Hunger Strikes: Legal Rights of Guantanamo Detainees

Jon Scott
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BY: JON SCOTT

I. INTRODUCTION

“I am slowly dying in this solitary prison cell,” Omar Deghayes told media representatives. “I have no rights, no hope. So why not take my destiny into my own hands, and die for a principle?” Many of the hundreds of detainees held by the U.S. government at Guantanamo Bay, Cuba feel similarly towards their detention. On 11 September 2004, 131 detainees went on hunger strike to protest their incarceration. By October 2005 however, the U.S. government gladly informed visiting media that the number of participants had decreased to 25. The government responded by force feeding 22 of the remaining fasters by inserting nasogastric tubes into the detainees’ stomachs. The government’s current force-feeding practices violate the detainees’ common law right to refuse unwanted medical treatment by seeking justification from state interests that have failed to carry the burden of proof necessary to supersede the detainees’ established rights to hunger strike.

The following assessment of applicable legal principles will reveal that detainees may claim the right to hunger strike. First, a recent court ruling shows that the Guantanamo detainees do possess some substantive constitutional rights, including due process of law, which provides the common law basis for the right to refuse unwanted medical treatment. Second, the state may potentially apply a few specific interests to provide the legal basis to force-feed a faster.

1 Jon Scott is a junior at Brigham Young University majoring in Political Science with a minor in Middle East Studies. He plans on attending law school and hopes to continue his studies of Hebrew and Middle East politics. Jon is from Liberty, Missouri.


3 Susan Okie, Glimpses of Guantanamo-Medical Ethics and the War on Terror, 353 NEW ENG. J. MED. 2529, 2530 (2005).
including: the preservation of life, prevention of suicide, avoiding manipulation of the justice system, and protecting the integrity of medical ethics. Third, several courts have ruled against the detainees’ ability to hunger strike without even addressing the basis for their common law rights, allowing the government to negatively portray the hunger strikers’ possible motivations. Fourth, a clear disclosure of the facts and legal precedent demonstrates that applicable state interests fail to carry the burden of proof necessary to prevail against the detainees’ right to refuse unwanted medical treatment.

II. ESTABLISHED DETAINEE RIGHTS

The recent ruling of In re Guantanamo Detainee Cases has provided the framework under which the constitutional and historical right to refuse unwanted medical treatment may apply to the Guantanamo detainees. In the case, the court interpreted Rasul v. Bush to declare that the Guantanamo detainees maintain some constitutional rights concerning their detention and the conditions of their detention, including the fundamental right to due process of law under the Fifth Amendment. Specifically, the court stated that the “Supreme Court held that habeas jurisdiction did in fact exist” in regards to Guantanamo Bay and that the “existence of habeas jurisdiction and substantive constitutional rights were ‘directly tied.’” This ruling’s reference to habeas jurisdiction signified that the Guantanamo Bay detainees do not exist in a legal void outside the protection of the United States Constitution, but rather they do enjoy some degree of legal standing that includes substantive constitutional rights. This idea of substantive constitutional rights under due process

becomes significant because substantive due process, as distinct from procedural due process, guarantees many protections upon the legal foundation of common law. It is common law that lays the basis for the detainees' right to refuse unwanted medical treatment.

Legal scholars have broadly defined common law as guarantees of "life, liberty, property, and immunities under the protection of the general rules which govern society." These general rules center around ideals of fairness that have evolved from "history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith." Substantive due process refers to fundamental guarantees beyond mere procedural legal processes to a description of life that lies beyond the invasion of others, including force-feeding practices. Legal scholars instruct, "The right to refuse medical treatment or to withhold consent to medical treatment may be protected by the common law." Therefore, detainees may exercise their common law right to hunger strike due to the substantive due process that the Constitution has permitted them within its habeas jurisdiction.

Legal precedent further establishes the constitutional and historical right to refuse unwanted medical treatment, thus strengthening the detainees' case concerning their fundamental common law rights. The Supreme Court in *Cruzan v. Director, Missouri Department of Health* stated, "The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." The same court began its opinion on *Cruzan* by quoting a 1891 Supreme Court case that stated, "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of

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7 Donald T. Kramer, Annotation, Constitutional Law, 16B AM JUR 2d 1, 468 (1998).
8 Id. at 478.
9 Id. at 475.
others, unless by clear and unquestionable authority of law. This century-old ruling not only establishes the historical right to refuse unwanted medical treatment, but it also shows a strong correlation between autonomy over one’s body and the highest form of liberty. If substantive due process can claim to protect any liberty under common law, then surely the Fifth Amendment protects the most sacred of liberties. In Washington v. Glucksberg, the Supreme Court likewise drew upon common law precedent to maintain the distinction between “right to die” jurisprudence and the state’s ban on assisted suicide. The Court explained, “Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this nation’s history and constitutional traditions.”

Such common law liberties extend even to a more local level. The Supreme Court of Iowa in Polk County Sheriff v. Iowa District Court for Polk County similarly “recognized that the [Fourteenth] Amendment gave a competent person a constitutionally protected liberty interest in refusing unwanted medical treatment.” Thus guaranteed freedoms under substantive due process remain consistent at both the federal and the state levels. All this evidence reveals the depth that common law rights have penetrated American society, both temporally and institutionally. However, the Supreme Court of Iowa also cautioned that such liberty interests need “to be balanced against countervailing State interests.”

III. APPLICABLE STATE INTERESTS

When assessing an individual’s right to refuse unwanted medical treatment, justice officials and scholars commonly weigh the influence of four applicable state interests: the preservation of life, prevention of suicide, potential disruption of prison discipline, and protection of

12 Silver, supra note 11.
13 Id.
14 Williams, supra note 4, at 290.
15 Id.
the medical profession's integrity. However, under the assumption that medical professionals have determined the hunger strikers to be competent, the prevention of suicide does not apply sufficiently to permit the state to suspend the detainees' common law rights. The law has confined the prevention of suicide to "the prevention of irrational self-destruction, and although the state will act to prevent suicide, merely declining medical care, even essential treatment, is not considered a suicidal act or an indication of incompetence." Here the law identifies an important distinction between the right of a rational individual to refuse life-sustaining treatment and the prohibition on an irrational individual to terminate their own life. One scholar succinctly correlated this distinction specifically to hunger strikers by stating "...the public policy in preventing suicide is to prevent the irrational loss of life; the decision of a competent hunger-striking prisoner is not irrational.

The Guantanamo Bay detainees provide an excellent example of how society may deem a competent hunger strike a rational decision. Israel Waismel-Manor, a scholar from the University of Haifa, states that officials should not view a hunger strike as "the act of a crazy individual, but a rational path that follows some deliberation and is based on individuals' socialization and the political action alternatives open to them." Waismel-Manor provides some possible criteria that medical professionals may use to determine hunger strikers' rationality, namely: signs of deliberation, a patient's socialization, and few available political alternatives. First, the nature of the hunger strike allows a participant to seriously deliberate the consequences of their actions because a hunger strike is slow and includes multiple opportunities to choose whether to improve one's condition by eating or to continue to refuse offered food. Hunger strike fatalities do not occur instantly because of one rash choice. Second, the detainees' Islamic socialization has already incorporated the principle of fasting

16 Williams, supra note 4, at 294-295.
17 Dietz, supra note 10, at 482-483.
18 Williams, supra note 4, at 291.
into their lives as an acceptable form of behavior. As an orthopraxy, Islam motivates Muslims to show their faith by action, which frequently includes fasting. Therefore, the detainees may easily resort to such behavior as they seek divine intervention in their highly restrictive environment. Third, the government has left the detainees with very few options as a possible response to such a restrictive environment, prompting the detainees to make decisions with higher risks. As stated earlier, Omar Deghayes believed that he had no rights and no hope. Judge Green in *In re Guantanamo Detainee Cases* explains that by claiming the right to incarcerate the detainees for the duration of an ambiguous, potentially multigenerational conflict, the U.S. Executive Branch has basically sentenced the detainees to life imprisonment, which is the ultimate deprivation of liberty short of the death penalty.  

The government’s actions have extensively undermined the very ideal that the common law finds fundamental to our humanity: liberty. The detainees’ current punishment may almost be perceived as worse than the death penalty because the detainees must live a life with little or no meaning. The government has not named their crimes, and therefore, the detainees’ punishments have not been fixed that they might be fulfilled. The government has left the detainees with very few options beyond the decision of whether or not to endure a life devoid of incentives to live. Their restrictive detention provides these Muslim detainees with the reasons to rationally attempt a hunger strike, and medical doctors already hold the procedures to determine the competency of a hunger striker. Therefore, only three of the four possible state interests apply specifically to the detainees’ common law right to refuse unwanted medical treatment; though, no argument can completely avoid the prevention of suicide interest since “generally, the state’s interest in preventing suicide is a natural corollary to its interest in preserving life.”  

Concerning state interests that could apply, military officials at Guantanamo Bay have sought to reference the preservation of life as

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21 Dietz, *supra* note 10, at, 482.
a justification for force-feeding many of the detainees, emphasizing a weak commitment to starvation amongst hunger strikers as an unuttered plea for such preservation. Major General Jay W. Hood, commander of the Joint Task Force-Guantanamo, has told visiting media that “consistent with the Department of Defense policy the JTF will prevent unnecessary loss of life by detainees through standard medical intervention, including involuntary medical intervention when necessary to overcome a detainee’s desire to commit suicide.”

The government feels that such procedures are consistent with federal prisons’ policies in the United States, which “authorize the involuntary treatment of hunger strikers when there is a threat to an inmate’s life or health.” Government officials also justify such responsive action by concluding that the hunger strikers do not truly desire to terminate their own lives. The government views the detainees’ hunger strikes more as protests than actual attempts to commit suicide, and thus officials assume the responsibility to sustain the detainees’ true desires for life. Captain John S. Edmondson, an emergency physician and the commander over the detainees’ medical care, referring to the camp’s hunger strikers stated, “In none of these [cases] have I ever gotten the impression that these guys want to die.”

In regards to another state interest, several courts have ruled against hunger strikers to avoid possible manipulation of the prison or justice system by detainees making radical threats of self-destruction. Scholars believe that prisoners may hunger strike for a variety of ulterior motives, including frustration, the desire to gain attention for specific political beliefs, or the intention to use their health as a bargaining tool to change their circumstances. Justice Lavorato stated the following concerning inmate hunger strikers: “In most of these cases, the inmate’s main aim was to gain attention from correction officials and

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24 Okie, supra note 2, at530.
25 Williams, supra note 4, at 287.
sometimes from the public to manipulate the penal system. In virtually all of these cases, the court allowed force-feeding as a reasonable response to a threatening disruption of discipline and order in the penal institution. The common fear was that other inmates might do the same thing for manipulative purposes.  

Commonwealth v. Kallinger supported this theory and stated that “allowing a prisoner to starve to death while in state custody would have an unpredictable negative effect on the security and order within the prison system.” Those that fear manipulation of the penal system seem to hold the belief that any apparent success by one hunger striker would begin a chain reaction of hunger strikes, where prisoners would unitedly attempt to undermine the very sentences that seek to enact justice upon them.

Other government officials justify the force-feeding of hunger strikers by upholding the integrity of medical ethics under Hippocratic principles. In Commonwealth v. Kallinger, a prison psychiatric director testified that “it would be devastating to the staff and the staff morale if they had to allow someone to cease living, virtually by their own hand, while under [prison] care.” The specialist seemed to believe that health officials’ training has so ingrained the preservation of life within their consciousnesses that any actions against such training would threaten the health care providers’ emotional stability. A nephrologist, in Commissioner of Correction v. Myers, likewise testified that “medical ethics demanded that everything possible be done to [treat] the defendant ‘up to the point we cannot technically manage it.’” Supporters of such a position seem to express a moral imperative that health workers seek to satisfy to avoid the possible compromising of personnel specifically trained to save lives. However, these specialists fail to define the limit of health officials’ obligations by failing to account for patients’ consent, but medical ethics will assess those limitations momentarily.

26 Id. at 290.
28 Silver, supra note 27, at 652.
29 Id.
IV. CORRESPONDING STATE ACTIONS

Several courts and governmental policy have supported these state interests in their rulings and statements against the detainees, especially favoring the preservation of life and the protection of the justice system from any manipulation respectively. Judge Bates ruled in O.K. v. Bush that the plaintiffs, referring to the Guantanamo hunger strikers who sought a stop to being force-fed, carry the burden of persuasion to “demonstrate a likelihood of injury in the imminent future in order to secure an injunction.”\(^{30}\) Judge Bates later added that that burden “takes on added importance in a case where the Court is asked to regulate the conduct of the Executive in the theater of war.”\(^{31}\)

In conclusion Judge Bates declared that “absent a persuasive claim that the conditions of confinement at Guantanamo are so severe that they present an imminent threat to petitioner’s health, the Court will not insert itself into the day-to-day operations of Guantanamo.”\(^{32}\) Interestingly enough, this judge seems to feel it necessary that the detainees prove that the government seeks their harm when the controversy actually lies with the government’s unwillingness to allow detainees to naturally harm themselves. Later in El-Banna v. Bush, Judge Louis Oberdorfer likewise ruled that “the movants here, like the movant in the O.K. case, have failed to demonstrate an imminent threat to their health.”\(^{33}\) Such non-interference into the conduct of the Executive has allowed the government to term the detainees’ actions as attempts to manipulate the terms of their detainment. Navy Commander Robert Durand, a Guantanamo Bay spokesman, recently stated, “The hunger strike technique is consistent with Al-Qaida practice and reflects detainee attempts to elicit media attention to bring international pressure on the United States to release them back to the battlefield.”\(^{34}\)


\(^{31}\) Id.

\(^{32}\) Id. at 5-6.

\(^{33}\) Id. at 6.

V. STATE INTERESTS VS. DETAINEE REALITIES AND RIGHTS

A comparison of the realities and rights of the Guantanamo detainees to the mentioned state interests reveals a situation far more degrading and oppressive to the hunger strikers than government officials have described. Concerning the state’s interest to preserve life, first consider that inherent in every individual is a uniqueness that only freedom of expression can articulate. Such uniqueness prompts the state to see life as valuable and worth preserving. However, it is possible that the state may actually diminish the virtue of that life by seeking to save it. The Massachusetts Supreme Judicial Court stated, “The constitutional right to privacy…is an expression of the sanctity of individual choice and self-determination as fundamental constituents of life. The value of life as so perceived is lessened not by a decision to refuse treatment, but by the failure to allow a competent human being the right of choice.”35 Other legal scholars agree almost verbatim stating, “A competent person’s common-law and constitutional rights to forgo life-sustaining treatment do not depend on the quality or value of his or her life and the value of life is lessened not by a decision to refuse treatment, but by the failure to allow a competent human being the right of choice.”36 Everything worth preserving in life demands that officials respect the rational decisions of individuals. Freedoms, like the freedom to refuse unwanted medical treatment, lose all meaning if individuals may not exercise such freedoms in reality. Humanity’s freedom capabilities separate it from all other creatures, but suppression may easily allow individuals to lose that which makes them human.

Instead, government officials have marginalized detainees’ humanity by questioning their resolve to exercise their fundamental common law rights while simultaneously incarcerating these individuals in a condition that the previously mentioned court rulings

36 Dietz, supra note 10, at 532.
have termed “the ultimate deprivation of liberty.” Surely realizing their hopeless position, some detainees have even resorted to possible irrational behavior, which provides a contradicting response to Captain Edmondson’s previous statement concerning the detainees’ desire to stay alive. The military admits that there have been thirty-six suicide attempts by twenty-two Guantanamo detainees as of November 1, 2005. One detainee, Jumah Dossari, attempted suicide by gouging his right arm until it bled and then hanging himself from a makeshift noose in his cell. However, Dossari’s lawyer, who had been meeting with his client until a few minutes before the suicide attempt, happened to enter Dossari’s cell in enough time to discover Dossari’s dangerous circumstances and stop his client from losing his life.

Then on June 10, 2006, Mani Shaman Turki al-Habardi Al-Utaybi, Yassar Talal Al-Zahrani, and Ali Abdullah Ahmed hung themselves in their cells and succeeded in taking their own lives. Clearly some of the detainees feel so hopeless about their current situation that several would like to end their suffering. Such evidence also describes an environment where rational actors may choose to hunger strike, exercising one of the few political alternatives left to the detainees.

Concerning the undermining of the penal system, Mara Silver, a graduate from Stanford Law School, finds the state’s rulings on the hunger strikers’ ulterior manipulative motives as very ambiguous and asserts that the law requires states to carry the heaviest burdens of persuasion “before fundamental rights may be restricted.” Silver finds it interesting that the “Kallinger court itself admits that the effect of a faster’s death would be, at best, ‘unpredictably negative’.” Clearly, unpredictable consequences do not provide the strong evidence necessary to suppress a common law right.

38 Okie, supra note 2, at 2531.
39 Id.
41 Silver, supra note 27, at 649.
42 Id.
goes on to cite Singletary v. Costello, in which the Florida District Court of Appeal ruled that state interests could not stop Costello’s hunger strike “given there was no evidence of actions undermining security, safety, or welfare within the prison. Rather, ‘arguments concerning the effect of Costello’s conduct [were] nothing more than speculation and conjecture.’”

The district court judge then went on to challenge the theory that a successful hunger strike would start a chain reaction of multiple coercive fasters. He stated, “It is hard to imagine that if [Costello] dies as a result of his actions, that inmates will be rushing to imitate him.” Competent individuals will surely back down from permanent consequences if weakly committed to an action because they still believe that their lives have hope for meaning.

Government officials would also be wise to not minimize individual rights even in a prison setting, lest society animalizes those humans who are incarcerated. The Supreme Court has already stated in Turner v. Safley that a prisoner “retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.” The Court then later clarified in Johnson v. California that “while ‘certain privileges and rights must necessarily be limited in the prison context,’ rights that need not necessarily be compromised for proper prison administration are ‘not susceptible to the logic of Turner,’” which had provided a very lax standard for prison regulations. The judge in Costello understood that a hunger striking prisoner does not disrupt proper prison administration. An individual that weakens himself from lack of nourishment cannot easily lead a revolt against prison security. Furthermore, the Supreme Court, in Wolff v. McDonnell, “denied the existence of an ‘iron curtain’ between the Constitution and the prisons.” Legal scholars summarize these principles succinctly

43 Silver, supra note 27, at 650.
44 Id. at 651.
45 Id. at 641.
46 Id. at 642.
47 Williams, supra note 4, at 291.
by stating, "An inmate's constitutional right to refuse nonconsensual medical treatment is not vitiated by fact that he or she is incarcerated."\footnote{Dietz, supra note 10, at 485-486.}

Finally, concerning protection of the medical community, the World Medical Association, an international authority on medical ethics, has declared that doctors must learn to balance the values of preserving life and being respectful of their patients' autonomy when presented with a hunger striker as a patient.\footnote{World Med. Ass'n, Declaration on Hunger Strikers, 43rd World Med. Assembly Malta, Nov. 1991.} In Singletary v. Costello, the court ruled that "patient autonomy and medical ethics are not reciprocals; one does not come at the expense of the other."\footnote{Silver, supra note 27, at 652.} When a patient proves himself or herself competent, then medical ethics state that the patient holds the power to refuse unwanted medical treatment. A doctor's obligation to use all available means to preserve a patient's life ends where and when a competent patient desires. The World Medical Association, which includes the American Medical Association, declared that doctors that agree to attend to a hunger striker accept all of the "responsibilities inherent in the doctor/patient relationship, including consent and confidentiality."\footnote{World Med. Ass'n, supra note 49.} Then applying more specifically to the detainees, the W.M.A. has stated, "Where a prisoner refuses nourishment and is considered by the physician as capable of forming an unimpaired and rational judgment concerning the consequences of such a voluntary refusal of nourishment, he or she shall not be fed artificially."\footnote{World Med. Ass'n, WMA Declaration of Tokyo: Guidelines for Physicians Concerning Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment in Relation to Detention and Imprisonment, 29th World Med. Assembly Tokyo, Oct. 1975.} These statements continue to strengthen the argument that common law rights may not be easily discarded, even in extreme circumstances. Just as incarceration cannot instantly dissolve all fundamental rights, hunger strikes do not operate under a new framework outlining the doctor-patient relationship. Further showing the endurance of these basic rights, the W.M.A. has also
announced that “medical ethics in times of armed conflict is identical to medical ethics in times of peace.”\textsuperscript{53} The W.M.A. would seem to argue that the war on terrorism has not relinquished the detainees’ right to refuse unwanted medical treatment through hunger striking.

VI. CONCLUSION

The government’s current actions and policies clearly violate the detainees’ right to refuse unwanted medical treatment by seeking justification from state interests that have failed to carry the burden of proof necessary to supersede the detainees’ fundamental common law rights. The United States justice system has plainly ruled that the detainees hold substantive constitutional rights, including the due process of law which builds its foundation upon common law. Furthermore, common law protects those personal liberties that define the humanity within an individual, like autonomy over one’s person, the most sacred liberty of all. The government has offered justifications for their force-feeding practices, but each excuse lacks merit. The government cannot preserve life by keeping an individual breathing to only oppress the essence of that individual’s humanity later. Life requires freedom of expression to have meaning. The government cannot claim possible exploitation of the penal system when hunger strikes do not hinder the proper administration of the prison facility and detainees maintain their common law rights in prison. Finally the government cannot raise the banner of medical ethics to heroic proportions where medical personnel must save lives at all costs when the power of consent gives the patient the ability to place limitations on medical intervention. If the government wishes to continue acting in such an authoritarian manner toward the Guantanamo prisoners, then it should provide evidence that gives them that authority. In the meantime, the detainees should maintain their common law right to decide their own destiny.

Nonetheless government officials and some courts have yet to acknowledge that the detainees hold any such rights, sometimes\textsuperscript{53}  

even to the point of absurdity. It makes little sense that the El-
Banna judge required hunger strikers to prove that government
actions present an imminent threat to their health before a detainee
may exercise his or her established right to end their own life. The
hopelessness of the detainees’ indefinite incarceration provides an
understandable environment where an individual may feel it necessary
to exercise such a right, especially if Islamic socialization strengthens
such a decision’s viability. The detainees see no end, and possibly
little reason, to their incarceration. The court, in In re Guantanamo
Detainee Cases, referred to Hamdi v. Rumsfeld which applied a Mathews
v. Eldridge analysis where the plurality opinion called detainee private
interests “the most elemental of liberty interests -- the interest in
being free from physical detention by one’s own government.”54 The
Court then wisely explained, “There is no practical difference between
incarceration at the hands of one’s own government and incarceration
at the hands of a foreign government; significant liberty is deprived
in both situations regardless of the jailer’s nationality.”55 Universal
principles of liberty stretch their jurisdiction across all boundaries,
hoping to bless all of humanity, but unfortunately, those principles
have yet to improve the lives of the detainees in Guantanamo Bay,
Cuba. Meanwhile, legal precedent, unjust incarceration, and medical
ethics all support the rationality of the detainees to hunger strike.
No one’s preference should be able to arbitrarily suspend the rights
of another, regardless of the extent of their power in the country.

54 In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 465 (D.C. Cir.
2005).
55 Id.
CURRENT DEVELOPMENTS

The final draft of this article was submitted to the production team prior to the decision of the United States Court of Appeals for the District of Columbia that denied certain Constitutional rights to detainees at the Guantnamo Bay prison. The nature of the topic being discussed effects the current legal validity of this argument. Lawyers for the detainees are planning an appeal to the Supreme Court.
