asserted by prisoners, the type of activity in which they seek to engage, and whether the challenged restriction works a total deprivation (as opposed to a mere limitation) on the exercise of that right.”).

74. See *Block v. Rutherford*, 468 U.S. 576, 596–97 (1984) (Marshall, J., dissenting) (arguing that the unwarranted deference the Court gives prison administrators has created a system where almost any regulation stripping inmates of their rights can be upheld).

75. See *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 139, 147 (1977) (Marshall, J., dissenting) (opining that prisoners will eventually lose all their constitutional rights if the Court permanently adopts the analysis stated in *Jones*).

Amendment scrutiny should apply despite incarceration.<sup>76</sup> If the Court gave prison officials too much leeway, Justice Marshall believed, officials would “inevitably . . . err on the side of too little freedom” and that courts should more strictly critique regulations that strip constitutional rights.<sup>77</sup>

Justice Marshall again articulated this concern in his dissent in *Bell v. Wolfish*,<sup>78</sup> this time speaking only for himself.<sup>79</sup> In *Bell*, the Court determined that prison administrators could limit a pretrial detainee’s rights in the same manner as regular prisoners.<sup>80</sup> Justice Marshall stated that providing unlimited deference in these situations amounted to abdication of judicial duty,<sup>81</sup> and argued that a standard that “balances the deprivations involved against the state interests assertedly served would be more consistent with the import of the Due Process Clause.”<sup>82</sup>

In an attempt to remedy the issues raised by Justice Marshall, the Second Circuit, in *Abdul Wali v. Coughlin*, applied an analysis in which the level of deference toward prison officials changed depending on the situation at hand.<sup>83</sup> The *Abdul Wali* standard looked at two factors in determining the appropriate level of deference to prison officials: the nature of the right at issue and “whether the challenged restriction works [as] a total deprivation (as opposed to a mere restriction) on the exercise of that right.”<sup>84</sup> This *Abdul Wali* standard has three levels. First, if a court determines that effectuating the right in a penal

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76. *See id.* at 141–43 (explaining that “principals, college presidents, mayors, councilmen, and law enforcement personnel” all make the First Amendment determinations that are no more difficult than those made by prison officials in this case, yet none receive the same level of deference from the Court).

77. *Id.* at 139, 142–43.

78. 441 U.S. 520 (1979).

79. *See id.* at 563–64 (Marshall, J., dissenting) (arguing that the level of deference the Court gave to prison officials was “unsupportable” and “preclude[d] effective judicial review of the conditions of pretrial confinement”). Although no other Justices joined Justice Marshall, Justice Stevens also filed a dissent that Justice Brennan joined. *Id.* at 579 (Stevens J., dissenting). In his opinion, Justice Stevens explained that although Justice Marshall had a different basis for his analysis, Justice Stevens “agree[d] with much of [Justice Marshall’s] analysis and most of his criticism of the Court.” *Id.* at 580 n.4.

80. *See id.* at 562 (majority opinion) (explaining that the “wide range of ‘judgment calls’” present in the penal system are “outside of the Judicial Branch of Government”).

81. *Id.* at 568 (Marshall, J., dissenting).

82. *See id.* at 569–70 (footnotes omitted) (adding that this approach would be more “sensitive” to the “individual interests at stake”).

83. *See* 754 F.2d 1015, 1028–29 (2d Cir. 1985) (citing *Procurier v. Martinez*, 416 U.S. 396, 422–23 (1974) (Marshall, J., concurring)) (basing the entire decision on Justice Marshall’s opinion that a prisoner “retains all the rights of an ordinary citizen except those expressly, or necessarily by implication, taken from him by law”).

84. *Id.* at 1033.

institution is “presumptively dangerous”—as it was in *Jones*—then “judicial deference should be nearly absolute.”<sup>85</sup> Second, if the right in question is not presumptively dangerous, and the regulation restricts but does not eliminate an inmate’s ability to effectuate the right—as was the case in *Pell*—prison officials should be given similarly wide-ranging deference.<sup>86</sup> Finally, in situations where the right at issue is not presumptively dangerous, and where “official action (or inaction)” totally deprives the inmate of the right at issue, the state should carry the burden of justifying the restriction.<sup>87</sup> The Second Circuit implicitly felt that this three-step analysis better took the inmate’s interests into account and limited the ability of prison officials to abuse their authority.<sup>88</sup>

3. *Turner v. Safley Held That Prison Regulations Are Constitutional if They Reasonably Relate to a Legitimate Penological Interest, Eliminating Confusion Regarding the Appropriate Standard of Review*

The United States Supreme Court clarified its prison jurisprudence in *Turner v. Safley* and announced that courts should evaluate all prison regulations under a rational basis standard and uphold the regulations if they reasonably relate to a legitimate prison interest.<sup>89</sup> While *Turner* dealt with regulations restricting inmate speech and marriage,<sup>90</sup> it effectively synthesized the Court’s past cases and provided lower courts with a succinct and universal standard to follow.

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85. *Id.* (“In these situations, the proper role of the court ends with the determination that the asserted right does not inhere within the prison’s walls.”). The court further explained that in such situations, the “burden [is on] prisoners to demonstrate that the restriction is not supported by a reasonable justification.” *Id.*

86. *Id.* (citing *Pell v. Procunier*, 417 U.S. 817, 823 (1974)) (“Because such restrictions work only limited privations, courts should yield to official determinations regarding their necessity and propriety.”).

87. *Id.* (citing *Procunier v. Martinez*, 416 U.S. 396, 413 (1974)) (“In these limited circumstances, it is incumbent upon prison officials to show that a particular restriction is necessary to further an important governmental interest, and that the limitations . . . are no greater than necessary . . .”).

88. *See id.* at 1035–36 (explaining that if the court gave the commissioner’s determinations general deference he would be able to withhold any document based on little more than his own fears and personal beliefs).

89. *See Turner v. Safley*, 482 U.S. 78, 89 (1987) (“[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”).

90. *See id.* at 81–82. The first regulation limited correspondence between inmates at different institutions to those concerning legal matters and those between immediate family members. The second regulation required special approval from the superintendent of the prison before inmates could marry. *Id.*

The *Turner* majority unequivocally established rational basis, and not strict or intermediate scrutiny, as the standard of review for constitutional challenges to prison regulations. It stated, “If *Pell*, *Jones*, and *Bell* have not already resolved the question . . . we resolve it now: when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is *reasonably related to legitimate penological interests*.”<sup>91</sup>

The Court then listed four separate reasonableness factors it viewed as important in evaluating prison regulations. First, courts should evaluate whether there is a “‘valid rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it.”<sup>92</sup> Second, whether alternative means of exercising the right remain open to prison inmates.<sup>93</sup> Third, the impact accommodating the right will have on prison resources generally.<sup>94</sup> And fourth, whether there are ready alternatives to the proposed regulation that administrators can implement at a *de minimis* cost.<sup>95</sup>

The majority then mandated that courts evaluate prison regulations’ constitutionality using these factors, concluding that this standard provided prison administrators with the independence necessary to run their institutions while still enabling the judiciary to overrule administrative determinations in egregious cases. The Court refused to mandate strict scrutiny review in the prison context, reasoning that such a standard would “seriously hamper [prison officials’] ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.”<sup>96</sup> More importantly, the Court worried that a more restrictive standard would “inevitably”

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91. *Id.* at 89 (emphasis added).

92. *Id.* at 89–90 (citing *Block v. Rutherford*, 468 U.S. 576, 586 (1984)) (explaining that the government must have a “legitimate and neutral” interest and its connection to the goal cannot be too remote). Courts generally refer to this as the first prong of the *Turner* standard.

93. *Id.* at 90 (citing *Pell v. Procunier*, 417 U.S. 817, 827 (1974)) (differentiating between a regulation that makes effectuating a right impossible and a regulation that only limits a right). Courts commonly call this the second prong of the *Turner* standard.

94. *Id.* (citing *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 132–33 (1977)) (describing the potential issues or “ripple effect” allowing the inmate to effectuate the right could have on other inmates and the prison in general). This is known as the third prong of the *Turner* standard.

95. *Id.* at 90–91 (citing *Block*, 468 U.S. at 587) (holding that the presence or absence of “ready alternatives” to the proposed regulation “may be evidence” of whether it is reasonable). This is the fourth prong of the *Turner* standard.

96. *Id.* at 89.

lead courts to become the “primary arbiters . . . to every administrative problem [in prisons].”<sup>97</sup>

Four Justices disagreed with the *Turner* standard,<sup>98</sup> in part due to its failure to recognize the difference between protecting constitutional rights and the slippery slope they thought the standard created.<sup>99</sup> Justice Stevens mentioned *Abdul Wali* specifically and observed that “[the majority opinion] in *Abdul Wali* . . . makes a more careful attempt to strike a fair balance between legitimate penological concerns and the well-settled proposition that inmates do not give up all constitutional rights by virtue of incarceration.”<sup>100</sup> Justice Stevens was also particularly concerned with the majority’s use of speculative evidence to justify its decision, insinuating that under a reasonableness standard like *Turner*, courts could essentially justify any action by prison officials.<sup>101</sup> Justice Stevens’s fears, however, were not enough to sway a majority of the Justices, and the *Turner* Court conclusively established that courts should uphold prison regulations if they are reasonably related to legitimate penological interests.

4. *The Supreme Court Has Only Applied the Turner Standard to an Inmate’s Right to Refuse Medical Treatment for a Mental Condition*

The Supreme Court’s first—and thus far only—opportunity to apply the *Turner* standard to the refusal of medical treatment arose regarding a mental condition in *Washington v. Harper*.<sup>102</sup> In *Harper*, the Court held that a prison regulation compelling inmates to take

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97. *Id.* (citing *Procurier v. Martinez*, 416 U.S. 396, 407 (1974)). Notable in the Court’s decision is that the *Turner* standard only applies to facial challenges of prison regulations, and that specific actions by prison officials, absent a regulation, are outside *Turner*’s scope. *See id.* (stating that a “regulation is valid” if it meets the listed requirements but neglecting to establish a constitutional standard for evaluating administrative undertakings where a regulation is absent). Nevertheless, cases since *Turner* have seen courts adopt a deferential position when evaluating actions taken without a regulation in place. *See, e.g., McNabb v. Dep’t of Corr.*, 180 P.3d 1257, 1264 (Wash. 2008) (en banc) (applying *Turner*’s deferential posture to a hunger-strike case where there was no controlling regulation).

98. Specifically, Justices Marshall, Stevens, Blackmun, and Brennan voted against adopting the *Turner* standard. *Turner*, 482 U.S. at 100 (Stevens, J., concurring in part and dissenting in part).

99. *See id.* at 100–01 (explaining that a clever warden could get almost any regulation past the Court’s reasonableness standard).

100. *Id.* at 101 n.1.

101. *See id.* at 100–01 (“Application of the standard would seem to permit disregard for inmates’ constitutional rights whenever the imagination of the warden produces a plausible security concern and a deferential trial court is able to discern a logical connection between that concern and the challenged regulation.”).

102. 494 U.S. 210 (1990).

antipsychotic drugs against their will was constitutional.<sup>103</sup> The majority focused on two components of the regulation in determining its validity. First, the Court explained that the regulation was reasonable under *Turner* because the inmate in question had not demonstrated that any other prison action would provide a comparable solution at a “di minimus” cost.<sup>104</sup> Second, the Court determined that the regulation’s scope was acceptable under *Turner* because prison officials could only medicate inmates when doing so related to valid treatment purposes and was conducted under the supervision of medical personnel.<sup>105</sup> Importantly, the Court rejected the notion that the state must present clear and convincing evidence in determining that anti-psychotic medication is required.<sup>106</sup>

Justice Stevens—joined by Justices Brennan and Marshall—dissented on the merits, arguing the Court misapplied the *Turner* standard and “undervalued [several dimensions] of respondent’s liberty interest.”<sup>107</sup> Noting the Washington Supreme Court recognized the ability to reject treatment as a “fundamental liberty interest deserving the highest order of protection,”<sup>108</sup> Justice Stevens argued the potential for long-term damage from medical treatment deserved a much closer analysis than the Court conducted.<sup>109</sup> Justice Stevens also

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103. *Id.* at 236. The Court explained that this particular regulation properly accommodated both “an inmate’s liberty interest in avoiding the forced administration of antipsychotic drugs and the State’s interests in providing appropriate medical treatment”). *Id.* It is important to note that *Harper’s* holding is limited to antipsychotic drugs. *Id.* at 214 n.1 (“Like the Washington Supreme Court, we limit our holding to the category of antipsychotic drugs.”). The *Harper* decision has become a topic of discussion since the shooting of Rep. Gabrielle Giffords and a Ninth Circuit decision to allow her alleged shooter, Jared Loughner, to refuse treatment for bipolar disorder. *United States v. Loughner*, No. 11-10339, 2011 WL 2694294, at \*2 (9th Cir. July 12, 2011).

104. *See id.* at 226–27 & n.10 (citing Brief for American Psychiatric Association et al. as Amici Curiae supporting petitioners at 11–12, *Washington v. Harper*, 494 U.S. 210 (1990) (No. 88-599, 1989 WL 1127132)) (explaining that there is “substantial evidence” demonstrating that any other means of controlling the inmate’s behavior, such as physical restraints or seclusion, were limited in effectiveness and cost-prohibitive).

105. *Id.* at 226 (“600.30 is a rational means of furthering the State’s legitimate objectives. Its exclusive application is to inmates who are mentally ill and who . . . are gravely disabled or represent a significant danger to themselves or others. The drugs may be administered for no purpose other than treatment . . .”).

106. *Id.* at 235 (citing *Vitek v. Jones*, 445 U.S. 480, 494–95 (1980)) (determining that a standard of proof requiring “clear, cogent, and convincing” evidence of a danger to one’s self or others is “neither required nor helpful when medical personnel are making” the ultimate determination on whether to treat).

107. *Id.* at 237 (Stevens, J., dissenting).

108. *Id.* at 241 & n.9.

109. *See id.* at 240 & n.8 (detailing the potential side effects of the medication, which range from “drowsiness, excitement, restlessness, [and] bizarre dreams” to “tardive dyskinesia, an often irreversible syndrome of uncontrollable movements that can prevent a per-

questioned the applicability of the Court's "necessary treatment" requirement,<sup>110</sup> concluding that responding to generalized security concerns with forced medical treatment amounted to an "exaggerated response" and went outside the *Turner* standard.<sup>111</sup>

*C. Prison Security Interests Have Generally Prevailed over an Inmate's Right to Perform Hunger Strikes or Refuse Treatment for Communicable Diseases*

Although the Supreme Court has only analyzed forced treatment within the context of mental conditions, throughout the last century lower federal and state courts have allowed prison officials to force-feed inmates conducting hunger strikes and treat inmates suffering from communicable diseases against their will. With the exception of Florida and Georgia, state courts have refused to allow inmates to stop eating for any reason. Further, both state and federal courts have universally held inmates refusing treatment for communicable diseases must undergo treatment. Both outcomes are based on judicial determinations that the state's interest in prison security outweighs the inmate's personal interests in bodily integrity.

*1. Most Courts Have Allowed Prison Officials to Force-Feed Inmates Performing Hunger Strikes in an Effort to Maintain Prison Security*

The need to maintain security and promote order in prisons has led almost all state courts to allow prison officials to force-feed inmates conducting hunger strikes. Hunger strikes are defined by the International Red Cross as a "voluntary total fasting" by an individu-

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son from exercising basic functions" and "neuroleptic malignant syndrome" which carries a thirty percent chance of death).

110. *Id.* at 244–45 (explaining that, on its face, "the Policy does not require a determination that forced medication would advance [the inmate's] medical interest[s]," but worrying that the state might be inclined to use medication in an effort to "manag[e] an unruly prison population" because medicated inmates are more docile).

111. *See id.* at 246–47 (arguing that medicating for an extended period of time is antithetical to preventing "an *imminent* likelihood of *serious* harm") (emphasis in original). While *Harper* provides an idea of how the Court would generally adjudicate forced-treatment cases, the foundational differences present in cases dealing with competent inmates leave at least a general question on the constitutional merits of forced treatment in such a situation. *Cf. Stouffer v. Reid*, 413 Md. 491, 514–16, 993 A.2d 104, 117–18 (2010) (analyzing the right to refuse treatment for a noncommunicable disease on constitutional grounds and determining that the state's evidence was insufficient even under the *Turner* standard). *Stouffer* was ultimately decided on common-law grounds. *Id.* at 502–03, 993 A.2d at 110.

al.<sup>112</sup> A “true” hunger strike is a form of protest against the violation of a specific right,<sup>113</sup> and inmates in the American prison system have historically conducted hunger strikes as a form of protest.<sup>114</sup>

In most hunger-strike cases, the inmate states a particular goal and refuses to eat until he or she gets what he or she wants.<sup>115</sup> Because of the communicative purpose of the hunger strike, there is typically concrete evidence, usually in the form of an admission or statement by the inmate, that he or she is undertaking a hunger strike.<sup>116</sup> This kind of situation has enabled correctional facilities in most jurisdictions to end hunger strikes by obtaining a court order enabling prison officials to feed the inmate against his or her will.<sup>117</sup>

Most jurisdictions have consistently distinguished between refusing any form of medical treatment—whether for communicable or noncommunicable conditions—and participating in a hunger strike.<sup>118</sup> The Supreme Court of New Hampshire in *In re Caulk* succinctly articulated the differences:

[A hunger strike] is not a situation where an individual, facing death from a terminal illness, chooses to avoid extraordinary and heroic measure to prolong his life, albeit for a short duration. Rather, [the individual refusing medical treatment] has set the death-producing agent in motion with

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112. Hernán Reyes, *Medical and Ethical Aspects of Hunger Strikes in Custody and the Issue of Torture*, in 19 RESEARCH IN LEGAL MEDICINE: MALTREATMENT AND TORTURE (M. Oehmichen ed., 1998), available at <http://www.icrc.org/eng/resources/documents/article/other/health-article-010198.htm>.

113. See *id.* (explaining that the French phrase “jeûne de protestation,” literally meaning “fasting as a form of protest,” is a more accurate linguistic description than the term “hunger strike”).

114. See, e.g., *Zant v. Prevatte*, 286 S.E. 715, 716 (Ga. 1982) (explaining that inmate started his hunger strike to “get the attention of prison officials” because he “fears for his life” in the Georgia prison system and “wants to be transferred to North Carolina where he feels he will be safe”).

115. See, e.g., *People ex rel. Dep’t of Corr. v. Fort*, 815 N.E.2d 1246, 1249 (Ill. App. Ct. 2004) (describing a situation where an inmate refused to eat until he was transferred to another prison).

116. See *id.* at 1249. (“[D]efendant told the assistant warden that he was on a hunger strike in response to his property being taken.”); see also *Von Holden v. Chapman*, 450 N.Y.S.2d 623, 625 (N.Y. App. Div. 1982) (“[Inmate] expressed intention to take his life by starvation.”).

117. See, e.g., *McNabb v. Dep’t of Corr.*, 180 P.3d 1257, 1267 (Wash. 2008) (en banc) (affirming the intermediate appellate court and allowing corrections officers to end defendant’s hunger strike through force-feeding).

118. See, e.g., *Von Holden*, 450 N.Y.S.2d at 627 (“Even superficial comparison of the right to decline medical treatment with the right to take one’s life illustrates their essential dissimilarity and to argue that because the State has recognized the former it must permit the latter would be to engage in the most specious reasoning.”).

the specific intent of causing his own death, and any comparison of the two situations is superficial.<sup>119</sup>

The New Hampshire Supreme Court held that “the State’s interests in maintaining an effective criminal justice system and in preserving life . . . must prevail” over an inmate’s right to refrain from eating.<sup>120</sup> The court primarily based its decision on the notion that “prison officials will lose much of their ability to enforce institutional order if any inmate can shield himself from the administration’s control . . . by announcing that he is on a starvation diet.”<sup>121</sup> Courts have applied this prophylactic approach to inmate hunger strikes in New York,<sup>122</sup> West Virginia,<sup>123</sup> Washington,<sup>124</sup> and Illinois,<sup>125</sup> among others.

In contrast to most states’ generally deferential attitude toward prison officials’ decisions to force-feed inmates, Georgia and Florida have held that inmates have the right to starve themselves to death while incarcerated.<sup>126</sup> These two states used privacy rationales founded in their own state constitutions to justify their decisions.<sup>127</sup> Specifically, the Georgia Supreme Court afforded a prisoner the right to perform a hunger strike in *Zant v. Prevatte*.<sup>128</sup> In an extremely brief opinion, the court stated that prison officials have no right to violate

119. 480 A.2d 93, 96–97 (N.H. 1984) (citations omitted). *In re Caulk*, however, represents the antithetical hunger-strike case; the inmate fasting had no manipulative motive and was not causing a security threat. *Id.* at 95 (“[Defendant] is not making any demands or asking for anything in return for his fast. There is no evidence that [the defendant] poses a direct threat to the security of the institution or to anybody in the institution.”). The inmate simply wanted to die via starvation. *Id.*

120. *Id.* at 96, 97.

121. *Id.* at 96.

122. See *Von Holden*, 450 N.Y.S.2d at 624–25 (explaining that the state’s interests involved in the prison context outweigh any potential individual interests in starvation).

123. See *State ex rel. White v. Narick*, 292 S.E.2d 54, 58 (W. Va. 1982).

124. See *McNabb v. Dep’t of Corr.*, 180 P.3d 1257, 1265–66 (Wash. 2008) (en banc).

125. See *Illinois ex rel. Dep’t of Corr. v. Fort*, 815 N.E.2d 1246, 1250–51 (Ill. 2004).

126. Justice Douglas’s dissent in *In re Caulk* reflects the minority view in hunger-strike cases. See 480 A.2d 93, 97 (N.H. 1984) (Douglas, J., dissenting) (using the New Hampshire state motto of “Live Free or Die” as a juxtaposition of an inmate’s decision to die via hunger strike, stating that “[i]f [defendant] can’t do the former, I would permit the latter”).

127. See *Zant v. Prevatte*, 286 S.E.2d 715, 716 (Ga. 1982) (“A prisoner does not give up his constitutional right to privacy because of his status as a prisoner.”); see also *Singletary v. Costello*, 665 So.2d 1099, 1105 (Fla. Dist. Ct. App. 1996) (“Costello possessed a fundamental right to refuse non-consensual medical treatment even though he was incarcerated.”).

128. 286 S.E.2d 715, 717 (Ga. 1982) (explaining a mentally competent inmate can “by virtue of his right of privacy . . . refuse to allow intrusions on his person, even though calculated to preserve his life”).

an inmate's bodily integrity and end a hunger strike, even if the hunger strike will result in the inmate's death.<sup>129</sup>

Likewise, the Florida Supreme Court allowed an inmate to engage in a hunger strike in *Singletary v. Costello*.<sup>130</sup> The court in *Singletary* concluded that the state's purported justifications did not rise to a level that made compelling treatment appropriate.<sup>131</sup> The court dismissed the state's argument that allowing inmates to perform hunger strikes would result in threats to prison security as "nothing more than speculation and conjecture."<sup>132</sup> The *Singletary* court is unique in recognizing this fact, as future cases dealing with a prisoner's right to refuse medical treatment have routinely relied on speculative evidence when compelling medical treatment. *Zant* and *Singletary* represent exceptions to the rule, as a large majority of state courts have refused to allow inmates to conduct hunger strikes under any circumstance.

2. *Federal and State Courts Have Universally Approved Prison Officials' Decisions to Compel Medical Treatment for Communicable Diseases*

Even more so than hunger strikes, the law has largely rendered inmates unable to refuse treatment for contagious diseases. The Fifth Circuit in *McCormick v. Stalder*<sup>133</sup> demonstrates the judiciary's clear stance on the issue of forced treatment for communicable conditions. McCormick was an inmate in the Louisiana prison system who previously tested positive for tuberculosis.<sup>134</sup> Prison officials treated McCormick pursuant to their established regulations, supposedly against his will.<sup>135</sup> McCormick filed for an injunction claiming that this treatment violated his constitutional rights.<sup>136</sup> The court affirmed dismissal of the complaint as frivolous, citing *Turner* and explaining that the "compelling" state interest in preventing the spread of disease made the forced medication policy reasonable.<sup>137</sup>

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129. *See id.* at 717 ("[The State] has no right to destroy a person's will by frustrating his attempt to die if necessary to make a point.").

130. 665 So.2d 1099 (Fla. Dist. Ct. App. 1996).

131. *See id.* at 1110 (explaining that "the countervailing state interests [as applied to these facts, do] not overcome [defendant's] privacy right to refuse medical intervention").

132. *Id.* at 1109–10.

133. 105 F.3d 1059 (5th Cir. 1997).

134. *Id.* at 1060–61.

135. *Id.*

136. *Id.* at 1060.

137. *Id.* at 1061–62. The court also pointed out that, if McCormick was truly against undergoing treatment, the prison offered the option of isolation. *Id.* at 1062.

The Seventh Circuit in *Russell v. Richards*<sup>138</sup> provided a similar justification for forcing treatment when dealing with a contagious disease in an enclosed prison population.<sup>139</sup> *Russell* dealt with a policy enacted to prevent lice outbreaks.<sup>140</sup> The regulation required incoming inmates to shower with “Liceall brand delousing shampoo” in order to ensure all incoming inmates were lice-free.<sup>141</sup> According to prison officials, lice outbreaks, when they occurred, required an extensive and expensive decontamination process that could potentially last for weeks.<sup>142</sup> The Seventh Circuit held that the regulation was reasonable under *Turner*, determining that the impact allowing inmates to forego the shampoo treatment would have on others in the prison and the prohibitive costs of an individualized approach justified the policy.<sup>143</sup> Like hunger strikes, the state interests outweighed the constitutional right of inmates to refuse treatment.<sup>144</sup> These cases demonstrate that, before and after *Turner*, lower courts generally found that the needs of prison safety and security prevent inmates from conducting hunger strikes or refusing treatment for communicable diseases.

*D. State Supreme Courts Deciding Whether Inmates Can Refuse Treatment for Incurable, Noncommunicable Conditions Have Been Inconsistent*

Five state supreme courts have evaluated a prisoner’s right to refuse medical treatment for an incurable, noncommunicable medical condition, but their decisions have not been consistent. Although these courts did not apply *Turner* in every case,<sup>145</sup> the deferential attitude proffered in *Turner* has guided three courts to compel treatment

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138. 384 F.3d 444 (7th Cir. 2004).

139. *Id.* at 448–49 (explaining that inmates do not have a right to expose other inmates and guards to disease and infestation).

140. *Id.* at 446.

141. *Id.*

142. *See id.* (explaining that if lice are detected on a single inmate in a cell block, the entire cell block is decontaminated, a process that takes approximately twenty-five minutes per bunk and can last for days).

143. *See id.* at 448–49 (the risk of prison infestation far outweighed the minor physical intrusion and rights violation associated with forcing inmates to use the delousing shampoo and individually inspecting every incoming inmate would lengthen medical examinations while producing no additional guarantees of effectiveness).

144. *Id.* at 450.

145. *See Stouffer v. Reid*, 413 Md. 491, 512–13, 993 A.2d 104, 116 (2010) (citing *McNabb v. Dep’t of Corr.*, 180 P.3d 1257, 1264–65 (Wash. 2008) (en banc)) (explaining that *Turner* does not control, absent a regulation guiding the prison administrator’s actions).

based on speculative evidence of prison security risks or an inmate's intent to manipulate the prison system. Two cases, however—*Stouffer v. Reid* and *Thor v. Superior Court*—rejected the State's speculative assertions and upheld the inmates' right to refuse medical treatment because the right is too important to be cast aside based on nonspecific security risks.

1. *State Supreme Courts Before and After Turner Have Relied on Speculative Evidence Proffered by Prison Officials in Deciding to Compel Medical Treatment for Incurable, Noncommunicable Conditions*

The three state courts that have compelled inmates suffering from incurable, noncommunicable conditions to undergo treatment exclusively relied on speculative security threats and potential manipulative intent. The Massachusetts Supreme Judicial Court decided the first major prison medical treatment refusal case, *Commissioner of Correction v. Myers*,<sup>146</sup> eight years before *Turner* and laid the groundwork for all future decisions on the subject.<sup>147</sup> Subsequently, courts in North Dakota and Iowa have compelled inmates to undergo medical treatment for incurable, noncommunicable conditions using rationales similar to those in *Myers*.

*Myers*, decided in 1979, was the first case dealing with inmate refusal of treatment. In *Myers*, a competent inmate sought to discontinue hemodialysis that had become necessary due to an incurable but treatable kidney condition he developed in prison.<sup>148</sup> The state sought to compel medical treatment, alleging that Myers's refusal was not in good faith but was in fact an attempt to manipulate his placement within the prison system.<sup>149</sup> In addition to applying the *Saikewicz* state interest factors, the court focused on two new considerations, both of which were exclusive to the prison context.

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146. 399 N.E.2d 452 (Mass. 1979).

147. All four courts deciding refusal of treatment for incurable, noncommunicable diseases decided after *Myers* have discussed the *Myers* court's analysis at length. See *Thor v. Superior Court of Solano Cnty.*, 855 P.2d 375 (Cal. 1993) (en banc) (citing *Myers* seven times in the opinion), *Polk Cnty. Sheriff v. Iowa Dist. Court*, 594 N.W.2d 421 (Iowa 1999) (citing *Myers* six times in the majority opinion), *Stouffer v. Reid*, 413 Md. 491, 495, 993 A.2d 104, 105 (2010) (citing *Myers* thirteen times in the opinion), *State ex rel. Schuetzle v. Vogel*, 537 N.W.2d 358 (N.D. 1995) (citing *Myers* five times in the opinion).

148. See *Myers*, 399 N.E.2d at 454 ("According to estimates of . . . the treating nephrologist, [Myers] could survive only three to five days if he refused both dialysis and [medication] . . .").

149. *Id.* at 457–59.

First, the court examined the “intrusiveness” of the treatment in a more holistic manner, explaining that the mental and emotional impact of medical treatment is important to consider, particularly when treatment is conducted against the patient’s will.<sup>150</sup> Second, the court recognized “the preservation of internal order and discipline, the maintenance of institutional security, and the rehabilitation of prisoners” as state interest factors unique to the prison context.<sup>151</sup> Noting that courts should give prison administrators’ decisions “wide-ranging deference,” the court denied the inmate’s right to refuse treatment.<sup>152</sup> In so holding, the court accepted the commissioner’s testimony that Myers’s refusal was merely “an attempt to manipulate his placement within the prison”<sup>153</sup> which “would create very serious practical problems in prison administration.”<sup>154</sup> While recognizing that this case was a “very close balance of interests,” the court ultimately determined that “the State’s interest in upholding orderly prison administration” controlled and ordered Myers to undergo hemodialysis.<sup>155</sup>

The next major decision and first decision after *Turner* was in *North Dakota ex rel. Schuetzle v. Vogel*, a combination case dealing with an individual refusing medical treatment and conducting a hunger strike.<sup>156</sup> *Vogel* involved an inmate who stopped eating and began refusing his diabetes medication in protest of the state’s decision to deny his parole and discontinue his work release.<sup>157</sup> The Supreme Court of North Dakota affirmed the trial court’s decision to compel medical treatment, applying the *Turner* standard and holding that “the requirement that Vogel take diabetes medication against his will

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150. *See id.* at 457 (explaining that although dialysis is not the same as the “sacrifice of a limb [n]or [does it] entail substantial pain,” it is still a procedure requiring a high level of commitment by the individual undergoing the treatment).

151. *Id.* (quoting *Procunier v. Martinez*, 416 U.S. 396, 412 (1974)).

152. *Id.* at 457–58 (quoting *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 126 (1977)). This level of deference is required unless “substantial evidence” exists demonstrating that prison officials’ actions were exaggerated. *Jones*, 433 U.S. at 128 (citing *Pell v. Procunier*, 417 U.S. 817, 827 (1974)).

153. *Myers*, 399 N.E.2d at 457–58 & n.4 (footnote omitted) (quoting *Jones*, 433 U.S. at 126 n.4) (explaining that prison officials may consider the “purpose” behind an inmate’s decision to exercise a constitutional right in making their ultimate determination on whether to allow the action).

154. *See id.* at 459 (accepting the commissioner’s claims that “failing to prevent Myers death would present a serious threat to prison security” by creating a potentially “explosive” situation).

155. *Id.* at 457–58.

156. 537 N.W.2d 358, 359 (N.D. 1995).

157. *Id.*

is reasonably related to legitimate penological interests.”<sup>158</sup> Like *Myers*, the court focused on the “overwhelming” evidence demonstrating Vogel’s intent to manipulate the prison system and the “extremely costly” medical care that would be necessary if Vogel were allowed to deteriorate.<sup>159</sup> The court considered *Harper* in its analysis, concluding that although *Harper*’s holding was limited to *antipsychotic* drugs, “nothing in *Harper* . . . gives a competent prisoner an absolute right to refuse necessary medical treatment.”<sup>160</sup>

In the third state court case—*Polk County Sheriff v. Iowa District Court*—the Iowa Supreme Court applied reasoning similar to *Myers* and *Vogel* in deciding to compel a pretrial detainee to undergo dialysis.<sup>161</sup> At the same time, the dissenting opinions in *Polk* also demonstrate the potential for significant disagreement on this subject.<sup>162</sup> Although *Polk* did not articulate the detainee’s reasons for refusing dialysis treatment,<sup>163</sup> the court analyzed each *Saikewicz* state interest factor<sup>164</sup> and performed a detailed review of the potential effects of a detainee’s refusal of treatment on prison security.<sup>165</sup>

The court specifically focused on the potential for “copycat” actions by other inmates, comparing refusal of treatment scenarios to hunger strikes and explaining that allowing the detainee to refuse dialysis could potentially inspire “other inmates [to] do the same thing for manipulative purposes.”<sup>166</sup> The court additionally worried that

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158. *Id.* at 363–64.

159. *See id.* at 364 (explaining that Vogel’s only reason for refusing treatment was to “blackmail” prison officials and finding that Vogel’s condition would invariably deteriorate without treatment to a point where he would require expensive transplant surgery, which, due to the Court’s holding in *Estelle v. Gamble*, was constitutionally required).

160. *See id.* at 362 (citing *Washington v. Harper*, 494 U.S. 210, 214 n.1, 227–29 (1990)) (explaining that penological interests can override a inmate’s right to refuse medical treatment for competent and incompetent inmates equally).

161. 594 N.W.2d 421, 431 (Iowa 1999).

162. *See id.* at 431 (Snell, J., dissenting) (“The majority’s application of the legal principles that are appropriate to this issue seriously diminishes, if not eliminates, to a pretrial detainee the liberty interest established by the United States Constitution.”).

163. *See id.* at 424 (majority opinion) (detailing the detainee’s advanced knowledge of his condition, dialysis treatment generally, and the potential effects of abstaining from treatment). When asked why he was refusing treatment, detainee only explained that “he was refusing medical treatment ‘at this time.’” *Id.*

164. *See id.* at 426–28 (explaining that the state interests in preserving life, protecting the interests of innocent third parties, and maintaining the ethical integrity of the medical profession all cut towards compelling treatment, whereas prevention of suicide was a non-issue).

165. *Id.* at 428–31.

166. *See id.* at 430–31 (citing *Commonwealth v. Kallinger*, 580 A.2d 887, 891 (Pa. Commw. Ct. 1990)) (drawing parallels between refusal of dialysis treatment and hunger strikes to explain the “copycat” justification).

the results from refusing dialysis treatment “might be serious enough to convince authorities to let [the detainee] out of jail,” and explained that the potential for a serious medical reaction due to non-treatment would inappropriately “disrupt the day-to-day management of the jail.”<sup>167</sup> The Iowa Supreme Court ultimately compelled treatment but did so without explaining which of the state interest factors carried the most weight in its analysis.<sup>168</sup>

The *Polk* court also produced two dissents that demonstrate the split in reasoning that characterizes this constitutional argument. Both dissents were highly critical of the majority’s decision to take jailer security concerns at face value without any tangible evidence of security risks resulting from the detainee’s refusal of treatment. Justice Snell’s dissent focused on the constitutional nature of the liberty interest at stake and argued that the court was incorrect to violate this interest when relying exclusively on the chief jailer’s “nebulous” claims of residual effects.<sup>169</sup> Justice Cady argued that there were no legitimate penological interests put into play by detainee’s refusal of treatment, explaining that “[c]onstitutional rights are too important to be denied based on supposition and unfounded fears.”<sup>170</sup> These dissents voice the concerns among some judges and scholars that compelling treatment based merely on speculative evidence and the potential for manipulative intent is inappropriate.

2. *Two Courts Have Rejected Prison Officials’ Speculative and Nonspecific Security Justifications and Allowed Inmates to Refuse Medical Treatment*

The high courts in Maryland and California both applied the ideas articulated in the *Polk* dissents and allowed inmates to refuse medical treatment for incurable, noncommunicable conditions, even though doing so would result in their death. In *Thor v. Superior Court*, the Supreme Court of California determined that an inmate’s liberty interest in maintaining his bodily integrity outweighed any counter-

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167. *See id.* at 431 (explaining that the detainee would need additional monitoring and medical staff treatment to prevent a potential life-ending heart attack if the court allowed him to refuse dialysis treatment).

168. *See id.* (holding that the combination of the other state interest factors prevailed over detainee’s liberty interest to refuse treatment).

169. *See id.* at 431–34 (Snell, J., dissenting) (“Constitutional rights should not be shunted aside by such a frail reed of supposition.”).

170. *See id.* at 435 (Cady, J., dissenting) (arguing that the state’s security concerns should be subjected to “some scrutiny that reveals a reasonable necessity” before the court denies an individual his constitutional rights).

vailing state interests and enabled him to refuse medical treatment.<sup>171</sup> Similarly, the Maryland Court of Appeals refused to compel an inmate to undergo treatment based on nonspecific and unsubstantiated security threats proffered by prison officials.<sup>172</sup>

*Thor* dealt with an inmate named Andrews who had become a quadriplegic during incarceration and now required around-the-clock medical care.<sup>173</sup> After approximately six months of treatment, Andrews requested that all medical attention cease and physicians allow him to die.<sup>174</sup> Upon this request, Andrews's doctor, Daniel Thor, initiated an *ex parte* proceeding classifying Andrews's action as a hunger strike and asking the court for permission to feed and medicate Andrews against his will.<sup>175</sup> In response, Andrews argued his "right to make decisions regarding his care and treatment" should control, denying "any intention to engage in a hunger strike."<sup>176</sup>

The Supreme Court of California applied a reasonableness standard and determined that Andrews's liberty interest in maintaining his bodily integrity outweighed any countervailing state interests, including the prisons security interests.<sup>177</sup> Discussing Andrews's personal autonomy, the court explained that the state must not perform its duty to preserve life in a manner that "demean[s] or degrade[s] [Andrews's] humanity."<sup>178</sup> Furthermore, the court reiterated the idea that prisoners only lose those rights that conflict with safety and security.<sup>179</sup> And after applying the judicial policy of deference to prison

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171. *See* 855 P.2d 375, 378–79 (Cal. 1993) (“[I]n the absence of evidence demonstrating a threat to institutional security . . . prison officials . . . may not deny a person incarcerated in state prison [the] freedom [to refuse medical treatment].”). The *Thor* court determined that the state interests did not create the “reasonable connection” necessary to compel treatment. *See id.* at 388 (determining that the proffered security risks were merely “a matter of conjecture”).

172. *Stouffer v. Reid*, 413 Md. 491, 495–96, 993 A.2d 104, 106 (2010). The *Stouffer* court ultimately based its decision on Maryland common law. *Id.* at 501–03, 993 A.2d at 109–10.

173. *Thor*, 855 P.2d at 379.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 388 (“[W]e hold that [Dr. Thor] must accede to Andrews’ decision and may not force him to accept unwanted treatment or care.”).

178. *Id.* at 383–84 (explaining that the state’s interest in preserving Andrews’s life is tempered by Andrews’s legitimate desire to bring about his own natural death).

179. *See id.* at 387 (citing *De Lancie v. Superior Court*, 647 P.2d 142, 143–44 (Cal. 1982)) (reiterating the concept that prison walls are not a barrier to all constitutional rights).

officials,<sup>180</sup> the court stated that measures depriving inmates of their constitutional rights “must be demonstrably ‘reasonable’ and ‘necessary,’ not a matter of conjecture.”<sup>181</sup> Thus, the Supreme Court of California deemed the testimonial evidence of a potential security threat (which was sufficient in *Myers* and *Polk*) to be insufficient in *Thor*.<sup>182</sup>

The second case affirming an inmate’s refusal of medical treatment is *Stouffer v. Reid*, a Maryland Court of Appeals decision from 2010.<sup>183</sup> Troy Reid was an inmate serving a forty-year sentence and suffering from advanced renal failure, a condition that required dialysis treatment three times per week.<sup>184</sup> After submitting to treatment, Reid eventually decided to discontinue it, resulting in the Commissioner of Corrections filing a writ to compel treatment.<sup>185</sup> In analyzing the prison security interests, the court pointed out that the commissioner could not provide any evidence demonstrating a “valid, rational connection” between Reid’s refusal of treatment and prison security concerns.<sup>186</sup> While admitting that courts must give significant deference to the prison official’s judgment on prison matters, the court explained “that [the official’s] judgment must be reasonable and informed.”<sup>187</sup> The court ultimately determined that the “nonspecific” claims provided by the Commissioner of Corrections were insufficient to compel medical treatment because they could not reasonably relate Reid’s refusal to a legitimate penological interest.<sup>188</sup>

Federal and state court decisions over the past half-century demonstrate how an individual’s ability to refuse medical treatment has grown from a component of individual autonomy into a right firmly grounded in the United States Constitution. Inmates, however, have a more attenuated connection to this right than others because of prison institutional needs and the Supreme Court’s deference to

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180. *See id.* at 388 (citing *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 126 (1977)) (explaining that courts lack the expertise necessary to properly evaluate prison regulations).

181. *Id.*

182. *See id.* at 388 (“A custodial environment is uniquely susceptible to the catalytic effect of disruptive conduct; and courts will not interfere with reasonable measures required to forestall such untoward consequences. However, such measures must be demonstrably ‘reasonable’ and ‘necessary,’ not a matter of conjecture.”) (citations omitted).

183. 413 Md. 491, 519, 993 A.2d 104, 120 (2010). The Court of Appeals is the highest appellate court in the state of Maryland.

184. *Id.* at 495, 993 A.2d at 105–06.

185. *Id.*, 993 A.2d at 106.

186. *See id.* at 516, 993 A.2d at 118 (explaining that a prison action denying a constitutional right requires more than mere speculation on the part of prison officials).

187. *Id.* at 515–16, 993 A.2d at 118 (citing *Turner v. Safley*, 482 U.S. 78, 82 (1986)).

188. *Id.* at 519, 993 A.2d at 120.

prison administrative policies. The Court's holding in *Turner* magnified this issue by firmly establishing that prison regulations abrogating any constitutional right should be upheld if they "reasonably relate to a legitimate penological interest." And while a connection to penological interests has been easy to find in hunger-strike and communicable disease cases, this is not the case with incurable, noncommunicable conditions. Only two cases, *Stouffer* and *Thor*, have allowed inmates suffering from incurable, noncommunicable conditions to refuse treatment, while three others have not, demonstrating an inconsistency on the subject.

## II. ANALYSIS

In *Turner*, the Supreme Court established a general test for all regulations affecting inmates' constitutional rights, articulating a general policy of deference towards prison officials' regulations and determinations.<sup>189</sup> This standard is ill-equipped to handle the unique constitutional interests associated with an inmate's refusal of treatment for an incurable, noncommunicable condition for two reasons.<sup>190</sup> First, the rights analyzed in creating the *Turner* standard are different in kind from the right to refuse treatment because of its intrinsically individualized nature.<sup>191</sup> The *Turner* standard developed around *interpersonal* rights<sup>192</sup>—like speech or assembly, rights that by definition require more than one person to execute—rather than *intrapersonal* rights like refusing medical treatment. Second, although some courts have equated force-feeding in hunger strikes with the compulsion of medical treatment generally,<sup>193</sup> the lack of choice associated with contracting and treating noncommunicable medical conditions makes these two situations almost incomparable.<sup>194</sup>

The personalized nature of the right to refuse treatment and limited security risk associated with effectuating that right, as well as the enhanced potential for abuse by prison officials, demand that courts do not take prison officials' conclusory security determinations at face value.<sup>195</sup> A standard similar to that in *Thor* and *Stouffer* would

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189. *See supra* Part I.B.3.

190. *See infra* Part II.A–C.

191. *See infra* Part II.A.

192. *See Turner*, 482 U.S. at 84–91 (explaining that the *Turner* standard is based off the Court's decisions in *Pell*, *Jones*, and *Bell*, cases dealing with speech and assembly, rights that inherently require more than one person to effectuate).

193. *See supra* Part I.C.2.

194. *See infra* Part II.B.

195. *See infra* Part II.C.

enable inmates to effectuate their constitutional rights while also maintaining prison security interests.

A. *The Right to Refuse Treatment for Noncommunicable Conditions Is Different in Kind from the Constitutional Rights Previously Analyzed in the Prison Context and Necessitates That Courts Give Inmates' Decisions More Respect*

The right to refuse medical treatment for noncommunicable conditions is fundamentally different from the right to speak, assemble, and refuse treatment for communicable diseases because it includes three specific intrapersonal dimensions that the Court did not consider when developing the *Turner* standard.<sup>196</sup> First, by forcing inmates to undergo medical procedures against their will, courts and prison administrators inevitably violate the inmate's bodily integrity and personhood in a unique manner. Second, allowing inmates to refuse medical treatment for an illness they cannot spread presents fewer facially problematic security threats than allowing prisoners to effectuate other more active constitutional rights. Lastly, the security and public health issues in communicable disease treatment cases are not present when an inmate refuses treatment for an incurable, non-communicable disease. These specific aspects of institutionalized confinement in conjunction with the personal nature of medical treatment should inspire courts and prison administrators to differentiate an inmate's decision to refuse medical treatment from other, more interpersonal rights courts have previously analyzed under the *Turner* standard.<sup>197</sup>

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196. See generally *Turner v. Safley*, 482 U.S. 78, 89–91 (1987) (describing the relevant factors courts must consider under the *Turner* standard, all of which were drawn from interpersonal rights cases).

197. See generally Erwin Chemerinsky, *The Constitution In Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 441, 458–60 (1999) (categorizing prisons as authoritarian institutions where it is accepted that “[i]ndividuals . . . have little, if any, protection of their most civil liberties,” and explaining that judicial review of actions and regulations is even more important in this context because of the potential for the abuse of power).

1. *Forcing an Inmate to Undergo Treatment Invariably Results in a Per Se Violation of Physical Integrity and Personhood That Does Not Occur When Prison Administrators Curtail Other Interpersonal Rights*

Courts have admitted that the state inherently compromises an individual's bodily integrity by compelling medical treatment.<sup>198</sup> An action by the state to compel medical treatment against an inmate's will differs from the curtailing of other constitutional rights in two ways. First, forcing treatment leaves no alternative avenues to effectuate the right at issue, unlike other rights that individuals can potentially exercise in different ways.<sup>199</sup> Second, denying an inmate's right to refuse treatment violates his personhood and dignity in a manner altogether different from the other rights.<sup>200</sup>

The black-and-white nature of the right to refuse treatment makes it fundamentally different from the rights evaluated in the cases leading up to *Turner*. For example, the Court in *Bell v. Wolfish* barred inmates from receiving hardcover books from individuals outside prison, but allowed publishers to ship books directly to inmates.<sup>201</sup> Similarly, in *Pell v. Procunier*, the Court upheld a regulation that banned media interviews with inmates in certain situations but allowed interviews in others.<sup>202</sup> *Bell* and *Pell* appropriately balanced inmates' constitutional rights with the reasonable security concerns of the prison system by curtailing instead of denying the right at issue.<sup>203</sup> A partial rights abrogation is typically preferred over a complete deni-

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198. See, e.g., *Russell v. Richards*, 384 F.3d 444, 447 (7th Cir. 2004) (citing *Washington v. Harper*, 494 U.S. 210, 221–22 (1990)) (“[T]he jail’s policy of directing an inmate to use a delousing shampoo . . . implicates[s] the inmate’s constitutionally-protected interest in refusing unwanted medical treatment.”).

199. See *id.* at 448 n.2 (citing *Harper*, 494 U.S. at 224–25) (explaining that the purpose of a regulation or action compelling involuntary medical treatment is to deprive the inmate of his constitutional right to refuse that procedure).

200. See *Harper*, 494 U.S. at 240–41 (Stevens, J., concurring in part and dissenting in part) (“There is no doubt . . . that a competent individual’s right to refuse [medical treatment] is a fundamental liberty interest deserving the highest order of protection.”).

201. See *Bell v. Wolfish*, 441 U.S. 520, 550–52 (1979) (explaining that because the regulation leaves open “alternative means of obtaining reading material[s]” it effectively balances inmates’ rights with the prison’s security needs).

202. See *Pell v. Procunier*, 417 U.S. 817, 833–34 (1974) (declaring that the regulation is valid because it does not eliminate the ability of inmates and the press to effectuate their rights). The Court’s decision, however, seems to ignore the spirit of the regulation at issue. In *Pell*, journalists could not choose their interview subjects; the regulation only allowed prison administrators to pick the interviewees. *Id.* at 819.

203. See *Turner v. Safley*, 482 U.S. 78, 86–87 (1987) (basing the standard for evaluating whether a prison regulation is constitutional largely on the reasoning discussed in *Pell*, *Jones*, and *Bell*).

al because it still allows the inmate to effectuate his constitutional rights in some manner.<sup>204</sup>

The results in *Pell* and *Bell* address speech and assembly restrictions and starkly contrast with the situation that occurs when prison inmates are compelled to undergo medical treatment against their will. Unlike speech or assembly rights, where there is some give and take, there is no gray area in the right to refuse medical treatment.<sup>205</sup> Any state action denying an inmate's right to refuse medical treatment inevitably denies the right in full.<sup>206</sup> The partial rights abrogation, which occurred in *Pell* and *Bell*, is impossible in the context of refusing medical treatment, demonstrating the significant baseline differences between this right and the rights the Court analyzed leading up to its decision in *Turner*.<sup>207</sup>

Additionally, unlike regulations concerning interpersonal rights, such as speech, prison actions forcing inmates to take medication result in a distinct violation of the inmate's personhood and dignity.<sup>208</sup> Justice Stevens's dissent in *Washington v. Harper* properly framed the issue, describing forced antipsychotic treatment as "degrading" and explaining that "[t]he liberty of citizens to resist the administration of [medical intervention] arises from our Nation's most basic values."<sup>209</sup> Similarly, Justice Snell's dissent in *Polk* appropriately categorized forced ongoing medical treatment as an "additional form of confine-

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204. See *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 131 (1977) (describing regulations that limit but do not strip an inmate's constitutional rights as preferable to regulations proscribing a general denial). *Turner* also relied on *Jones* in establishing the second prong of its reasonableness test. *Turner*, 482 U.S. at 90 (citing *Jones*, 433 U.S. at 131).

205. See *In re Browning*, 568 So.2d 4, 11 & n.6 (Fla. 1990) (explaining that the right to refuse medical treatment is not qualified or differentiated at all based on the procedure being performed and determining that any intrusion whatsoever qualifies as a violation of bodily integrity).

206. See *Washington v. Harper*, 494 U.S. 210, 237 (1990) (Stevens, J., concurring in part and dissenting in part) ("Every violation of a person's bodily integrity is an invasion of his or her liberty.").

207. Compare *id.* with *Bell v. Wolfish*, 441 U.S. 520, 551 (1979) ("[T]here are alternative means of [effectuating the right at issue] that have not been shown to be burdensome or insufficient."), and *Pell*, 417 U.S. at 823 (upholding a prison regulation that "clearly restricts one manner of communication between prison inmates and members of the general public").

208. See generally THE HASTINGS CENTER, GUIDELINES ON THE TERMINATION OF LIFE-SUSTAINING TREATMENT AND THE CARE OF THE DYING 6-7 (1987) (explaining that respecting a patient's autonomy is an ethical obligation for doctors and detailing that medical treatment should not be forced on a patient with decisionmaking capacity).

209. See *Harper*, 494 U.S. at 237-38 & n.3 (citing *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.").

ment.”<sup>210</sup> By forcing inmates to undergo humiliating procedures against their will, authorities not only confine inmates within the prison walls, but also make them prisoners within their own bodies and treatment regimens.<sup>211</sup> The inescapable violation of personal bodily integrity that occurs in every instance of compulsion of treatment highlights the core differences between this right and the other more social rights used by the Supreme Court in developing the *Turner* standard.

2. *Refusing Treatment for Noncommunicable Conditions Is Exclusive to the Person and Produces Fewer Facial Security Issues than Interactive Constitutional Rights*

Unlike active rights such as speech and assembly that innately require more than one person to effectuate, refusing medical treatment for an incurable, noncommunicable condition is an intensely personal undertaking that produces few tangible security concerns.<sup>212</sup> The primary result of refusal is the natural death of the individual who refused treatment; there is no possibility the condition could spread.<sup>213</sup> This fact has often required prison officials to speculate about the security concerns an inmate’s refusal of treatment creates in a manner that is not necessary for other constitutional rights with more obvious security issues.<sup>214</sup>

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210. *See* Polk Cnty. Sheriff v. Iowa Dist. Court, 594 N.W.2d 421, 432–33 (Iowa 1999) (Snell, J., dissenting) (citing *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 288 (1990) (O’Connor, J., concurring)) (explaining that compelling an inmate to undergo lengthy treatment procedures against his will essentially makes the inmate a prisoner of both the state and his own body).

211. *See id.* (same).

212. *See generally* *Cruzan*, 497 U.S. at 275 (majority opinion) (quoting *In re Westchester Cnty. Med. Ctr.*, 531 N.E.2d 607, 613 (N.Y. 1988)) (concluding that “no person or court should substitute its judgment as to what would be an acceptable quality of life for another”). Although the primary effect is on the individual refusing the treatment, states have concluded that the impact allowing an individual to refuse treatment could have on innocent third parties is something to consider. *See, e.g.,* *Stouffer v. Reid*, 413 Md. 491, 518–19, 993 A.2d 104, 119–20 (2010) (analyzing the effect Reid’s decision would have on innocent third parties).

213. *Compare* *Stouffer*, 413 Md. at 495, 993 A.2d at 105–06 (explaining that inmate was refusing treatment for renal failure, a condition that is in no way contagious) *with* *Russell v. Richards*, 384 F.3d 444, 448–49 (7th Cir. 2004) (describing the highly contagious nature of lice and how one inmate’s refusal could easily result in many more inmates becoming infected).

214. *See, e.g.,* *Stouffer*, 413 Md. at 515–16, 993 A.2d at 117–18 (describing the commissioner’s evidence of security threats as nonspecific and “merely speculative” and deeming it insufficient to justify forcing treatment); *see also* *Polk*, 594 N.W.2d at 435–36 (Cady, J., dissenting) (explaining that the evidence the majority used to compel treatment was “un-

The Supreme Court's decision in *Jones v. North Carolina Prisoners' Labor Union* demonstrates the kind of facially obvious security issues that the Court relied upon in creating the *Turner* standard. In *Jones*, the Court curtailed the right to assembly by preventing prisoners from conducting union meetings or soliciting other inmates for membership within a union.<sup>215</sup> At the time of trial, the union in *Jones* had grown to "some 2,000 inmate 'members' in 40 different prison units throughout North Carolina."<sup>216</sup> Gathering over two thousand inmates together in a confined area entails tangible security issues in a much more obvious way than does an individual inmate's refusal of life-sustaining medication.<sup>217</sup>

The Supreme Court's prison speech cases also provide clear examples of real, nonspeculative security threats. *Procunier v. Martinez* discussed the situations where prison administrators could censor messages from inmates to free citizens or inmates in other prisons.<sup>218</sup> The Court was almost nonchalant about the presence of security issues in some situations, stating "[p]erhaps the most obvious example of justifiable censorship of prisoner mail would be refusal to send or deliver letters concerning escape plans or containing other information concerning proposed criminal activity, whether within or without the prison."<sup>219</sup>

In contrast, some courts have routinely relied on highly speculative and nonspecific security threats to compel inmates to undergo life-sustaining treatment.<sup>220</sup> While some courts have dismissed this evidence as unconvincing,<sup>221</sup> others have used *Turner's* doctrine of de-

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realistic" and should have been subjected to some level of scrutiny in order to prove its validity).

215. See *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 122 (1977) (detailing the prisoners' argument that any regulations whatsoever deprived them of their right "to engage in protected free speech, association, and assembly").

216. *Id.*

217. Compare *Jones*, 433 U.S. at 132–33 (describing the potential security issues if a group of 2,000 inmates were allowed to associate for the purposes of negotiation and the powder keg such a situation would produce), with *Polk*, 594 N.W.2d at 431–32 (Snell, J., dissenting) (describing the risk of "serious adverse consequences to the jail's security" stemming from a refusal of treatment as merely a possibility).

218. See *Procunier v. Martinez*, 416 U.S. 396, 399–400 (1974) (describing the restrictions on correspondence that the inmates were challenging).

219. *Id.* at 413.

220. See, e.g., *Comm'r of Corr. v. Myers*, 399 N.E.2d 452, 457–59 & n.3 (Mass. 1979) (taking the commissioner's statements—that allowing Myers to refuse treatment would result in "many cases of inmates mutilating themselves" in an effort to manipulate the system—at face value in making its ultimate determination).

221. See, e.g., *Stouffer v. Reid*, 413 Md. 491, 515–16, 993 A.2d 104, 117–18 (2010) (refusing to accept as fact commissioner's testimony that allowing Reid to reject treatment would

ference to justify accepting speculative threats to curtail established constitutional rights.<sup>222</sup> These cases demonstrate Justice Stevens's concern in *Turner* that prison administrators, if given enough deference, will "create" a rational justification for any administrative action or regulation.<sup>223</sup> The *Polk* dissenters expressly stated that the majority's analysis allowed prison officials to "conjure up a fear" and, without providing any concrete evidence of its validity, use that fear to justify limiting or eliminating inmates' rights.<sup>224</sup> And although *Turner* dealt with facial challenges to prison regulations,<sup>225</sup> courts have looked to *Turner* when dealing with "as applied challenges" as well, broadening the scope of inmate actions that prison officials can limit.<sup>226</sup> Thus, *Turner's* analytical framework has enabled courts to limit the right to refuse treatment based on standards and rationales founded in rights that are different in kind from the refusal of medical treatment.

3. *Communicable Diseases Necessitate Forced Treatment Because They Produce Tangible Prison Security Threats and Potentially Substantial Public Health Concerns That Incurable, Noncommunicable Conditions Do Not*

The inarguable threats to institutional security and public safety that communicable diseases present require the curtailment of inmate rights that are not present in incurable, noncommunicable con-

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cause "angst" within the prison population and holding that the "merely speculative" evidence was "insufficient" to compel medical treatment under the *Turner* standard).

222. See *Polk*, 594 N.W.2d at 424, 430 (majority opinion) (relying on the speculative testimony of the county sheriff of a security threat if detainee were allowed to refuse treatment, the court claimed it could "easily say there is a reasonable relationship between" the regulation and institutional security). The two dissents fervently disagreed with this assertion. See *supra* notes 168–170 and accompanying text.

223. See *Turner v. Safley*, 482 U.S. 78, 100–01 (1987) (Stevens, J., concurring in part and dissenting in part) (hypothesizing that the *Turner* standard will permit imaginative wardens and deferential trial courts to "disregard . . . inmates' constitutional rights" whenever they perceive a "logical connection" between a "plausible security concern" and the "challenged regulation").

224. *Polk*, 594 N.W.2d at 431–32 (Snell, J., dissenting).

225. *Turner*, 482 U.S. at 81–84, 99–100.

226. See *Stouffer*, 413 Md. at 512–13, 993 A.2d at 116 (explaining that the *Turner* evaluation process for prison regulation reasonableness should be looked to when conducting an as applied evaluation); see also *McNabb v. Dep't of Corr.*, 180 P.3d 1257, 1264–65 (Wash. 2008) (en banc) (explaining that *Turner* delineates "additional state interest[s]" that should be considered, namely, institutional safety and security and the doctrine of deference).

ditions.<sup>227</sup> Past cases have noted that the failure of prison officials to properly screen for communicable diseases poses an “indiscriminate” threat to all inmates and can amount to a constitutional violation.<sup>228</sup> This is because communicable diseases have the potential to spread among the inmate population quickly due to the nature of confinement.<sup>229</sup> For example, an alarming number of prison inmates are infected with tuberculosis (“TB”),<sup>230</sup> and failing to quickly diagnose and treat a disease as virulent as TB could potentially cause an outbreak.<sup>231</sup> An incident like that could have a devastating effect on prison security, potentially stretching resources beyond sustainability.<sup>232</sup>

In addition to putting prison inmates personally in harm’s way, leaving communicable diseases unchecked in a closed environment such as a prison could potentially have devastating effects on the general population. One commentator described prisons as “epidemiological pumps,” where diseases such as TB, syphilis, and HIV could “mutate into treatment resistant forms, and then travel with released prisoners to infect the broader community.”<sup>233</sup> Another commentator explained that the failure to screen, diagnose, and properly treat communicable diseases in prison amounts to “a gross display of social

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227. See *Russell v. Richards*, 384 F.3d 444, 449 (7th Cir. 2004) (pointing out the obvious issues with allowing inmates to forgo delousing and the extreme burden a lice outbreak would place on the prison system).

228. See *Lareau v. Manson*, 651 F.2d 96, 109 (2d Cir. 1981) (explaining that failing to screen for tuberculosis posed enough of a threat to create a colorable *Estelle* claim of deliberate indifference to a serious medical need).

229. One inmate explained that some cellmates use each other’s personal hygiene products such as razors and toothbrushes, a practice he claimed had given him tuberculosis in the past. *Andrews v. Cervantes*, 493 F.3d 1047, 1050 (9th Cir. 2007).

230. See Laura M. Maruschak, *Medical Problems of Prisoners*, BUREAU OF JUSTICE STATISTICS (April 1, 2008), available at <http://bjs.ojp.usdoj.gov/content/pub/html/mpp/tables/mppt02.cfm> (noting that over nine percent of state inmates and over seven percent of federal inmates were infected with tuberculosis when this data was collected).

231. See, e.g., *DeGidio v. Pung*, 920 F.2d 525, 527–30 (8th Cir. 1990) (describing how the inadequate tuberculosis screening procedures at Stillwater prison led to an outbreak that ultimately resulted in financial liability).

232. See generally Sarah E. Valway et al., *Outbreak of Multi-Drug-Resistant Tuberculosis in a New York State Prison, 1991*, 140 AM. J. EPIDEMIOLOGY 113, 113–22 (1994) (explaining that multi-drug-resistant tuberculosis has a high mortality rate and can become rampant without proper preventative measures).

233. See John V. Jacobi, *Prison Health, Public Health: Obligations and Opportunities*, 31 AM. J.L. & MED. 447, 473 (2005) (citing TRACY KIDDER, MOUNTAINS BEYOND MOUNTAINS: THE QUEST OF DR. PAUL FARMER, A MAN WHO WOULD CURE THE WORLD 231–32 (2003)) (explaining that the mismanagement of health care in prison is a “public disaster” and something everyone should be concerned with “[e]ven if we care nothing for the prisoners themselves”).

negligence” that “jeopardizes community health and well-being.”<sup>234</sup> These significant and tangible security and public health threats, both inside and outside the prison system, more than justify prison officials curtailing an inmate’s right to refuse treatment in situations concerning communicable diseases.<sup>235</sup> In contrast, noncommunicable conditions by definition carry none of these risks. While renal failure, hypertension, and quadriplegia are serious conditions, there is no chance that they could spread from inmate to inmate or mutate into more complex and deadly conditions.

Refusing treatment for incurable, noncommunicable conditions contrasts sharply with other rights inmates can effectuate in prison. Unlike the rights analyzed in *Turner’s* development, refusal of treatment is generally a black-and-white question, and any abrogation of that right naturally results in a total denial of the inmate’s right to refuse, amounting to a *per se* violation of the inmate’s bodily integrity. Additionally, the security threats posited by courts to justify compelling treatment for noncommunicable conditions have been more speculative and hypothetical than those concerning other rights. Finally, incurable, noncommunicable conditions share none of the security threats and public health concerns posed by communicable diseases. These three reasons justify treating the right to refuse treatment for incurable, noncommunicable conditions differently than other rights in the penal context.

*B. Foundational Differences Between Refusing Medical Treatment for Incurable, Noncommunicable Conditions and Prison Hunger Strikes Make Comparisons Inappropriate for the Purposes of Legal Reasoning*

While compelling life-sustaining medical treatment has some of the characteristics associated with force-feeding, foundational differences make the two situations inapposite and demand that courts treat each differently. Unlike the refusal of life-sustaining medical

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234. JEREMY TRAVIS, BUT THEY ALL CAME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 200–02 (2005).

235. Sadly, most scholarship on the topic of communicable diseases in prisons deals with the institutional failures surrounding the diagnosis and treatment of these diseases and how to fix the systemic problems. *See, e.g.*, Robert B. Greifinger, *Inmates as Public Health Sentinels*, 22 WASH. U. J.L. & POL’Y 253, 260–64 (2006) (detailing the problem of inmate health in the United States and discussing seven different areas where improvement is necessary). It is rare to find a prisoner suffering from a communicable disease who vehemently refuses treatment prison officials are offering, and as such, there is little to no scholarship on the topic. This situation simply serves to demonstrate the fundamental differences regarding threats to security between an inmate refusing treatment for a communicable disease and a noncommunicable disease.

treatment, the concept of prison hunger strikes has generated a significant amount of jurisprudence and commentary both domestically and internationally.<sup>236</sup> And because forced feeding shares certain distinctive qualities with forced medical treatment, many courts and commentators have been quick to treat the two scenarios as equivalent.<sup>237</sup> The concept of choice, however, highlights two clear differences between refusal of treatment for incurable noncommunicable conditions and hunger strikes.

First, individuals conducting hunger strikes voluntarily choose to perform the action, whereas people suffering from a disease contract it involuntarily. Second, incurable, noncommunicable diseases carry a lifelong treatment regimen while a hunger striker can “cure” their condition at any time. And although the potential for inmates to refuse medical treatment in a manipulative manner exists,<sup>238</sup> this fact does not eliminate the fundamental differences between the two actions and simply merits a case-by-case determination of manipulative intent. Eschewing cases of clear system manipulation—something courts should never tolerate—any comparisons between hunger strikes and the refusal of medical treatment are inappropriate and unconvincing.

*1. Differences in Choice Demonstrate Clear Differences Between Hunger Strikes and Incurable, Noncommunicable Conditions*

Although intervention in hunger strikes and refusals of life-sustaining medical treatment result in the violation of a prisoner’s bodily integrity, the concept of choice in contraction and duration of treatment is a key difference that makes the two situations incomparable. On the one hand, by definition, a hunger strike is a voluntary action that an inmate undertakes on his own prerogative for one reason or another and can cease whenever he so chooses.<sup>239</sup> Even in cas-

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236. See generally George J. Annas, *Human Rights Outlaws: Nuremberg, Geneva, and the Global War on Terror*, 87 B.U. L. REV. 427, 449–51 (2007) (providing a synopsis of American hunger-strike jurisprudence along with the opinions of several multi-national medical organizations).

237. See, e.g., *State ex rel. Schuetzle v. Vogel*, 537 N.W.2d 358, 361 (N.D. 1995) (citing hunger-strike cases and refusal of medical treatment cases interchangeably when discussing an inmate’s “medical circumstances”).

238. See *id.* at 363 (using inmate Vogel’s own statements to prove that his purpose in refusing treatment was to blackmail prison officials).

239. See *Zant v. Prevatte*, 286 S.E.2d 715, 716 (Ga. 1982) (explaining that the purpose of an inmate’s hunger strike was to obtain the attention of prison authorities); *Von Holden v. Chapman*, 450 N.Y.S.2d 623, 624–25 (N.Y. App. Div. 1982) (listing suicide and an attempt to “draw attention to the starving children in the world” as the inmate’s reasons for performing a hunger strike); Marlynn Wei & Rebecca W. Brendel, *Psychiatry and Hunger*

es where the inmate does not have a manipulative purpose, it is still the inmate's own personal choice that fuels the action.<sup>240</sup> On the other hand, the medical conditions present in refusal of treatment cases—such as kidney failure and diabetes—occur naturally and are incurable.<sup>241</sup> The inmate has no say in the matter;<sup>242</sup> he is stuck dealing with his condition for the rest of his life.<sup>243</sup> This is an obvious, but important, distinction. Unlike hunger strikers, sick inmates are *forced*, through an illness that they did not voluntarily contract, into a situation where prison authorities can legally violate their bodily integrity.<sup>244</sup>

While some hunger-strike cases, namely *Zant* and *Singletary*, have granted inmates a general right to refuse prison interference with their bodily integrity,<sup>245</sup> such decisions fail to recognize the important choice distinction between voluntarily and involuntarily contracted conditions. The chief disagreement in hunger-strike jurisprudence is whether denying the body the nourishment necessary for survival is

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*Strikes*, 23 HARV. HUM. RTS. J. 75, 78–81 (2010) (defining hunger strikes both inside and outside the prison context as containing an element of voluntariness).

240. See *In re Caulk*, 480 A.2d 93, 95 (N.H. 1984) (describing the purpose of the inmate's hunger strike as exclusively the manner in which he wanted his life to end).

241. The only conditions courts have analyzed thus far have been advanced renal failure, diabetes, and quadriplegia. Currently there is no known cure for diabetes and quadriplegia; kidney replacement surgery has the potential to cure renal failure.

242. *Thor v. Superior Court* potentially represents an interesting and important break from this differentiation. In *Thor*, the court failed to conclusively establish whether the inmate's condition—quadriplegia—was brought on accidentally or purposely by the inmate's own actions. See *Thor v. Superior Court*, 855 P.2d 375, 379 (Cal. 1993) (en banc) (explaining that an inmate's condition resulted when he either “jumped or fell from a wall while in prison”). Prosecutors claimed that Andrews “jumped off a third-tier deck.” Philip Hager, *Right-To-Die Case Goes to High Court*, L.A. TIMES, May 29, 1992, at A3, available at [http://articles.latimes.com/1992-05-29/news/mn-318\\_1\\_high-court](http://articles.latimes.com/1992-05-29/news/mn-318_1_high-court). The court, however, brushed this issue aside and provided a holding that potentially encompasses both the refusal of medical treatment and a general right for prisoners to perform hunger strikes. See *Thor*, 855 P.2d at 387–88 (failing to define the limits of “unwanted treatment or care”). If *Thor* is read this broadly, the court's decision is essentially analogous to *Zant* and *Singletary*; it recognizes an inmate's general right to personal bodily integrity in any context.

243. See, e.g., *Thor*, 855 P.2d at 379 (explaining that the inmate's medical condition (quadriplegia) was “irreversible” and that it left him in constant need of personal medical attention for the rest of his life).

244. Cf. *Polk Cnty. Sheriff v. Iowa Dist. Court*, 594 N.W.2d 421, 434 (Iowa 1999) (Snell, J., dissenting) (defining forced treatment as a form of punishment).

245. See *Zant v. Prevatte*, 286 S.E.2d 715, 716–17 (Ga. 1981) (quoting superior court order) (“The State can incarcerate one who has violated the law and, in certain circumstances, even take his life. But it has no right to destroy a person's will by frustrating his attempt to die if necessary to make a point.”); see also *Singletary v. Costello*, 665 So.2d 1099, 1105, 1110 (Fla. 1996) (upholding a hunger-striking inmate's refusal of force-feeding because he possessed a “fundamental right to refuse non-consensual medical treatment even though he was incarcerated” that outweighed any state interests).

equivalent to denying the body the medicine necessary to combat an illness or condition.<sup>246</sup> A minority of jurisdictions and a growing number of commentators have argued that any bodily intrusion against the inmate's will under any circumstance is ethically unacceptable.<sup>247</sup> However, a more convincing argument—one that *Singleton* and *Zant* fail to properly consider—is that the initiation of a hunger strike requires a conscious choice by the inmate, whereas an incurable medical condition originates naturally.<sup>248</sup> This—in conjunction with the differences in choice of treatment—illustrates the difference between hunger strikes and noncommunicable medical conditions, underscoring why courts should treat these situations differently.

A complementary difference is the treatment regimen associated with hunger strikes as compared to the treatment regimen associated with an incurable medical condition. The crucial difference is again the inmate's own personal choice.<sup>249</sup> As a matter of course, an inmate performing a hunger strike never has to undergo forced-feeding treatment. The choice to pick up a sandwich is always on the table, a choice that hunger strikers often take.<sup>250</sup> By contrast, an individual suffering from an incurable medical condition has no such choice; he—absent a medical miracle—must continue receiving treatment in

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246. Compare *Zant*, 286 S.E.2d at 716 (“The State has no right to monitor this man’s physical condition against his will; neither does it have the right to feed him to prevent his death from starvation if that is his wish.”), and *WMA Declaration of Malta On Hunger Strikes*, WORLD MEDICAL ASSOCIATION, <http://www.wma.net/en/30publications/10policies/h31/> (last visited Oct. 16, 2011) (explaining that “[p]hysicians should respect individuals’ autonomy” and “[f]orced feeding contrary to an informed and voluntary refusal is unjustifiable.”), with *McNabb v. Dep’t of Corr.*, 180 P.3d 1257, 1266 (Wash. 2008) (en banc) (differentiating between life-saving treatment and life-sustaining treatment, in that the former, which is the case in force-feeding cases, “does not merely temporarily relieve a chronic condition but restores [the inmate] to a naturally healthy condition”).

247. See *supra* notes 245–246.

248. See *Lantz v. Coleman*, No. HHDCV84034912, 2010 WL 1494985, at \*15 (Conn. Super. Ct. Mar. 9, 2010) (differentiating between hunger strikes and incurable terminal conditions based on the fact that hunger strikes “[are] not an . . . irreversible medical condition that will cause death if life support systems are not administered within a brief period”) (internal quotation marks omitted).

249. See *Thor v. Superior Court*, 855 P.2d 375, 385 (Cal. 1993) (en banc) (“[A] necessary distinction exists between a person suffering from a serious life-threatening disease or debilitating injury who rejects medical intervention . . . and an individual who deliberately sets in motion a course of events aimed at his or her own demise . . .”).

250. See *State ex rel. White v. Narick*, 292 S.E.2d 54, 55 & n.1 (W. Va. 1982) (profiling an inmate who, after losing over one hundred pounds and claiming that “he would rather die for his cause than be fed” had since ended his hunger strike, gained fifty pounds, and now worked in the prison kitchen).

order to stay alive.<sup>251</sup> The punitive undertones present when the state forces an individual to undergo medical treatment against his will<sup>252</sup> should inspire courts to give an inmate's decision to stop treatment a heightened level of respect.<sup>253</sup> While some commentators have argued that these punitive undertones are also present in hunger-strike cases,<sup>254</sup> it is inescapable the individual on hunger strike could simply decide to start eating at any time. It is the ability to decide to stop—as well as to start—a hunger strike that ultimately differentiates it from incurable, noncommunicable medical conditions.

2. *Hunger-Strikes and Refusal-of-Treatment Cases Are Not Equivalent Just Because the Potential for Manipulation Exists in Both Situations*

The potential for manipulative intent in refusal-of-treatment cases does not make judicial comparisons to hunger-strike cases appropriate. While fears of potentially manipulative actions by inmates suffering from incurable, noncommunicable conditions are legitimate, they are also easily prevented through active administrative conduct. Numerous cases have demonstrated that a manipulative purpose can drive an inmate to perform a hunger strike,<sup>255</sup> and *Vogel* demonstrated the potential for inmates refusing medication to harbor the same manipulative intent.<sup>256</sup> While courts should never tolerate manipulative

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251. See Steven Neu & Carl M. Kjellstrand, *Stopping Long-Term Dialysis: An Empirical Study of Withdrawal of Life-Supporting Treatment*, 314 NEW ENG. J. MED. 14, 14 (1986) (explaining that patients discontinuing long-term dialysis die shortly thereafter).

252. See *Washington v. Harper*, 494 U.S. 210, 243 (1990) (Stevens, J., dissenting) (arguing that forcing medical treatment based on “the legitimate needs of his institutional confinement” leaves open the potential for inappropriate action); see also *Polk Cnty. Sheriff v. Iowa Dist. Court*, 594 N.W.2d 421, 434 (Iowa 1999) (Snell, J., dissenting) (arguing that forcing treatment on a pretrial detainee through the use of speculative evidence amounted to punishment without trial).

253. See Gutterman, *supra* note 43, at 165–66 (quoting *Meacham v. Fano*, 427 U.S. 215, 233 (1979) (Stevens, J., dissenting)) (explaining Justice Marshall's viewpoint that all people, even those incarcerated, deserve to be treated with dignity).

254. See Mara Silver, Note, *Testing Cruzan: Prisoners and the Constitutional Question of Self-Starvation*, 58 STAN. L. REV. 631, 643 (2005) (arguing that underneath courts' pragmatic arguments for force-feeding is a retributivist desire to prevent inmates from “escaping” their sentences through an early death).

255. See, e.g., *Illinois ex rel. Dep't of Corr. v. Fort*, 815 N.E.2d 1246, 1249 (Ill. 2004) (explaining that the purpose of the inmate's hunger strike was to force a transfer to a better facility).

256. See *State ex rel. Schuetzle v. Vogel*, 537 N.W.2d 358, 359 (N.D. 1995) (citing an inmate's list of terms that must be met before he would resume taking his diabetes medication).

behavior by inmates,<sup>257</sup> this fact does not erase the fundamental differences that exist between these two situations.<sup>258</sup> Furthermore, inmates often refuse medical treatment for more understandable purposes,<sup>259</sup> unlike hunger strikes, where the express purpose is almost always manipulative.<sup>260</sup>

This was the case in *Stouffer*, where the inmate refused treatment because he was exhausted with the extensive treatment regimen dialysis entailed<sup>261</sup> and harbored no manipulative intent whatsoever.<sup>262</sup> Accordingly, courts should display a heightened level of respect towards an inmate refusing treatment where concrete evidence of a manipulative purpose is absent. Applying a “zero tolerance” policy toward prison system manipulation and compelling treatment unless the inmate is willing to take the advanced directives laid out in *Stouffer*, *Thor*, and *In re Caulk*, courts could properly enable prisoners to effectuate their rights while still protecting security interests.

The core differences between hunger strikes and incurable, non-communicable conditions demonstrate why courts should not analogize these two situations. Because hunger strikes are optional undertakings that can start and stop at an inmate’s choosing, they differ considerably from the lifelong and unwilling contraction of a legitimate medical condition. And just because an inmate can potentially exploit both situations in an attempt to manipulate the prison system does not mean that courts should blindly treat these two different situations as analogous. In short, hunger strikes and incurable conditions are simply too different for courts to compare them on any meaningful level.

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257. *See id.* at 361 (“Courts cannot condone a prisoner’s manipulation of his medical circumstances to the detriment of a state’s interest in prison order, security, and discipline.” (internal citations omitted)).

258. *See supra* Part II.B.1–2.

259. *See, e.g., Thor v. Superior Court*, 855 P.2d 375, 379 (Cal. 1993) (en banc) (chronicling how the inmate was paralyzed on all four extremities, needed around the clock medical care for the rest of his life, and was serving a life sentence).

260. *But see In re Caulk*, 480 A.2d 93, 95 (N.H. 1984) (evidencing a hunger strike undertaken for the sole purpose of effectuating the inmates death). *In re Caulk*, however, is the exceptional case. It is this author’s opinion that hunger strikes could pose devastating problems for prison institutions, a view that is shared by others. *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, 169–70 (2007) (describing the copycat potential that a successful hunger strike would have on the inmate population as a whole).

261. *Stouffer v. Reid*, 413 Md. 491, 495, 993 A.2d 104, 105–06 (2010).

262. *See id.* at 514, 993 A.2d at 117 (“[T]here is no evidence in the present case that Reid’s refusal of dialysis ‘treatment is predicated on an attempt to manipulate his placement within the prison system.’”).

*C. Courts Should Apply an Analysis Similar to Stouffer and Thor and Not Allow Speculative Evidence of Security Threats or Manipulation to Enable Prison Officials to Compel Medical Treatment*

The unique characteristics of the right to refuse medical treatment—specifically in cases where the disease is noncommunicable and incurable—demands courts evaluate prison administrative decisions to compel treatment differently than decisions infringing on an inmate’s other rights. The burden of proving the facts necessary to compel medical treatment should not rest with the inmate, as it currently does under the *Turner* standard,<sup>263</sup> but with the state.<sup>264</sup> Refusing treatment for incurable, noncommunicable medical conditions represents the kind of activity that is not “presumptively dangerous” and deserves more respect from courts and prison administrators.<sup>265</sup> *Stouffer* and *Thor* demonstrate that courts can apply the proper level of scrutiny toward prison administrative decisions by denying requests to compel treatment exclusively justified by speculative evidence.<sup>266</sup> These cases, as well as the dissent in *In re Caulk*, a hunger-strike case, also provide excellent examples of the additional steps prison administrators can take to actively prevent manipulation and eliminate liability while also allowing inmates to effectuate their constitutional rights. As such, courts should follow the analysis demonstrated in *Stouffer* and *Thor* and hold that speculative evidence of nonspecific security threats or intent to manipulate the prison system fail to provide the justification necessary to compel medical treatment.

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263. See *Polk Cnty. Sheriff v. Iowa Dist. Court*, 594 N.W.2d 421, 430 (Iowa 1999) (quoting *Jones v. N.C. Prisoners’ Union, Inc.*, 433 U.S. 119, 132 (1977)) (internal quotation marks omitted) (“[C]orrection officials may curtail constitutional rights whenever [they] conclude that an inmate’s conduct may likely disrupt the penal institution’s order or stability, or otherwise interfere with the legitimate penological objectives of the institutional environment.”).

264. See *Turner v. Safley*, 482 U.S. 78, 101 n.1 (Stevens, J., dissenting) (“The [majority’s] . . . standard makes it much too easy [to deny constitutional rights] on the basis of administrative concerns and speculation about possible security risks rather than on the basis of evidence that the restrictions are needed to further an important governmental interest.”).

265. See *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1033 (2d Cir. 1985) (“Where, however, the activity in which prisoners seek to engage is not presumptively dangerous, and where official action (or inaction) works to deprive rather than merely limit the means of exercising a protected right, professional judgment must occasionally yield to constitutional mandate.”).

266. See *Stouffer v. Reid*, 413 Md. 491, 516, 993 A.2d 104, 118 (2010) (determining that “the evidence presented was merely speculative” and failed to justify the “infringement on Reid’s right to refuse medical treatment”); see also *Thor v. Superior Court*, 855 P.2d 375, 388 (Cal. 1993) (en banc) (explaining that the court will not compel treatment when presented with evidence amounting to “conjecture”).

*Stouffer* and *Thor* appropriately balance state interests and personal autonomy by requiring administrators to produce concrete evidence of security risks or an intent to manipulate when they seek to compel treatment for incurable noncommunicable conditions. It is not unprecedented for courts to apply differing levels of scrutiny to different rights within the prison system. Before *Turner*, some courts had applied a three-tiered approach to administrative actions limiting rights in the prison setting.<sup>267</sup> This three-tiered approach included a consideration of (1) “the nature of the right being asserted by prisoners,” (2) whether the type of activity in which the prisoners seek to engage is “presumptively dangerous,” and (3) “whether the challenged restriction works a total deprivation (as opposed to a mere limitation) on the exercise of that right.”<sup>268</sup>

An inmate’s ability to effectuate a constitutional right in this three-tiered approach depended on (1) whether, if effectuated, the right in question would produce a “presumptively dangerous” result, and (2) whether the prison regulation “work[ed] to deprive rather than merely limit the means of exercising a protected right.”<sup>269</sup> If these two conditions were not met, courts placed the burden on prison officials to demonstrate the action at issue was “necessary to further an important government interest.”<sup>270</sup> The majority in *Turner*, however, rejected this tiered analytical standard primarily because of the difficulty in determining whether effectuating a particular right produced a “presumptively dangerous” result.<sup>271</sup>

But if prison inmates and officials take certain preliminary steps, it is difficult to see how a court could ever consider an inmate’s refusal of medical treatment for incurable, noncommunicable conditions “presumptively dangerous.” *Stouffer*, *Thor*, and the dissent in *In re Caulk* delineate particular procedures that prison officials could take to guarantee that an inmate’s refusal is genuine and will not produce an adverse result for the penal system.<sup>272</sup> These procedures can be broken up into a medical component and a legal component.

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267. See *Abdul Wali*, 754 F.2d at 1033 (describing a “tripartite standard” used by some courts).

268. *Id.*

269. See *id.* (discussing the different permutations possible when considering these two factors).

270. *Id.*

271. See *Turner v. Safley*, 482 U.S. 78, 88–89 (1987) (explaining that a presumptively dangerous determination is inappropriate because there is no clear standard for determining whether a particular act is presumptively dangerous).

272. See, e.g., *In re Caulk*, 480 A.2d 93, 100 (N.H. 1984) (Douglas, J., dissenting) (concluding that if these steps are followed, “the State is not aiding or abetting a suicide, it is

The medical component consists of a thorough consultation by both a general physician and a psychiatrist.<sup>273</sup> First, the inmate should consult with an independent, private physician who will clearly and honestly explain what will happen to the inmate if he stops treatment.<sup>274</sup> Second, an independent psychiatrist should evaluate the inmate to ensure he is competent and understands the magnitude of his decision.<sup>275</sup> The psychiatric consultation is critical because courts have traditionally treated mentally incompetent inmates differently.<sup>276</sup> Further, it is possible that the nature of institutional confinement could result in coercive pressure by prison administrators for inmates to refuse treatment.<sup>277</sup> Courts must do everything possible to ensure that inmates making the decision to stop life-sustaining treatment do so with sound mind and a clear understanding of the consequences.

The legal component is largely bureaucratic and primarily intended to eliminate liability for prison officials and taxpayers. First, courts and prison officials should require the inmate to sign a waiver of liability, asserting that neither he nor his estate will sue the prison system under an *Estelle* action for deliberate indifference towards an inmate's health.<sup>278</sup> Second, the inmate should waive any appointment of a guardian, so as to prevent someone from stepping in and attempting to order treatment after the inmate's condition has deteriorated.<sup>279</sup> This ensures that prison officials will carry out the inmate's directives and that no one can step in at the eleventh hour to change things. By following these steps, prison officials can protect them-

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merely leaving an individual alone to speed the natural and inevitable part of life known as death").

273. *See id.* (explaining that the inmate should be "examined by a physician" for informed consent reasons and deemed competent enough to understand that these actions will bring about his death); *Thor v. Superior Court*, 855 P.2d 375, 379 (Cal. 1993) (en banc) (explaining that the inmate had been evaluated by a psychiatrist and deemed mentally competent before the court determined he could refuse treatment).

274. *Cf. Stouffer v. Reid*, 413 Md. 491, 507–08, 993 A.2d 104, 113 (2010) (noting that prison doctors gave Reid inaccurate information regarding what would happen if he stopped treatment and surmising that this fact fueled his distrust of prison doctors).

275. *See Thor*, 855 P.2d at 379 (establishing through psychiatric evaluations that the inmate is cognizant of the situation and "understand[s] and apprec[iates the] circumstances").

276. *See generally* *Washington v. Harper*, 494 U.S. 210, 224–27 (1990) (applying the *Turner* standard but giving special consideration to an inmate's mental condition in evaluating whether to compel antipsychotic medicine).

277. *See* Nancy Neveloff Dubler, *The Collision of Confinement and Care: End-of-Life Care in Prisons and Jails*, 26 J.L. MED. & ETHICS 149, 153 (1998) (explaining that there is always a possibility that an inmate's decision to refuse treatment is the result of a care team or prison administrator who has convinced him that doing so is the right course of action).

278. *See In re Caulk*, 480 A.2d 93, 100 (N.H. 1984) (Douglas, J., dissenting).

279. *Id.*

selves from liability while also enabling inmates to effectuate their constitutional rights.

### III. CONCLUSION

As much as society—and prison officials—may choose to forget about them, prison inmates are still American citizens with rights guaranteed by the Constitution.<sup>280</sup> The *Turner* standard enacted by the Supreme Court enables prison officials to violate specific intrapersonal rights with little to no judicial oversight. *Turner's* deferential posture is inappropriate when evaluating a prison official's decision to compel medical treatment against an inmate's will. This is because of the inherent differences between the interpersonal rights *Turner* was based on and the right to refuse treatment.<sup>281</sup> Additionally, the absence of clear, articulable security risks created by inmates effectuating this right makes forcing treatment unconstitutional.<sup>282</sup> Further, past judicial comparisons between the refusal of medical treatment and inmate hunger strikes fail to recognize the foundational differences between the two situations.<sup>283</sup> Accordingly, courts should follow the analysis used in *Stouffer* and *Thor* and reject arguments to compel treatment for incurable, noncommunicable disease based on unsupported conclusory statements of prison officials, thereby demonstrating a heightened respect for inmates' liberty interest and requiring concrete evidence of security threats or manipulative intent before compelling treatment.<sup>284</sup>

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280. *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974).

281. *See supra* Part II.A.1.

282. *See supra* Part II.A.2.

283. *See supra* Part II.B.

284. *See supra* Part II.C.