

Forced Medication and Feeding And Transgender Housing

COURT'S ANALYSIS

(FORCED MEDICATION)

- Eighth Amendment (Right to medical care)
 - Estelle v. Gamble (1977)
 - Established the government's obligation to provide medical care for those whom it is punishing by incarceration.

Forced Medication

- In 1975, the U.S. Supreme Court ruled in O'Connor v. Donaldson that involuntary hospitalization and/or treatment violates an individual's civil rights.
- Does the Fourth Amendment analysis change for an incarcerated inmate?

REFUSAL OF MEDICAL CARE

- Can prisoners refuse medical treatment?
 - A competent person has a liberty interest under the Due Process Clause in refusing unwarranted medical treatment. Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261 (1990)
- Can the refusal be overridden?
 - A prisoner may be compelled to accept medical treatment when prison officials deem it necessary to carry out valid medical or penological objectives. Lowry v. Honeycutt, 211 Fed.Appx. 709 (10th Cir. 2007)

COURT'S ANALYSIS

(FORCED MEDICATION)

- To determine if the government can force medical care through Prison Regulations. Turner v. Safley (1987). Turner balances prisoner rights with security needs:
 - Is there a legitimate governmental interest in the rule or policy and a rational connection between that rule or policy and the governmental interest?
 - Do prisoners have an alternative way to exercise the right being regulated?
 - What effects would accommodation have on the institution in general?
 - Can the prisoner provide a less expensive or burdensome alternative to the rule or policy?

WHEN CAN YOU FORCE MEDICATE?

- Applying Turner v. Safely:
 - Identify the prison regulation:
 - Forced medications
 - Forced medical treatment
 - Identify the reason for the regulation:
 - Review less intrusive alternatives for the inmate and institution
 - Impact on the institution



COUNTY'S EXPERIENCE WITH FORCED MEDICATION

- Factual summary
- No policy in place.
- Issue raised as a motion within the criminal case the defendant was incarcerated on.
- Court is reluctant to force medicate; have options for the court.

Internal Practices And Court Action

regarding forced antipsychotic medication

- ***Washington v. Harper***, 110 S. Ct 1028 (1990)

Mentally ill inmate possessed a liberty interest in avoiding unwanted administration of antipsychotic drugs under the due process clause of the Fourteenth Amendment.

- Court noted that forced treatment would be permissible if the inmate were a danger to himself.

- *Riggins v. Nevada*, 504 U.S. 127 (1992)
- Sets minimum standards for forced medication of a pretrial detainee. Because “[t]he forcible injection of medication into a nonconsenting person's body... represents a substantial interference with the person's liberty,” *Id.* at 134, quoting *Washington v. Harper*, 494 U.S. 210, 229 (1990), forcing anti-psychotic medication on an accused, “is impermissible absent a finding of overriding justification and a determination of medical appropriateness,” *Id.* at 135.



The Supreme Court indicated an overriding justification is shown when:

- If it is demonstrated that the treatment “was medically appropriate and, considering less intrusive alternatives, essential for the sake of [the accused's] own safety or the safety of others,”
- When a court permits forced medication it needs to make “[a] determination of the need for this course or any findings about reasonable alternatives,” or “a finding that safety considerations or other compelling concerns outweighed [the accused's] interest in freedom from unwanted antipsychotic drugs.”



DEVELOP POLICY

- Federal Bureau Prisons Regulation §549.45
 - Sets forth the requirements for involuntary psychiatric care or treatment
- This policy follows the legal requirements under Harper and Riggins.

- HUNGER STRIKES

Guantánamo hunger x msn x Guantánamo hunger x

www.theguardian.com/world/2014/feb/11/guantanamo-hunger-strikers-force-feeding-ruling/print

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Guantánamo hunger strikers able to challenge force-feeding, court rules

Judges decline to end practice at detention camp but detainees can challenge the conditions of their confinement

Ed Pilkington in New York

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The decision overturns two earlier rulings by separate district judges. Photograph: Paul J Richards/AFP

Hunger-striking detainees in Guantánamo Bay will be able to challenge in federal court the force-feeding to which many are being subjected, a Washington appeals court ruled on Tuesday, though the judges declined to put an immediate end to the practice.

In a split judgment from the US court of appeals for the DC circuit that deals with Guantánamo, the judges ruled by 2-1 to allow detainees to challenge the conditions of their confinement, specifically force-feeding, in habeas corpus petitions to the federal courts. The decision overturns two earlier rulings by separate district judges who had suggested the military commissions in Guantánamo effectively stripped the federal courts of jurisdiction over detainees and their custodial conditions.

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Hunger Strikes

- Most Courts view a decision to engage in a hunger strike as a fundamental right.
- Requires a **compelling state interest** to override the inmates decision to express their first amendment right.
- Generally courts view the following as compelling state interests:
 - The preservation of life;
 - The protection of innocent third parties
 - The prevention of suicide
 - The maintenance of ethical integrity of the medical profession
 - The preservation of internal order and discipline in the facility

When, Who And How

- Under state law:
 - Permitting hunger strike without medical intervention
 - Singleton v. Costello, 665 So.2d 1099 (Florida 1996)- Balanced privacy interest against state's right to preserve life; held state's interest did not overcome privacy interest.
 - Zant v. Prevatte, 286 S.E. 2d 715 (1982, Georgia) Competent inmate right to privacy afforded him the right to refuse intrusions on his person even to preserve life.
 - Denying inmate's right to participate in hunger strike
 - In re Calk, 480 A.2d 93 (1984, New Hampshire)- Court acknowledged inmates constitutional right to privacy but found the state had a compelling state interest in maintaining institutional security and preventing suicide. Also see; Dept. of Public Welfare v. Kallinger, 580 A.2d 887 (1990, Pennsylvania) and In re Sanchez, 577 F. Supp. 7 (S.D.N.Y. 1983).

FORCED FEEDING




UTAH LAW

INVOLUNTARY FEEDING AND HYDRATION

- Utah state law and history
 - UCA §77-16b-102
- Permits a corrections facility to petition the court for an order permitting involuntary feeding or hydration of a prisoner who is likely to suffer severe harm or death by refusing nutrition.
- Applies **Harper** and **Riggins** analysis statutorily to determine the state compelling interest and the least restrictive alternative.

BEING PREPARED TO RESPOND

- Creating a log regarding food or water refusal.
- People who are in good health at the beginning of a hunger strike "are usually at little risk of dying from malnutrition for at least six to eight weeks," the guidelines state. But people who are ill can die from malnutrition in as little as three weeks.
- And if a person also refuses all fluids, including water, "deterioration is very rapid, with death quite possible within seven to 14 days, especially during hotter periods of the year."
- With an inmate in poor health refusing food and hydration, you may have only a few days (2-3) to recognize the severity of the problem and begin to react. The court process will likely take a minimum of 3-4 days.


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- Review and prepare a sample petition for forced feeding or hydration.
 - Understand the communication and documentation process required.
 - Calculate the time lost filing a petition and receiving a court order into your response period.

Transgender Housing Issues

A Transgender Woman Says She Was Locked In A Cell With Her Rapist


In a lawsuit, Zahara Green says she was wrongly placed in a men's prison — and when she asked for protective custody, found herself sharing a cell with the inmate who had been abusing her. Original reporting from BuzzFeed News' Jessica Testa.

posted on Sept. 26, 2014, at 9:32 a.m.

 **Jessica Testa**
BuzzFeed Staff

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WHAT DOES IT MEAN TO BE TRANSGENDERED?

- Transgender is a term for used people whose **gender identity, expression or behavior** is different from those typically associated with their assigned sex at birth.
- Transgender is a broad term and is good for non-transgender people to use. “Trans” is shorthand for “transgender.”
- **LGBTI** refers to lesbian, gay, bisexual, transgender and intersex persons as a group.

WHAT IS THE LEGAL STANDARD

- Case law
 - Prisoners have no constitutional right to a particular classification status. See *Moody v. Daggett*, 429 U.S. 78, 88 n. 9, 97 S.Ct. 274, 50 L.Ed.2d 236 (1976).
 - Courts are requiring exhaustion by inmates filing grievances relating to their classification. See *Sine v. Pandya*, 2013 WL 3729695 (W.D. Mich.)
 - Courts are currently split on whether hormone therapy must be provided/continued or whether additional gender assignment treatments are required using an Eight Amendment analysis or deliberate indifference standard.

How Does PREA Impact Your Policies

- **PRISON RAPE ELIMINATION ACT (PREA)**
- The Prison Rape Elimination Act (PREA), 42 USC § 147 was passed into law on September 4, 2003. It was created to eliminate sexual abuse in confinement. The regulations implementing PREA can be found at Part 115 of Title 28 of the Code of Federal Regulations.

PREA REQUIREMENTS

- Requires agencies to train employees in effective and professional communication with LGBTI and gender-nonconforming inmates inmate,
- Requires the screening process to consider whether the inmate is, or is perceived to be, LGBTI or gender nonconforming.
- Prohibits agencies from placing LGBTI inmates in dedicated facilities, units, or wings in adult prisons, jails, or community confinement facilities solely on the basis of such identification or status, unless such placement is in a dedicated facility, unit, or wing established in connection with a consent decree, legal settlement, or legal judgment for the purpose of protecting such inmates.

PREA REQUIREMENTS

- Imposes a complete ban on searching or physically examining a transgender or intersex inmate/detainee/resident for the sole purpose of determining the person's genital status.
- Requires agencies to train security staff in conducting professional and respectful cross-gender pat-down searches and searches of transgender and intersex individuals.
- In the lockup, inmates should not be specifically referenced by their LGBTI identity or gender-nonconforming appearance.
- Requires training on how to communicate effectively with all detainees, and
- Requires staff to ask detainees about their own perceptions of vulnerability and to consider the physical build and appearance of detainees.

HOW DO YOU DETERMINE WHERE TO HOUSE A TRANSGENDERED INMATE?

- Typically transgendered inmates are being temporarily classified in administrative segregation until a comprehensive review of their status can be performed.
- Segregation should be a short term decision until further review. Final classification should involve considerations of the inmate's safety needs, their safety concerns and a further understanding of their transgendered status, including any past medical procedures towards sex alteration, mental health concerns or behavior issues.
- A review should also take into consideration whether the inmate could pose a threat to others.
- If administrative segregation is maintained, the institution should document the basis for continued segregation. If warranted, regular reviews can be made.

ONCE HOUSED ARE YOUR CONCERNS OVER?

- Additional issues facing the LGBTI group include:
 - Medical care
 - *South v. Gomez*, 211 F.2d 1275, 2000 WL 222611 (9th Cir. 2000) (finding 8th Amendment violation where a prisoner's course of hormone treatment was abruptly cut off after being transferred to a new prison). and *Kosilek v. Nelson*, 2000 WL 1346898 (D. Mass. 2000) (assuming without deciding that transsexualism is a serious medical need, but finding insufficient evidence of deliberate indifference)
 - Clothing
 - Gender specific rights
 - Interaction issues

Unanswered Questions

- Clear policies will help prevent liability
- The legal obligations and rights of the LGBTI community are not clearly established. Most mistakes will be covered by qualified immunity if you are consistent and following clearly established policy.
- The legal trend appears to be continuation of hormone treatments; courts are reluctant to order surgical intervention.