The Linacre Quarterly

Volume 53 | Number 3 Article 3

August 1986

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Elizabeth Bouvia is a 28-year-old quadriplegic who suffers from cerebral palsy. In 1982, she petitioned a court to order Riverside Hospital near Los Angeles to provide her with hygienic care and painkillers so that she could starve herself to death, but this petition was rejected by the court.[1]

Earlier this year, Mrs. Bouvia returned to court because she had a nasogastric feeding tube inserted by physicians at High Desert Hospital in Lancaster, California.[2] The hospital and her physicians did this because her weight had fallen to 70 pounds or less, and they feared she was trying to starve herself to death. Mrs. Bouvia, with assistance of attorneys of the American Civil Liberties Union, petitioned to have this tube removed because she felt that it was intrusive, unnecessary and burdensome.[3] She claimed that she was not intending to starve herself to death, but that she was trying to feed herself orally.[4] This form of feeding, however, was complicated by the fact that she was unable to retain orally administered food on many occasions.[5]

High Desert Hospital resisted her petition and argued in court against removing the feeding tube on the grounds that Mrs. Bouvia's real intention was to kill herself by starvation, that her death would result from its withdrawal, and that physicians had a duty to provide what was just normal and minimal care.[6] The California Second District Appellate Court rejected the hospital's argument and ordered the feeding tube removed. And it seems from the court's opinion that the hospital also was prohibited from transferring her to another institution as long as she wished to remain there, just because her treatment decisions were contrary to hospital policy.[7]

We should recall that it was this very same three-judge panel which decided the *Barber v. California* case and brought about the cycle of withdrawal of feeding cases.[8] It now appears that this panel has laid the

legal foundations for physicians to give patients lethal injections upon request, for as we shall see, it held that health care professionals have a duty to help suffering patients find a quick and painless death if they desire it. It also appears that this decision will bring us a cycle of cases dealing with the provision of lethal injections upon request by health care professionals to chronically ill, handicapped and terminally ill patients.

In what follows, I would like to review the court's opinion and then comment on the case. In closing, suggestions for measures that could be taken to prevent the legalization of mercy killing by omission of morally required care and treatment or by positive action will be made.

I

The Holdings of the Court.

The court upheld Bouvia's right to refuse even life-sustaining feeding, and it even required the hospital to provide a substantial part of her care, such as alleviating her pain and suffering. To deny her the treatments she requested would violate her constitutional right to privacy, according to this court:

> Here Elizabeth Bouvia's decision to forego medical treatment or life-support through a mechanical means belongs to her. It is not a medical decision for her physicians to make. Neither is it a legal question whose soundness is to be resolved by lawyers or judges. It is not a conditional right subject to approval by ethics committees or courts of law. It is a moral and philosophical decision that, being a competent adult, is hers alone.

The court noted that Bouvia was unable to enter a private hospital because she was without means, and the hospital could not deny her relief from pain and suffering merely because she was refusing some treatments they wished to provide:

> We do not doubt the sincerity of [the hospital and medical personnel's] moral and ethical beliefs, or their sincere belief in the position they have taken in this case. However, if the right of the patient to self-determination as to his own medical treatment is to have any meaning at all, it must be paramount to the interests of the patient's hospital and doctors . . . The right of a competent adult to refuse medical treatment is a constitutionally guaranteed right which must not be abridged.[10]

The appellate court grounded its order to remove the feeding tube on the right to refuse medical treatments, and it construed this right very broadly:

> The right to refuse medical treatment is basic and fundamental. It is recognized as a part of the right of privacy protected by both the state and federal constitutions . . . Its exercise requires no one's approval. It is not merely one vote subject to being overridden by medical opinion.[11]

In holding that this right to refuse even food and water is elemental, the court clearly meant that this right was not to be abridged, restricted or limited in any way. The primary authorities cited for this viewpoint were the cases of *Barber v. Superior Court* and *Bartling v. Superior Court.*[12]

The court argued that the right to refuse treatments was not to be restricted, and even certain death resulting from a refusal of treatment should not be allowed to impede its exercise:

> All decisions permitting cessation of medical treatment or life-support procedures to some degree hastened the arrival of death. In part, at least, this was permitted because the quality of life during the time remaining in those cases has been terribly diminished to the point of hopelessness, uselessness, unenjoyability and frustration. She, as the patient, lying helplessly in bed, unable to care for herself, may consider her existence meaningless.[13]

The court argued in this manner, even though a number of other courts have differed with this judgment. In *Brophy v. Massachusetts*, for example, Judge David Kopelman argued that a purported declaration of a desire to refuse treatments should not be construed to mean that feeding should be withheld.[14] And *In the Matter of Claire Conroy*, the New Jersey Supreme Court argued that feeding could only be removed from a terminally ill incompetent patient, but not from the competent and nonterminal.[15]

The appellate court claimed that Bouvia had a right to live out her life with dignity and peace.[16] It suggested that her decision not to accept tube feeding was not a decision to commit suicide, but one to let nature take its course.[17] It suggested that she had wanted to commit suicide, but she failed to carry out that desire when she had the opportunity. Rather, it claimed that Bouvia was merely resigning herself to an early death, and was not trying to kill herself.[18] But this is highly doubtful, as her weight loss seemed to be due more to her refusal to eat than to difficulties she has in retaining foods. If this is true, then her rejection of the feeding tube would be suicidal, just as any refusal of oral feeding by her would be suicidal as well. The court should have adopted a more protective course and held that feeding had to be given because her true intentions were unclear.

The court gave consideration to the possibility that Bouvia had an intention to commit suicide, but this motive was not to be permitted to inhibit the exercise of her right to refuse medical treatments.[19] The court simply dismissed assertions that the right to refuse medical treatments should be limited to those who are terminally ill:

> Moreover, as the *Bartling* decision holds, there is no practical or logical reason to limit the exercise of this right to "terminal" patients. The right to refuse treatment does not need the sanction or approval by any legislative act, directing how and when it shall be exercised.[20]

The court pointed out that there was no foundation for such a restriction, and it asserted that previous cases had placed no restrictions on the right of a patient to refuse medical treatments.[21] The appellate court cited statements of the American Hospital Association, the Los Angeles County Medical Society and the President's Commission, among other sources, to justify its opinion, even though some sources such as the Commission did not explicitly consider whether the refusal of treatments could be permitted if suicide were to be a result of a treatment refusal.[22]

The court did mention the recently announced opinion of the Judicial Council which held that feeding could only be removed from a comatose patient, and not from a competent patient like Bouvia. It also cited the opinion of the Judicial Council of the American Medical Association which declared that the physician was to sustain life and relieve suffering.[23] When neither of these are possible, then the choice of the family or legal representative of the incompetent person was to prevail. What this means in practice is that authorization from one of these to bring death by act or omission should be respected, as the physician is obviously not able to sustain life or relieve pain in those circumstances.

In a rather casual manner, the court rejected numerous arguments put forth by the hospital for providing Bouvia with assisted feeding.[24] The court rejected the view that there were limits to the right to refuse medical treatment because:

> ... [a] competent adult patient has the legal right to refuse medical treatment ... The patient's interests and desires are the key ingredients of the decision making process.[25]

It rejected the argument that Bouvia had been admitted to a public facility and was therefore involving the state in her suicidal action which prohibited the hospital from cooperating in the suicidal act of rejecting life-sustaining medically providable food and fluids.[26] It rejected the view that she was not comatose or terminal and was truly trying to starve herself to death. It rejected the argument that she was asking for medical treatment which prohibited her from picking and choosing those treatments she wanted.[27]

The court also rejected arguments that there were state interests in preserving life, preventing suicide, protecting innocent third parties, and maintaining the ethical standards of the medical profession that could limit her right to refuse medical treatments.[28] To justify rejecting these claims, it relied on the *Bartling* and *Barber* cases, which was a rather superficial way of dealing with the serious problems involved in this case.

The court acknowledged that Elizabeth Bouvia could live for 15 or 20 years if feeding was continued.[29] But it discounted the importance of this probability by arguing that the length of time a patient was expected to live was irrelevant to the right to refuse care such as the nasogastric feeding tube:

> It is incongruous, if not monstrous, for medical practitioners to assert their right to preserve a life that someone else must live, or more accurately, endure, for "15 to 20 years." We cannot conceive it to be the policy of this State to inflict such an ordeal upon anyone.[30]

The court agreed that the withdrawal of medical treatments usually hastened death, but it argued that the poor quality of Bouvia's life justified her decision to reject the feeding tube:

> In Elizabeth Bouvia's view, the quality of her life has been diminished to the point of hopelessness, uselessness, unenjoyability and frustration ... Does it matter if it

be 15 to 20 years, 15 to 20 months, or 15 to 20 days if such a life has been physically destroyed and its quality, dignity and purpose gone?[31]

It explicitly admitted that her decision to refuse the feeding tube was made out of a motive to bring death, but it denied that such a motive could be used to limit the right to refuse treatments.

The appellate panel decided that it was not necessary to define or dwell at length on what constituted suicide. It noted that aiding suicide was a crime, but it asserted that all cases of assisted suicide involved positive actions taken by individuals and these were different from the exercising of a constitutional right to refuse a form of care or treatment.[32] By pointing this out, the court seemed to be asserting that the withdrawing of food and fluids simply could not be considered as assisted suicide under the law because it was a medical decision and not a positive act of killing. It noted that this was the teaching of the *Barber* and *Bartling* courts, as if these were the final authorities.

In many places, the appellate panel's decision appeared to be little more than pro-euthanasia propaganda. Judge Lynn Compton wrote a separate concurring opinion which was an outright endorsement of mercy killing and assisted suicide:

> Elizabeth apparently has made a conscious and informed choice that she prefers death to continued existence in her helpless and, to her, intolerable condition. I believe she has an absolute right to effectuate that decision. The state and the medical profession instead of frustrating her desire, should be attempting to relieve her suffering by permitting and in fact assisting her to die with ease and dignity. The fact that she is forced to suffer the ordeal of self-starvation to achieve her objective is in itself inhumane.
>
> The right to die is an integral part of our right to control our own destinies so long as the rights of others are not affected. That right should, in my opinion, include the ability to enlist assistance from others, including the medical profession in making death as painless and quick as possible.
>
> That ability should not be hampered by the state's threat to impose legal sanctions on those who might be disposed to lend assistance.
>
> The medical profession, freed of the threat of governmental or legal reprisal, would, I am sure, have no difficulty in accommodating an individual in Elizabeth's situation.[33]

He concluded his opinion with the assertion that "[I]f there is ever a time when we ought to be able to get the 'government off our backs' it is when we face death — either by choice or otherwise."[34]

II

Analysis of the Court's Holdings

There are distressing elements in this decision. First, the Bouvia decision has apparently denied the hospital and staff the right to be free from participation in the suicides of patients admitted to facilities where they serve. In this respect, the Bouvia court has gone far beyond what even the courts would permit in abortion cases, for the U.S. Supreme Court did not

require that individuals participate in abortions against their consciences. If the Bouvia decision is allowed to stand, it would mean that health care professionals in public institutions could be released from their positions for refusing to participate in what they understand to be suicides. The ultimate implication of this decision is that public hospitals may, in fact, become state supported euthanasia centers.

Second, the court seemed to believe that there was no duty incumbent upon the state to take reasonable measures to prevent what appeared to be suicide. The court here explicitly granted Bouvia the right to commit suicide by refusing to be fed. This court has apparently renounced any obligations to prevent the seriously ill, handicapped or terminally ill from committing suicide. The appellate panel narrowly focused on the right to refuse medical treatments, and it did not give any consideration to the duty of health care professionals to take reasonable measures to prevent what they consider to be suicidal actions. The court has also ignored much of living will legislation which has excluded nutrition and fluids from the class of electable medical treatments.

Third, it is clear that the court has endorsed the "pure contentless patient autonomy" model of the physician-patient relationship. This model holds that the physician is to abide by patient wishes irrespective of their content.[35] This model is very detrimental to health care professionals because it forces them to violate what they perceive to be their professional obligations and duties. This decision-making model is an overreaction to the "Golden Age" of medicine where the patient had few rights to reject a decision made about his or her care by the physician. Rather than endorsing this pure contentless patient autonomy model, the court should have endorsed the covenant model of the patient-physician relationship which would stress the mutual duties of health care professionals and patients in making medical decisions.[36]

Rev. John R. Connery, S.J., has emphasized the notion that the issue at stake in these cases is the quality of treatment given to medically dependent and vulnerable persons and not the quality of their lives.[37] What he meant by this was that courts have a jurisprudential obligation to promote the highest quality care for medically dependent persons and that this consideration should dominate concerns for quality of life or privacy. The Bouvia court stressed the notion that medical decision-making was to be guided by the patient's wishes and desires, rather than by the canons of medical ethics or of high quality medical care. Rather than encouraging them to do that, according to Connery's views, legal decisions in these cases should have been concerned with mandating the highest quality care and treatment for one such as Bouvia.

Conclusion

The Bouvia decision will prove to be a landmark decision, drawing us closer to fully legalized mercy killing. Judge Compton's concurring opinion has established the legal foundation for lethal injections, and

virtually any state court in the land could invoke his opinion to support a decision to give a lethal injection to a disabled person.

This decision will have a profound impact on medically vulnerable and handicapped persons, for it will encourage them to follow Bouvia's example and order all care and treatment removed or withheld when they grow tired of their condition and suffering. Within the health care professions, it has undermined opposition to mercy killing by ordering public hospitals to participate against its stated policies in what it perceives to be a suicide.

This decision makes it clear that the strongest proponents of mercy killing will not tolerate the imposition of any limitations on those who wish to end their lives. They do not believe that assisted suicide should be denied anyone, and they clearly hold that it should be provided for those who are not terminally ill, but who consider their lives too painful and burdensome to continue.

To counter this movement and to prevent the legalization of suicide and mercy killing, it is necessary to remove life-sustaining medically providable nutrition and fluids from the legal class of medical treatments that can be declined by patients. If suicide by omission of life-sustaining medically providable food and water is to be legally prevented, it will be necessary to legally define these as aspects of normal, routine customary care and basic patient maintenance.[38] It is necessary to do this in order to preserve the right of patients to decline extraordinary and radically burdensome treatments, but to also require them to consent to care and treatments whose provision prevents their committing suicide.

It would also be wise to enact legislation at the state and federal levels which would require the provision of medically providable food and fluids to patients who are not able to take these orally except when their provision would hasten or cause death. This would prohibit refusal of food and water in situations where their rejection would be equivalent to suicide. Finally, it appears that it will soon be necessary to strengthen assisted suicide laws so that it would be considered a felony not only to aid, assist and abet suicide, but also to procure any instrument or potion for another person, knowing that it would be used for suicidal purposes.[39]

With the emergence of the euthanasia movement at this time, we have seen our society come full circle from abortion. With legal endorsement of abortion, it became legal to perform directly lethal omissions or commissions against human life as it was entering the fullness of being. Now, with the rise of the euthanasia movement, many are contending that it should be legal to perform directly lethal omissions or commissions against life in its twilight. With the legalization of abortion, millions were killed simply because they were unborn. But with the dawn of euthanasia, we must fear that just as many will die because they are infirm, handicapped, terminally ill or too costly.

REFERENCS

1. *Bouvia v. County of Riverside*, Riverside County Superior Court, #159780, 1983.
2. *Bouvia v. Superior Court* (1986) Cal.App.2d slip opinion, at 7.
3. *Id.* at 1a.
4. *Id.* at 23.
5. *Id.* at 7.
6. *Id.*
7. *Id.* The majority opinion of the court stated:

Petitioner is without means to go to a private hospital, and apparently, real parties' hospital as a public facility was required to accept her. Having done so it may not deny her relief from pain or suffering merely because she has chosen to exercise her fundamental right to protest what little privacy remains to her. at 26.

8. *Barber v. Superior Court* (1983) 147 Cal.App.3d 1006.
9. *Bouvia v. Superior Court, supra.* Cal.App.2d. at 20.
10. *Id.* at 17.
11. *Id.* at 8-9. "It follows that such a patient has the right to refuse *any* medical treatment, even that which may save or prolong life." *Id.* at 8.
12. *Barber v. Superior Court, supra.* 163 Cal.App.3d. 186, *Bartling v Superior Court,* (1984) 163 Cal.App.3d 186.
13. *Bouvia v. Superior Court, supra.* Cal.App.2d. at 19-20. One must wonder how this young woman can consider her existence meaningless when her case has put virtually an entire nation on edge!
14. Commonwealth of Massachusetts, The Trial Court, The Probate and Family Court Department, Norfolk Division, #85E0009-G1. *Patricia E. Brophy, Guardian of Paul E. Brophy v. New England Sinai Hospital, Inc.* Judgment at 4-5.
15. *In the Matter of Claire C. Conroy,* 190 N.J. Super. 453, 458-60, 464 A.2d 303, 305-6 (N.J.Super. A.D. 1983) at 313-4.
16. *Bouvia v. Superior Court, supra.* Cal.App.2d. at 22. The majority opinion held:

Being competent she has the right to live out the remainder of her natural life in dignity and peace. It is precisely the aim and purpose of the many decisions upholding the withdrawal of life-support systems to accord and provide as large a measure of dignity, respect and comfort as possible to every patient for the remainder of his days, whatever be their number.

17. *Id.*
18. This judgment was disputed by Judge Lynn Compton in his concurring opinion:

I have no doubt that Elizabeth Bouvia wants to die; and if she had the full use of even one hand, could probably find a way to end her life — in a word — commit suicide. In order to seek the assistance which she needs in ending her life by the only means she sees available — starvation — she had to stultify her position before this court by disavowing her desire to end her life in such a fashion and proclaiming that she will eat all that she can physically tolerate. Even the majority opinion here must necessarily "dance" around the issue. *Bouvia v. Superior Court, supra.* Cal.App.2d, concurring opinion, Judge Lynn Compton, at 2.

19. The court held that:

Moreover, the trial court seriously erred by basing its decision on the "motives" behind Elizabeth Bouvia's decision to exercise her rights. If a right exists, it matters not what "motivates" its exercise. We find nothing in the law to suggest the right to refuse medical treatment may be exercised only if the patient's *motives* meet someone else's approval. It certainly is not illegal or immoral to prefer a natural, albeit sooner, death than a drugged life attached to a mechanical device. *Bouvia v. Superior Court, supra.* Cal.App. 2d. at 24.

20. *Id.* at 13-4.

21. The court, however, apparently referred only to the California cases of *Bartling* and *Barber*, but did not mention the landmark *Quinlan* or *Conroy* cases which restricted withdrawal of respiratory or nutritional and hydrational assistance to those who were terminally ill. The *Conroy* decision explicitly limited removal of care and treatment to those who were terminally ill, and it was open to criticism by some for that judgment.

22. *Id.* at 14-17.

23. *Id.* at 16-7.

24. *Id.* at 19-25. The court never did explicitly address the issues of protecting innocent third parties or protecting the professional medical ethics, and it argued that the motive of desiring to commit suicide was not relevant to one's freedom to exercise the right to refuse medical treatment.

25. *Id.* at 9-10. These were quoted from *Barber v. Superior Court, supra.* Cal.App.2d. at 1019-1020.

26. *Bouvia v. Superior Court, supra.* Cal.App.2d. at 25-6.

27. *Id.*

28. *Id.* at 19-25.

29. *Id.* at 19. What the court failed to mention was that Elizabeth was medically stable and that denying her food and fluids would be to introduce a new and independent lethal cause. Ordinarily, both the law and morality consider this to be killing, but the court did not give any consideration to this.

30. *Id.* at 20, 22.

31. *Id.* at 19-20.

32. *Id.* at 24-25.

33. *Id.* at 2-3, Concurring opinion of Judge Lynn Compton.

34. *Id.* at 4.

35. The pure contentless patient model is a "quick fix" to a deeper problem of growing mistrust between health care professionals, patients and our nation's courts. This mistrust was generated in large part by the rise of the abortion movement over the past 20 years where many physicians abandoned life-saving for life-taking. It made many physicians into life-destroyers rather than healers, and this profoundly shook the prestige of health care providers. Patients who had almost a blind confidence in physicians that they would always and everywhere preserve and promote life, came to distrust many of them, believing they had abandoned their classical professional ideals. But since then, American physicians became the only class of private citizens in our nation to have the legal power to destroy innocent unborn human life by their own authority. This virtually unlimited power spawned a great deal of mistrust among patients, who retaliated with threats and actions to make physicians pay for their negligence and malpractice as a way of getting them to refrain from destroying life.

37. See Connery, S.J., John, "In the Matter of Claire Conroy", *Linacre Quarterly*, Vol. 52, No. 4, November, 1985, pp. 324-5.

38. It is necessary for this categorization because the law has the power to prohibit competent and rational individuals from electing certain medical treatments for their own benefit. It is because of this that the law can prohibit competent and rational decision-makers from taking laetrile which is an unproven medical treatment. The best way of protecting competent persons from committing suicide by rejecting life-sustaining and medically providable food and water is by placing these in the category of normal care along with other forms of patient maintenance as hygienic care, protection from exposure, psychological support and exercise.