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Supreme Court of the State of Washington

Opinion Information Sheet

Docket Number: 77359-9  
 Title of Case: McNabb v. Dep't of Corr.  
 File Date: 04/10/2008  
 Oral Argument Date: 05/11/2006

SOURCE OF APPEAL

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 Appeal from Spokane County Superior Court  
 04-2-03552-4  
 Honorable Linda G Tompkins

JUSTICES

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Gerry L. Alexander	Signed Concurrence
Charles W. Johnson	Signed Concurrence
Barbara A. Madsen	Concurrence Author
Richard B. Sanders	Dissent Author
Tom Chambers	Signed Concurrence
Susan Owens	Signed Majority
Mary E. Fairhurst	Majority Author
James M. Johnson	Signed Majority
Debra L. Stephens	Did Not Participate
Bobbe J. Bridge, Justice Pro Tem.	Signed Majority

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McNabb (Charles R.) v. Dep't of Corrections

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SANDERS, J. (dissenting) -- Charles McNabb, while at Eastern State Hospital, was force-fed by a tube through his nose. He was strapped into a chair for 28 hours straight, during which time it was impossible for him to sleep. From the force-feeding he suffered bleeding from the nose for a day, pain, and nausea. Shortly after being transferred to the custody of the Department of Corrections (DOC), the DOC also force-fed Mr. McNabb for several days.<sup>1</sup>

The lead opinion condones the DOC's practice of force-feeding Mr. McNabb, a practice tantamount to torture,<sup>2</sup> because supposedly the DOC's interest in its policy outweighs Mr. McNabb's interest to avoid such treatment.

Lead op. at 18. The concurrence condones the DOC practice because Mr. McNabb is not terminally ill. Concurrence at 1. I cannot agree with either position. Under our state constitution Mr. McNabb's right to refuse involuntary nasogastric intubation,<sup>3</sup> an essential privacy right of autonomous decision-making

<sup>1</sup> The lead opinion claims what happened at Eastern State Hospital is irrelevant, lead op. at 3 n.3, yet it does not claim force-feeding at DOC was any different. If the lead opinion believes the physical and mental pain from such a procedure is irrelevant, then I beg to differ.

<sup>2</sup> See George J. Annas, Human Rights Outlaws: Nuremberg, Geneva, and the Global War on Terror, 87 B.U. L. Rev. 427, 457 (2007).

<sup>3</sup> I would characterize the right at issue as the right to refuse force-feeding because

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and bodily integrity, yields only to "authority of law." Const. art. I, § 7.

The lead opinion incorrectly frames the privacy interest at stake as the right to suicide. This case is no more about the right to suicide than *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), was about the right to sodomy. Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone."

*Olmstead v. United States*, 277 U.S. 438, 478, 48 S. Ct. 564, 72 L. Ed. 944

(1928) (Brandeis, J., dissenting), overruled in part by *Berger v. New York*, 388

U.S. 41, 87 S. Ct. 1873, 18 L. Ed. 2d 1040 (1967). Once incorrectly framed, the lead opinion and concurrence easily strike down its "straw man"<sup>4</sup> because our

prior case law, based on federal precedent, limits the right to die to terminally ill

that right is more definite and enforceable and because Mr. McNabb frames his asserted right in those terms. See Reply Br. of Appellant at 1 ("This case concerns a fundamental human right -- the right to protect one's own body against forced invasion."); id. at 3 (stating whether there exists a "right to refuse force-feeding" warrants independent state constitutional analysis); id. at 4 ("McNabb retains the right to refuse involuntary treatment, including force-feeding."); id. at 5 ("Whatever might be the outer limits of the state constitutional right to privacy, the right to refuse force-feeding is at its core.").

4 The "fallacy of the straw man" is an informal logical fallacy created when an easily refutable position is attributed to an opponent deliberately to overstate the opponent's position. Ruggero J. Aldisert, *Logic for Lawyers: A Guide to Clear Legal Thinking* 170 (1989).

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patients only.

Nowhere does Mr. McNabb state a wish to commit suicide. His "only wish is for [his] personal decision not to eat to be respected and to be left in peace for [his] fast to take its course." Clerk's Papers at 7 (Decl. of Charles B. McNabb). In other words, he wishes "to be let alone." *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

Furthermore, the right of terminally ill patients to refuse food and water under the federal constitution does not answer the question of whether Mr. McNabb may live free from the State's invasion of his body under our state constitution. Our guaranty of privacy is not found in the unstated "penumbra" of federal rights but is explicit in our state constitution: "[n]o person shall be disturbed in his private affairs . . . without authority of law." Const. art. I, § 7.

The plain language of article I, section 7 sets forth a simple two part test:5 Whether a person's private affairs are being disturbed, and, if so, is the disturbance under "'authority of law'" *State v. Surge*, 160 Wn.2d 65, 71, 156 P.3d 208 (2007). Unquestionably, force-feeding disturbs a "private affair" protected by article I, section 7. See lead op. at 15; see also *Surge*, 160 Wn.2d at 5 "Appropriate constitutional analysis begins with the text and, for most purposes, should end there as well." *Malyon v. Pierce County*, 131 Wn.2d 779, 799, 935 P.2d 1272 (1997).

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71 ("The 'private affairs' inquiry focuses on 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.'" (internal quotation marks omitted) (quoting *State v. Young*, 123 Wn.2d 173, 181, 867 P.2d 593 (1994))). The only issue remaining is whether the DOC acted under "authority of law."

"Authority of law" is a warrant. *Surge*, 160 Wn.2d at 71 ("In general terms, the "'authority of law'" required by article I, section 7 is satisfied by a valid warrant."); see also *State v. Day*, 161 Wn.2d 889, 893, 168 P.3d 1265 (2007) ("[O]ur state constitution . . . requires actual authority of law before the State may disturb the individual's private affairs."). But here there was no warrant. Under an independent state constitutional analysis, that should end the

discussion.6

Nevertheless, our court has opined a rule under the federal constitution to permit an intrusion into a person's "private affairs" upon a showing of a compelling interest with the intrusion narrowly tailored to achieve that interest. In re Juveniles A, B, C, D, E, 121 Wn.2d 80, 97, 847 P.2d 455 (1993). Yet this case arises under the Washington State Constitution; the federal rule and our

6 That is unless the State can argue its warrantless intrusion into Mr. McNabb's protected sphere of privacy falls into one of our jealously guarded exceptions. See, e.g., Day, 161 Wn.2d at 894. An exception does not clearly apply nor did the DOC argue one.

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precedents surrounding that rule are therefore irrelevant. See Surge, 160 Wn.2d at 78 ("[A] close reading of the case reveals that not only was Juveniles A, B, C, D, E decided under Fourth Amendment jurisprudence, but the types of privacy interests referred to originate from Fourteenth Amendment jurisprudence right to privacy, not article I, section 7."); see also State v. Evans, 159 Wn.2d 402, 412, 150 P.3d 105 (2007) ("[A]rticle I, section 7 of our state constitution provides a strong privacy interest, exceeding that provided by the federal constitution.").

More importantly, strict scrutiny analysis has no place in our article I, section 7 jurisprudence, which is based on a completely different text. The federal constitution does not even mention "privacy," whereas it is express in article I, section 7. Moreover, "strict scrutiny" was not even invented by the United States Supreme Court until 1938,<sup>7</sup> nor applied until 1942,<sup>8</sup> both well after

7 United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4, 58 S. Ct. 778, 82 L. Ed. 1234 (1938) (the famous footnote four introduced the idea of different levels of judicial review); see also Louis Lusky, Footnote Redux: A Carolene Products Reminiscence, 82 Colum. L. Rev. 1093 (1982).

8 Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942) (applying strict scrutiny analysis to an Oklahoma law requiring the sterilization of persons convicted of three or more felonies involving moral turpitude); see also Adam Winkler, Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts, 59 Vand. L. Rev. 793, 799 (2006) ("The Supreme Court first used the precise term 'strict scrutiny' in 1942's Skinner v. Oklahoma[, 316 U.S. at 541] . . . .").

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our state constitution was ratified in 1889. There is nothing in the text of our constitution that even implies this approach.

Under our state constitution an individual's "private affairs" simply cannot be abridged, even for a compelling reason, absent "authority of law." Const. art. I, § 7. This is because privacy is by definition antimajoritarian, protecting an individual's private affairs from majority intrusion. As such, an invasion of a privacy interest can never be justified by some majoritarian belief, no matter how compelling.

Even more disturbing than the lead opinion's "balancing" of our privacy right against some majoritarian government bias is the concurrence's

conditioning our right to privacy on the existence of a terminal illness. Concurrence at 1. The right to bodily integrity, the inner sanctum of all that is "private," is absolute under our state constitution; there is no basis to conclude terminally ill people have any superior right to bodily integrity than nonterminally ill people. The concurrence's notion to this effect is abhorrent to our tradition of equality.

Moreover, the concurrence's claim a statute may limit the scope of a constitutionally protected right finds no support in our case law and is inconsistent with our form of government. See *Tunstall v. Bergeson*, 141 Wn.2d 201, 218, 5 P.3d 691 (2000) ("The ultimate power to interpret, construe and

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enforce the constitution of this State belongs to the judiciary." (quoting *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 496, 585 P.2d 71 (1978)); *Leonard v. City of Spokane*, 127 Wn.2d 194, 198, 897 P.2d 358 (1995) (quoting same); *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 714, 911 P.2d 389 (1996) ("[T]he construction of the meaning and scope of a constitutional provision is exclusively a judicial function." (citing *State ex rel. Munro v. Todd*, 69 Wn.2d 209, 213, 417 P.2d 955 (1966); *Wash. State Highway Comm'n v. Pac. Nw. Bell Tel. Co.*, 59 Wn.2d 216, 222, 367 P.2d 605 (1961))); *Scott Paper Co. v. City of Anacortes*, 90 Wn.2d 19, 33, 578 P.2d 1292 (1978) ("The legislature has no power to define the meaning of a constitutional provision."); see also *City of Boerne v. Flores*, 521 U.S. 507, 519, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997) ("Congress does not enforce a constitutional right by changing what the right is."). As Chief Justice Marshall powerfully stated:

It is, emphatically, the province and duty of the judicial department to say what the law is. . . . [I]f both the law and the constitution apply to a particular case, so that the court must either decide that case, conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case: this is of the very essence of judicial duty. If then, the courts are to regard the constitution; and the constitution, is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle, that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the

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constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. . . .

*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78, 2 L. Ed. 60 (1803).

Lastly, the concurrence's reliance on *In re Guardianship of Grant*, 109 Wn.2d 545, 747 P.2d 445 (1987), to limit the scope of article I, section 7 is misplaced. A closer reading of *Grant* reveals not only was the case decided under federal constitutional grounds, but the only reference to article I, section 7

was to support the federal rule, not to limit its scope.<sup>9</sup>

Our Declaration of Rights protects individuals from majority oppression. As such, these rights are not subject to majority rule or majority interests. Nonetheless, were I to mistakenly walk the path the lead opinion sets before me, none of the State's interests is compelling nor is the DOC policy narrowly tailored.

#### The DOC Fails to Present a Compelling Interest

According to the lead opinion the DOC presents five compelling interests:

(1) maintenance of prison security and administration, (2) preserving life, (3) protecting third parties, (4) preventing suicide, and (5) maintaining the ethical

9 Grant, 109 Wn.2d at 553 n.1 (citing In re Welfare of Colyer, 99 Wn.2d 114, 120, 660 P.2d 738 (1983), which states, "[s]upport for this holding [that an adult suffering from an incurable illness has a constitutional right to refuse lifesaving treatment] is also found in our state constitution. Const. art. 1, § 7," overruled in part by In re Guardianship of Hamlin, 102 Wn.2d 810, 689 P.2d 1372 (1984)).

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integrity of the medical profession. Lead op. at 17-18. After hasty analysis the lead opinion finds four of these interests outweigh Mr. McNabb's right to bodily integrity. It is unclear whether any one of these interests is sufficient to outweigh McNabb's right to bodily integrity because the lead opinion does not provide such clarity.

Another reason the lead opinion lacks clarity as to whether an inmate's right to refuse food might ever outweigh the State's interests is the lead opinion's balancing of interests. Such "balancing" allows courts and parties alike great discretion in determining (or arguing) when the rights/interests of one party outweigh the rights/interests of another, resulting in malleable and unpredictable law. See Crawford v. Washington, 541 U.S. 36, 68-69, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) ("By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable . . ."). Moreover, the lead opinion gives deference to the government at the expense of the individual notwithstanding our duty of impartiality between parties. See Code of Judicial Conduct, Canon 3(A)(5).

The lead opinion affords DOC substantial deference by assuming the existence of DOC's first compelling interest (prison security and administration) without the benefit of a single affidavit or example of a deleterious effect on prison staff or population, making the DOC's burden to demonstrate a

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compelling interest significantly lighter. Lead op. at 18 (citing Turner v. Safley, 482 U.S. 78, 85, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987)). However, the greater the intrusion into a protected interest, the greater the necessity for some factual basis to support the prison official's assertions. See Turner, 482 U.S. at 97-99

(holding the penological interest in completely restricting marriage was unsupported by the record); see also Joel K. Greenberg, Note, *Hunger Striking Prisoners: The Constitutionality of Force-Feeding*, 51 *Fordham L. Rev.* 747, 766 (1983).

Here, absent any supporting evidence from DOC the lead opinion concludes, "[i]t is logical to infer that an inmate's slow death by starvation would have an unpredictable and deleterious effect on both prison staff and the prison population." Lead op. at 20. This speculative inference alone convinces the lead opinion a compelling interest exists sufficient to justify the most coercive intrusion into Mr. McNabb's body.

How is making the prison staff's job more palatable sufficiently compelling to justify intruding into Mr. McNabb's bodily integrity? How does respecting Mr. McNabb's bodily integrity result in prisoner unrest? Is not prisoner unrest more likely when prisoners learn they have lost the right to bodily integrity? Moreover, assuming death is the result of Mr. McNabb's fast, is it not equally, if not more, logical to infer inmates will follow his lead when they learn

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they are protected from that result? See Graham Zellick, *The Forcible Feeding of Prisoners: An Examination of the Legality of Enforced Therapy*, 1976 *Pub. L.* 153, 175.

Mr. McNabb is not fasting to manipulate or seek favors from prison officials.<sup>10</sup> He has signed a health care directive pursuant to RCW 70.122.030, indicating his intent (should he be diagnosed to be in terminal or permanent unconscious condition) to exercise his right to refuse medical or surgical treatment and to accept the consequences of such refusal.

I am declining to eat for personal reasons. I am competent to make this choice. I have not been declared incompetent. . . . I am not using my fast as a means to seek or ask for any special privileges or favors or otherwise attempt to manipulate the system. My only wish is for my personal decision not to eat to be respected and to be left in peace for my fast to take its course. . . . I have no dependents or anyone else relying on me for support. My decision not to eat affects only me.

Decl. of Charles B. McNabb.

McNabb's refusal to eat is a private and personal choice. Because DOC

<sup>10</sup> By contrast, in *Zant v. Prevatte*, 248 Ga. 832, 833, 286 S.E.2d 715 (1982), the purpose of the inmate's hunger strike was to get the attention of the prison officials and receive protective custody. The Georgia Supreme Court held the inmate "by virtue of his right of privacy, can refuse to allow intrusions on his person, even though calculated to preserve his life." *Id.* at 834. The court continued, "[t]he State has not shown such a compelling interest in preserving Prevatte's life, as would override his right to refuse medical treatment." *Id.*

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presented no evidence (only mere conjecture) that Mr. McNabb's refusal of food and drink will disrupt prison administration, the DOC unnecessarily violates McNabb's right to bodily integrity.

The lead opinion declares the DOC's second interest (preservation of life) exists because "the State has a strong interest in the preservation of life where medical treatment will in fact save the patient's life." Lead op. at 20 (citing *In re Welfare of Colyer*, 99 Wn.2d 114, 123, 660 P.2d 738 (1983), overruled in part by *In re Guardianship of Hamlin*, 102 Wn.2d 810, 689 P.2d 1372 (1984)). Yet "the value of life is desecrated not by a decision to refuse medical treatment but 'by the failure to allow a competent human being the right of choice.'" *In re Guardianship of Farrell*, 108 N.J. 335, 349, 529 A.2d 404, 411 (1987) (quoting *In re Conroy*, 98 N.J. 321, 343, 350, 486 A.2d 1209 (1985)).

The lead opinion perceives a distinction in our case law between "removing life-sustaining treatment [and] refusing life-saving treatment." Lead op. at 21. According to the lead opinion "McNabb does not suffer from a terminal condition and DOC's application of its force-feeding policy does not merely temporarily relieve a chronic condition but restores McNabb to a naturally healthy condition." *Id.*

The distinction between life-sustaining treatment and life-saving treatment is irrelevant.<sup>11</sup> We all suffer from this terminal condition requiring food to

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sustain our life, some of us more than others. Like the respirator artificially inflating the lungs until the next breath, force-feeding artificially fills the stomach until the next feeding. The only distinction between the two is the time interval involved before the next artificial intervention is necessary to sustain life. Force-feeding does not cure a need to eat any more than forced breath cures the need to breathe. Both conditions are chronic and incurable.

Furthermore, force-feeding an inmate in the interest of his or her purported "welfare" is disingenuous at best. See *In re Caulk*, 125 N.H. 226, 236, 480 A.2d 93 (1984) (Douglas, J., dissenting) ("The majority's reliance on the fact that Mr. Caulk is not facing death from a terminal illness ignores the non-physical quality of life and reduces the quality of life to mere physical well-being.").

Force-feeding will not rehabilitate Mr. McNabb or contribute to his welfare; by contrast, force-feeding is degrading and cruel. As this court noted in *Grant*, 109 Wn.2d at 560, "advanced methods of providing nutrition and

<sup>11</sup> The lead opinion's distinction is also not borne out in the case law. Compare *Application of President & Dirs. of Georgetown Coll., Inc.*, 118 U.S. App. D.C. 80, 331 F.2d 1000 (1964) (ordering blood transfusion to be given to Jehovah's Witness to save her life), with *In re Osborne*, 294 A.2d 372 (D.C. 1972) (upholding Jehovah's Witness's refusal of a life-saving blood transfusion). The religious motivation behind these examples is irrelevant to the bright-line life-sustaining/life-saving treatment distinction perceived by the lead opinion.

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hydration, while often safe, are not without risks. These are sophisticated

medical procedures whose benefits must be weighed against their burdens."

Patients requiring nutrition and hydration are "subjected to highly invasive and intrusive procedures." Id.

This court has previously referred to the State's interest in protecting "the sanctity"<sup>12</sup> of life. Colyer, 99 Wn.2d at 122. If the State truly seeks to preserve the "sanctity" of inmates' lives, force-feeding prisoners does precisely the opposite by dehumanizing them. Respecting a person's bodily integrity recognizes the sanctity of life, namely a person's life is his alone, it is not owned by the State. To say otherwise justifies slavery. One's bodily integrity -- the ultimate privacy protected under article I, section 7 -- is simply beyond the power of the State absent that "authority of law" provided by a warrant, obviously absent here.

Analyzing the State's third interest (protecting third parties) the lead opinion admits, "the State lacks a compelling interest on this count given that [McNabb] has no dependents." Lead op. at 21.

The lead opinion declares the State's fourth interest (the prevention of suicide) exists because McNabb set in motion and intended to cause his death.

<sup>12</sup> "[S]anctity" is defined as "holiness of life and character" the "quality or state of being holy or sacred." Webster's Third New International Dictionary 2009 (2002).

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Lead op. at 22. The lead opinion distinguishes a terminally ill patient refusing life-saving treatment from McNabb, id., since under our case law persons in advanced stages of terminal and incurable illnesses are entitled to withdraw or withhold medical treatment. See Grant, 109 Wn.2d at 559. Our prior decisions suggest the State's interest to prevent suicide is implicated where a patient's death is "set in motion [or] intended by the patient." Id. at 556-57; Colyer, 99 Wn.2d at 123.

McNabb correctly points out the bizarre ramifications of the State's interest in preventing suicide being implicated when death is set in motion or intended by the patient. A literal interpretation of Grant and Colyer suggests an individual whose death is "set in motion" because of his own actions loses the right to refuse life-sustaining treatment. By extension, does this mean the State could force a woman with a life-threatening pregnancy to submit to an abortion? Or could the State force an inmate who contracted lung cancer after years of smoking to undergo chemotherapy? Technically, both of these "conditions" were "set in motion" by the individual. And yet, forcing an abortion or cancer treatment upon an inmate is unthinkable to most. Likewise, since the State's interest in preventing suicide is based on theological doctrine, its constitutional validity is questionable.<sup>13</sup>

<sup>13</sup> Our culture's prohibition of suicide is founded in St. Augustine's City of God and the early church's concern of Christian extremists seeking suicide as a means to

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Properly stated, the State's prevention of suicide interest is concerned with preventing irrational acts of self-destruction, the impulsive act of irreparable consequence. See Superintendent of Belchertown State Sch. v. Saikewicz, 373 Mass. 728, 744 n.11, 370 N.E.2d 417 (1977). Fasting, however, is not an impulsive act of irreparable consequence but a daily commitment and affirmation of belief.<sup>14</sup> As Judge Benjamin Cardozo eloquently stated, "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body." Schloendorff v. Soc'y of N.Y. Hosp., 211 N.Y. 125, 129, 105 N.E. 92 (1914). This includes fasting for whatever reason.

More importantly, however, the lead opinion never explains why Mr. McNabb's presumed motivation for fasting is relevant to the recognition of his constitutional right. Do we condition the exercise of religion on proper motivation? How about speech? Do we say to a woman, "you may get an achieve life everlasting. G. Steven Neeley, *The Constitutional Right to Suicide: A Legal & Philosophical Examination* 48, 52 (Peter Lang Publ'g 1996); see also Glanville Williams, *The Sanctity of Life and the Criminal Law* 255 (1957).

<sup>14</sup> Christ was tempted each day of his 40 day fast in the wilderness. Luke 4:1-13. For a description of the physical effects of fasting see Steven C. Bennett, Note, *The Privacy and Procedural Due Process Rights of Hunger Striking Prisoners*, 58 N.Y.U. L. Rev. 1157, 1158 n.3 (1983); Stephanie Clavan Powell, Comment, *Constitutional Law -- Forced Feeding of a Prisoner on a Hunger Strike: A Violation of an Inmate's Right to Privacy*, 61 N.C. L. Rev. 714, 723 n.70 (1983).

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abortion but only if we agree with your motives" The lead opinion designs "a brave new world,"<sup>15</sup> where right thinkers have rights and wrong thinkers are subservient to the will of the masses.

Why Mr. McNabb wants to live free from governmental intrusion into his body is irrelevant to whether he has the right to live free from governmental intrusion into his body. Mr. McNabb is not incompetent, and we should recognize his right to refuse force-feeding.

Finally, the lead opinion concludes its fifth state interest (the maintenance of medical ethics) weighs in favor of the government. Lead op. at 23. To this I simply point to the World Medical Association, of which the American Medical Association is a member, and its policy prohibiting the force-feeding of hunger striking prisoners. World Med. Ass'n, World Medical Association Declaration on Hunger Strikers princ. 3 (1992) (revised by the World Med Ass'n Gen. Assembly, Oct. 2006), available at <http://www.wma.net/e/policy/h31.htm> (last visited Mar. 5, 2008) ("Forced feeding contrary to an informed and voluntary refusal is unjustifiable. Artificial feeding with the hunger striker's explicit or implied consent is ethically acceptable."); see also Physicians for Human Rights, *Forced Feeding of Gitmo Detainees Violates International Medical Code of* 15 William Shakespeare, *The Tempest* act 5, sc. 1.

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Ethics (Sept. 16, 2005), available at <http://physiciansforhumanrights.org/library/news-2005-09-16.html> (last visited Mar. 5, 2008).

DOC Policy Is Not Narrowly Tailored

Once the State's compelling interests have been identified, the federal doctrine relied upon by the lead opinion requires the State to prove its actions are narrowly tailored to achieve that compelling interest. Lead op. at 24.

As discussed above, the record does not contain a single affidavit or example of a deleterious effect on prison staff or population. Nor does the record indicate Mr. McNabb was examined in order to determine the seriousness of his condition. Nor does the record indicate Mr. McNabb's suicidal intentions. Given the paucity of the record it is impossible to determine whether the DOC's policy is narrowly tailored to achieve a single compelling interest. More critically, however, the DOC policy permits force-feeding of prisoners in the absence of any compelling interests.

The lead opinion adequately explains the DOC policy, lead op. at 19 n.11, but fails to recognize the breadth of the policy's terms; the DOC policy is not written in terms of any compelling interest. Under the DOC policy, once a prisoner has not eaten for three days, for whatever reason, the DOC may label the prisoner as "at risk" and begin force-feeding. How is this narrowly tailored to maintain prison security or to respect life or to prevent suicide? It seems to me

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the only purpose of this policy is to exercise control over the only thing remaining to Mr. McNabb, his body.

"[T]he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right."

John Stuart Mill, *On Liberty*, in 43 Great Books of the Western World 271 (Robert Maynard Hutchins ed., 1952), quoted in *Caulk*, 125 N.H. at 236 (Douglas, J., dissenting). Nor is the lead opinion convincing in its reliance on *In re Detention of Schuoler*, 106 Wn.2d 500, 723 P.2d 1103 (1986), to show narrow tailoring where treatment was "'necessary and effective.'" Lead op. at 24 (quoting *Schuoler*, 106 Wn.2d at 509). First, *Schuoler* addressed, on federal constitutional grounds, whether an involuntarily committed person, who by definition suffers from a disabling mental disorder, may refuse electroconvulsive therapy. *Schuoler*, 106 Wn.2d at 508 n.4. Mr. McNabb suffers from no mental disorder nor does he bring his case under federal constitutional grounds. More critically, however, the lead opinion "assume[s] DOC followed its own

procedures" and concludes, "[u]nder these conditions, DOC's application of the force-feeding policy was necessary and effective." Lead op. at 24.

Conclusion

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It is true that "many rights and privileges are subject to limitation in penal institutions because of paramount institutional goals and policies." *State v. Hartzog*, 96 Wn.2d 383, 391, 635 P.2d 694 (1981) (citing *Bell v. Wolfish*, 441 U.S. 520, 545-46, 555, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979); *Wolff v. McDonnell*, 418 U.S. 539, 555-56, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); *Rhodes v. Chapman*, 452 U.S. 337, 101 S. Ct. 2392, 69 L. Ed. 2d 59 (1981)). Yet this is no excuse for the lead opinion's disregard of our state constitution's clear textual mandate nor the lead opinion's hasty acceptance of DOC's unsupported justifications of its force-feeding policy. Article I, section 7 guarantees a right to privacy, with no penal exception, and "[t]here is no iron curtain drawn between the Constitution and the prisons of this country." *Hartzog*, 96 Wn.2d at 391 (quoting *Wolff*, 418 U.S. at 555-56). An essential element of privacy is the ability to define for ourselves the meaning and direction of our life. This ability is never balanced against the public's interest, regardless of how compelling that interest is professed to be. To deprive an individual of this ability is to rob one of his personhood.

Article I, section 7 promises certain private spheres of individual conduct are beyond government reach. This promise embodies the "moral fact that a person belongs to himself and not others nor to society as a whole." *Charles Fried, Correspondence*, 6 Phil. & Pub. Aff. 288-89 (1977), quoted in *Thornburgh*

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*v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 777 n.5, 106 S. Ct. 2169, 90 L. Ed. 2d 779 (1986) (Stevens, J., concurring). Permitting DOC to force-feed Mr. McNabb breaks this promise.

Forced feeding clearly violates Mr. McNabb's article I, section 7 right to bodily integrity. As such it may be accomplished only under "authority of law." No authority is present here and even under an inapplicable strict scrutiny analysis, the DOC has neither identified a compelling interest nor proved its policy is narrowly tailored.

I dissent.

AUTHOR:

Justice Richard B. Sanders

WE CONCUR:

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