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HIV DISEASE: CRIMINAL AND CIVIL LIABILITY FOR ASSISTED SUICIDE

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I. INTRODUCTION: HIV DISEASE AND SUICIDE

A 1988 study from Cornell University Medical College and the Office of the Chief Medical Examiner of New York City found that in 1985 suicide among men between the ages of twenty and fifty nine with HIV disease[1] was 36 times more likely

1. Human Immunodeficiency Virus (HIV) disease refers to the full spectrum of health experienced by people infected with the HIV virus. The three stages of HIV disease are early/asymptomatic, middle/ARC (AIDS Related Condition), and late/AIDS (Acquired Immunodeficiency Syndrome). Many of these HIV-infected men and women are without any symptoms and many are even unaware of their being HIV-infected; these patients are labeled asymptomatic seropositives. Other patients have mild signs of immune impairment and/or nonspecific signs of chronic disease (e.g. mild weight loss and fatigue): these people have ARC (AIDS Related Condition). Over time, generally 5 to 15 years after infection with the HIV virus, HIV disease often progresses to full-blown AIDS. In this stage, HIV-infected people experience life-threatening infections called opportunistic infections (e.g., pneumocystis carinii pneumonia), malignancies (e.g., Kaposi's Sarcoma), severe weight loss, and/or dementia. People with AIDS may succumb to their initial severe infection or may recover and function well for an additional 1-2 years. Note, however, that people with a Kaposi's Sarcoma diagnoses tend to have a better prognosis than people with other AIDS-qualifying diagnosis. There are many social and psychological sequelae of HIV disease. These include stigmatization of HIV-infected people and their families and even their health providers. These stigmatizations are based on HIV-infected people belonging to certain socially marginalized groups such as gay men, intravenous drug users, and people with multiple sexual partners. Stigmatization is also based on fear of contagiousness and the concomitant realization that HIV disease is a progressive, devastating illness, affecting people in the prime of life, and a disease which is incurable and often terminal. Many people with HIV disease, including those who are physically well, suffer from anxiety and depression. These psychological

than among noninfected men in New York City's general population.[2] One half of these suicides occurred in Hispanic or black patients, of which one-half expressed their intent to commit suicide. Dr. Peter Marzuk, who conducted the research, believes that even his estimate (that one thousand HIV-infected patients will probably commit suicide by 1991) is probably an underestimate because suicide is frequently unreported.[3] Significant rates of AIDS-related suicide are not limited to New York: the San Francisco Suicide Prevention Center receives sixty to one hundred AIDS-related calls per month.[4] In fact, a 1986 California study of death certificates of men between the ages of 20 and 39 found that the relative suicide rate of men with HIV disease was 21 times the rate of men without HIV disease.[5] Suicide is more prevalent among persons with HIV disease because of the "profound and progressive nature of the illness, the seeming unchangeability of the condition, and the often painful and disfiguring deterioration that occurs."[6] "Friends and relatives who assist such people, however, face criminal [and civil] liability under existing law. Thus, it is not surprising that there is a growing number of cases of 'secret' or 'concealed' suicide assistance. There is no indication that current case law has con-

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problems may stem from pragmatic concerns about finances, access to health care, and ability to maintain a job, to more abstract concerns about self-disclosure to friends and family, fear of chronic illness, and concerns about mortality.

Interview with Lisa C. Capaldini, M.D., M.P.H., Assistant Clinical Professor of Medicine, University of California, San Francisco (Jan. 23, 1991).

2. Marzuk, Tierney, Tardiff et al., *Increased Risk of Suicide in Persons with AIDS*, 259 J. A.M.A. 1333 (1988) [hereinafter Marzuk].

3. Mydens, *AIDS Patients' Silent Companion Is Often Suicide, Experts Discover*, N. Y. Times, Feb. 25, 1990, sec. A, p. 1.

4. P. GOLDBLUM AND J. MOULTON, "HIV DISEASE AND SUICIDE," in FACE TO FACE A GUIDE TO AIDS COUNSELING, (J. Dilley, C. Pies and M. Helquist, eds., San Francisco: AIDS Health Project, University of California., 1989, p. 153) [hereinafter Goldblum].

5. Kizer, Green, Perkins, Doebbert, Hughes, *AIDS and Suicide in California*, 260 J. A.M.A. 1881 (1988).

6. Goldblum, *supra* note 4 at 152. "In recent years . . . [the Hemlock Society] has been joined by scores of young men afflicted with AIDS . . . . " *Id.*, at 152. The Hemlock Society is an organization which was formed in order to promote the concept of active euthanasia. The organization was founded in 1980 by Derek Humphrey. Today, the Hemlock Society has 35,000 dues-paying members, has published nine books, and in 1989 had a budget of $700,000. Rarick, *AIDS Adding to Ranks of Hemlock Society, Death with Dignity Lobby; Euthanasia; A Journalist-Turned Activist Leads the Movement to Legalize Suicide Assistance for the Dying*, L.A. Times, Aug. 26,1990, at A28, col. 1. More recently the Hemlock Society/Carol Publishing has published a best selling suicide manual "Final Exit". Steinfels, *At Crossroads, U.S. Ponders Ethics of Helping Others Die*, N. Y. Times, Oct. 28, 1991, at A1, col. 2.

fronted this social problem [of suicide assistance]."[7]

However, the increasing frequency of public debate regarding the concept of a rational suicide,[8] combined with the legal system's treatment of certain private acts of suicide and assisted suicide, demonstrates the evolving cultural legitimacy of rational suicide. Nevertheless, current laws are still predicated on the belief that there is no such thing as rational (legitimate or functional) suicide. This article first traces the evolution of attitudes and subsequent laws regarding suicide and assisted suicide. Secondly, the criminal and civil liability of assisted suicide is assessed on the basis of California case law.

Lastly, this paper will discuss the applicability of the defenses of the right of privacy and the right of autonomy to acts of suicide and assisted suicide. This discussion will focus on the

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7. Sheffer, *Criminal Liability For Assisting Suicide*, 86 COLUM. L. REV. 348 (1986) [hereinafter Sheffer].

8. Suicide is defined "as doing something which results in one's death . . . " Brandt, *The Rationality of Suicide*, in *Suicide: The Philosophical Issues*, 117, 118 (M. Battin & D. Mayo eds. 1980). The definition of rational suicide is still being debated; however, most definitions require that the person contemplating suicide have some form of terminal illness. The 1988 California Humane and Dignified Death Initiative, which did not acquire the necessary 450,000 verified signatures necessary to get on the ballot, required terminal illness certification and competence. Parachini, *The California Humane and Dignified Death Initiative*, in *Mercy, Murder, and Morality: Perspectives on Euthanasia* HASTINGS CENTER REP. 1, 11, (Special Supplement, Jan./Feb. 1989). In November of 1991, voters of Washington state voted on Initiative 119 which allows physicians to legally perform active euthanasia without criminal sanctions on "a conscious and mentally competent, qualified patient . . . . . Candidates for active euthanasia [rational suicide assistance in this case by physicians] would be patients who are terminally ill or have an irreversible condition that, in the opinion of two physicians, would result in death within six months. The patient must be conscious and mentally competent, and voluntarily request the service in writing at the time it is to be rendered." Genal, *A Right to Die*, 9, 14, AM. MED. NEWS Jan. 7, 1991. Note that Initiative 119 was defeated by 54% of the voters. Paulson, *No to aid in dying—but fight goes on.* Seattle Post Intelligence, Nov. 7, 1991, at A9, col. 1. Proponents of 119 argue that last minute television ads distorted the truth by stating that the initiative had no safeguards. "The state Attorney General's Office considered the argument and determined that the initiative was written with safeguards and that the opposition could not reasonably contend none existed." Paulson, *Aid in dying initiative is rejected*, Seattle Post Intelligence, Nov. 6, 1991, at A1, col. 1. Other ethical factors considered include, "When terminal illness and the pain associated with it are experienced as essentially meaningless, when the future is perceived as holding nothing but further affliction and debilitation and there no longer appear to be grounds for confidence and courage with respect to what is yet to be, and when it seems that significant others no longer care nor want to be cared for, then the wish to choose death above life is eminently reasonable and understandable." E. Young, *Assisting Suicide: An Ethical Perspective*, 3 ISSUES IN L. & MED. 281, 287 (1987).

right of a person with HIV disease to enlist the assistance of the medical profession to make his or her death as quick and as painless as possible, a practice which under the current law could be classified as murder. The paper will conclude with an assertion that the charges of murder, voluntary manslaughter, and aiding and abetting a rational suicide should not apply to true "mercy killing." Concomitantly, civil suits and other laws affecting the administration and disposition of the estate or insurance proceeds should likewise not apply to true "mercy killing."

II. EVOLUTION OF THE CONCEPT OF RATIONAL SUICIDE

Some modern ethicists argue that the recent changes in attitudes regarding euthanasia are the result of the secularization of modern culture.[9] However, arguments continue to be made against euthanasia relying on the Judeo-Christian axiom that human life is sacred and only God may take life away. The changes in California law provide a unique opportunity to look at why and how a society departs from the Judeo-Christian axiom that only God may take life away. Whether or not California will ultimately choose to legalize assisted suicide for terminally ill patients such as those who suffer from HIV disease remains to be seen. However, a historical review of California's laws may shed light on what that outcome may very well be as well as explain why courts are inconsistent in treating cases involving suicide and assisted suicide.

Section A briefly traces the origins of suicide and assisted suicide laws which have profoundly impacted the treatment of suicide in modern culture. Section B more specifically reviews the development and the reasoning underlying California's laws which relate to suicide. Section C deals with the California Court's treatment of the right to privacy and autonomy regarding health care treatment and its relationship to suicide and assisted suicide. Lastly, Section D reveals the attitudes of secular institutions, the public in general, and ethicists regarding withholding or withdrawing medical treatment (passive euthanasia),

9. Doerflinger, *Assisted Suicide: Pro-Choice or Anti-Life?*, in *Mercy, Murder, & Morality: Perspectives on Euthanasia*, HASTINGS CENTER REP. 1, 16 (Special Supplement, 16, Jan./Feb., 1989).

as well as emerging attitudes regarding active euthanasia ("mercy killings").

A. EARLY ATTITUDES TOWARD SUICIDE: 348 B.C. TO 1700 A.D.

Some ancient primitive societies believed that the act of suicide released evil spirits and regarded suicide with horror.[10] The attitude of contemporary primitive cultures is also divided. Some cultures regard suicide with condemnation while others either "tolerated or encourage 'altruistic suicide.' "[11]

The early Greek philosophers Plato and Aristotle regarded suicide "as an offense against the gods or the state."[12] However, the Roman stoics "tended to condone suicide as a lawful and rational exercise of individual freedom and even *as an act of wisdom* in the cases of old age, disease, or dishonor."[13] The Roman Empire's acceptance of suicide deteriorated with the decline of the Empire. In fact, "the nobleman's fear of losing his serf to an early death may have played a major role in establishing antisuicidal legislation during this period."[14] The Roman Catholic Church, through the works of Augustine of Hippo, who pronounced that suicide was the worst of sins, set the stage for ecclesiastical attitudes for the next thousand years. "Barbarous" laws were established by the Church and the state punishing suicide.[15]

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10. Marzen, O'Dowd, Crone, Balch, *Suicide: A Constitutional Right ?*, 24 DUQ. L. REV. 17 (1985) (citing R. FEDDEN, SUICIDE: A SOCIAL AND HISTORICAL STUDY 27-48 (1938)) [hereinafter Marzen].

11. *Id.* at 17, (citing B. MALINOWSKI, *Crime and Custom in Savage Society* 78, 94-98 (4th ed. 1947). "Most seem to have regarded it with horror that was often associated with fear of the evil spirits it was believed to set loose." *Id.*, at 17, (citing B. MALINOWSKI, *Crime and Custom in Savage Society* 78, 94-98 (4th ed. 1947)). However, some societies did not regard suicide with horror. "In ancient China and India, for example, the 'suttee,' in which a widow leapt onto the burning funeral pyre of her deceased husband, was widely practiced." *Id.*, at 17, (citing N. FARBEROW, CULTURAL HISTORY OF SUICIDE, in SUICIDE IN DIFFERENT CULTURES 1, 3-4 (N. Farberow ed. 1975)).

12. Velasquez, *Defining Suicide*, 3 ISSUES IN L. AND MED. 37, 40 (1987).

13. *Id.* at 40.

14. *Id.* at 40-41, (citing H. FEDDEN, SUICIDE: A SOCIAL AND HISTORICAL STUDY, at 85-95 (1980).

15. Velasquez, *supra* note 12 at 41. Examples of canonical directives illustrate the Roman Catholic Church's position on suicide. For example, "[t]he Council of Arles (452 A.D.), . . . incorporated the Roman law's forfeiture of a suicide's estate. The Council of Braga (563 A.D.) banned religious rites for suicides. The Antisidor Council (590 A.D.) provided penalities for suicide, and the Synod of Nimes (1284 A.D.) denied suicides Christian burial." Marzen, *supra* note 11 at 29 (citing FARBEROW, CULTURAL HISTORY OF

During the Renaissance, the Roman stoics' acceptance of suicide and encouragement of autonomy regarding decisions of life and death were reiterated.[16] However, in the following era, the Protestant Reformation, Martin Luther and John Calvin stated respectively that suicide was the "work of the devil" or "ingratitude towards God."[17] In the early 1600s, Anglican clergymen Robert Burton and John Donne began to question the complete condemnation of suicide.[18] Basically, they questioned the validity of eternally condemning those who commit suicide and suggested that in individual cases suicide can be justified and acceptable to God.[19] By the early 1700s, however, the Christian church in England opposed suicide as a sin against God which would result in souls damned forever.[20]

Nevertheless, the Reformation and the Renaissance encouraged personal inquiry and sparked the secularization of philosophical thought.

> With the increasing secularization of philosophical thought in the eighteenth century, arguments opposing the absolute condemnation of suicide multiplied and mitigated the view of suicide as inherently sinful or criminal. Likewise, popular attitudes revealed an increasing toleration of suicide; the divergence between the laws against suicide and the enforcement of those laws grew wider, and in some places, penalties against suicide altogether disappeared.[21]

In fact, by the end of the nineteenth century, most anti-suicide laws, including California's, were no longer in existence.[22]

B. Modern Attitudes: The California Legal System

Ultimately, the criminalization of suicide was undermined not by evolving religious ideas but by the scientific finding that

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Suicide, in Suicide in Different Cultures at 7 (N. Farberow ed. 1975)).

16. Marzen, *supra* note 10 at 25. *See also*, F. Thonnard, A Short History of Philosophy (1955).

17. Marzen, *supra* note 10 at 31.

18. *Id.* at 31-32.

19. *Id.* 31-32.

20. *Id.* at 32-33.

21. Velasquez, *supra* note 12 at 41.

22. *Id.* at 42.

suicide is caused by psychiatric disorders and should be considered a reflection of disease, not a crime.[23] The California Supreme Court noted the felony status of suicide at common law but said, "Under American law, suicide has never been punished and the ancient English attitude has been expressly rejected . . . . Rather than classifying suicide as criminal, suicide in the United States has continued to be considered an expression of mental illness."[24]

In 1984, the Lanterman-Petus-Short Act was enacted.[25] The Act provides for the involuntary commitment of "any person, as a result of a mental disorder, [who] is in danger . . . to himself or herself . . . "[26] Once a suicidal person has been admitted to a hospital for care, the hospital and treating psychiatrist are subject to civil liability regarding the safekeeping of that suicidal patient.[27] The hospital/psychiatrist liability appears to be imposed because a "constructive assisted suicide" has arisen under the guise of a negligence action.

While suicide itself is no longer a criminal offense, assisted suicide is treated as a felony offense. In 1873, the California legislature adopted a law against assisted suicide which has remained unchanged to the present: "Every person who deliberately aids or advises, or encourages another to commit suicide is guilty of a felony."[28]

In 1983, the California Supreme Court noted three policy reasons for maintaining the assisted suicide statute. The first policy reason was that " '[s]tates maintaining statutes prohibiting aiding . . . suicide, attempt to do so to discourage the ac-

23. *In re* Joseph G., 34 Cal. 3d 429, 433, 667 P.2d 1176, 1178, 194 Cal. Rptr. 163, 165 (1983).

24. *Id.*, at 433, 667 P.2d at 1178, 194 Cal. Rptr. at 165.

25. CAL. WELF. AND INST. CODE § 5150 (West 1987).

26. *Id.*

27. Meier v. Ross General Hospital, 69 Cal. 2d 420, 424, 445 P.2d 519, 522-523, 71 Cal. Rptr. 903, 906-907 (1968). The court reversed a decision in favor of the physician and remanded the wrongful death action for a new trial based on the theory that the physician had a duty to protect the patient from his own actions. This case involved a patient who was admitted by the patient's personal physician (who also was in charge of the psychiatric wing of the hospital) to the psychiatric ward of an acute care hospital because of his attempt to commit suicide by slashing his wrists. The patient subsequently committed suicide by diving out of the second floor window in his room. *Id.*

28. CAL. PENAL CODE § 401 (Deering 1987).

tions of those who might encourage a suicide in order to advance some personal motives . . . . ' "[29] The second policy reason involved the state's " 'interests in the sanctity of life.' "[30] The third policy reason for maintaining the assisted suicide statute was that there was no evidence that the aider and abettor suffers from mental illness.[31] In 1959, the California Supreme Court had distinguished the difference between the crime of murder and the crime of assisted suicide. The Court stated that one who " 'actually performs, or actively assists in performing, the overt act resulting in death' " is guilty of murder.[32]

In 1976, the California Legislature passed the Natural Death Act, which allows a terminally ill patient to execute what is commonly known as a "Living Will."[33] Under the terms of a "Living Will," the patient signs a form entitled "Directive to Physicians" which directs the physicians to either withhold or withdraw life-sustaining procedures (passive euthanasia).[34] In order for the directive to have effect, two physicians must make the determination that the patient has a terminal illness that, "regardless of the application of life-sustaining procedures, would, within reasonable medical judgement, produce death, and where the application of the life-sustaining procedures serve only to postpone the moment of death of the patient."[35]

The Natural Death Act has been criticized as being vague,

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29. *In re* Joseph G., 34 Cal.3d 429, 437, 67 P.2d 1176, 1181, 194 Cal. Rptr. 163,168 (1983) (quoting Note, *Criminal Aspects of Suicide in the United States*, 7 N.C. CENT. L.J. 156, 162 (1975)).

30. *Id.* at 437, 667 P.2d at 1181, 194 Cal. Rptr. at 168. (quoting MODEL PENAL CODE § 210.5 comment 5 (Official Draft & Revised Commentaries (1980)).

31. *Id.* at 437, 67 P.2d at 1181, 194 Cal. Rptr. at 168 (quoting *The Punishment of Suicide - A Need for Change*, 14 VILL. L. REV. 463, 476 (1969)). Modernly, debates regarding rational suicide focus on whether the person choosing suicide is rational. For further discussion see Conwell, RATIONAL SUICIDE AND THE RIGHT TO DIE: REALITY AND MYTH, 325 New Eng. J. of Med., 1100, Oct. 10, 1991. Dr. Conwell stating that the central issue is "the needs and values of the patients themselves" points to the critical requirement that the "person's judgement be intact." Id at 1101. Dr. Conwell further states, "For the discussion to proceed to the development of thoughtful and sensitive public policy, both the medical profession and the legislators must be better able to distinguish between people whose suicidal intent is clearly conceived and free of any distorting mental disturbances and people who are in need of psychiatric care." Id at 1102.

32. People v. Matlock, 51 Cal. 2d 682, 694, 336 P.2d 505, 511 (1959) (quoting State v. Bouse,199 Or. 676, 702-703, 264 P.2d 800, 812 (1953)).

33. CAL. HEALTH & SAFETY CODE §§ 7185-95 (West 1987).

34. *Id.*

35. CAL. HEALTH & SAFETY CODE §§ 7186, 7187(e),(f) (West 1983).

limited, and unmanageable.[36] In fact, the court in *Bartling v. Superior Court*,[37] stated that the Natural Death Act was "so cumbersome that it is unlikely that any but a small number of highly educated and motivated patients will be able to effectuate their desires."[38] For these reasons the California Legislature looked for additional alternatives.[39]

In 1984, California adopted various changes to its Civil Code to provide for the durable power of attorney for health care.[40] This law allows mentally competent adults to empower a non-medical individual to make terminal health care decisions on the patient's behalf in the event that the patient becomes incapacitated. This power includes the power to instruct the physician to withhold life-sustaining treatments.[41]

The Natural Death Act and the enactment of the durable power of attorney for health care do not authorize active euthanasia.[42] However, the California Legislature has rejected a strict application of religious doctrines regarding suicide by recognizing that there are times when a patient has the right to direct the timing of his or her death.[43] In fact, the California Legislature through its findings and declarations recognized that artificial " . . . prolongation of life for persons with a terminal condition may cause loss of patient dignity and unnecessary pain and suffering, while providing nothing medically necessary or beneficial to the patient."[44] The California Legislature stated that, " . . . adult persons have the fundamental right to control the decisions relating to the rendering of their own medical care,

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36. Special Project, *The Right to Voluntary Euthanasia*, 10 WHITTIER L. REV. 489, 508-509.

37. Bartling v. Superior Court, 163 Cal. App. 3d 186, 209 Cal. Rptr. 220 (1984) (quoting Barber v. Superior Court, 147 Cal. App. 3d 1006, 1015, 195 Cal. Rptr. 484, 489 (1983)).

38. *Id.*

39. Smith, *All's Well That Ends Well: Toward a Policy of Assisted Suicide or Merely Enlightened Self-Determination?*, 22 U.C. DAVIS L. REV. 275, at 331 (1989).

40. CAL. CIV. CODE §§ 2400-2407 (West Supp. 1989).

41. *Id.*

42. CAL. HEALTH & SAFETY CODE § 7195 (West 1987). "Nothing in this chapter shall be construed to condone, authorize, or approve mercy killing, or to permit any affirmative or deliberate act or omission to end life other than to permit the natural process of dying as provided in this chapter." *Id.*

43. CAL. HEALTH & SAFETY CODE § 7186 (West 1987).

44. *Id.*

including the decision to have life-sustaining procedures withheld or withdrawn in instances of a terminal condition."[45]

C. Suicide And Assisted Suicide: The Right to Privacy and Autonomy

California case law has dealt with the person's right of privacy and autonomy with regard to suicide and assisted suicide. In 1983, the California Court of Appeals distinguished killing from a physician's letting someone die.[46] The court stated, for the first time, that there is no duty to continue medical treatment (continuation of an intravenous feeding) if, in the opinion of the physician, the treatment is unavailing.[47] The court of appeal focused on the prognosis of the patient resulting from the treatment rather than the traditional focus of ordinary versus extraordinary treatment, stating that

> even if a course of treatment might be extremely painful or intrusive, it would still be proportionate treatment if the prognosis was for complete cure or significant improvement in the patient's condition. On the other hand, a treatment course which is only minimally painful or intrusive may nonetheless be considered disproportionate to the potential benefits if the prognosis is virtually hopeless for any significant improvement.[48]

In 1984, the California Court of Appeal in *Bartling v. Superior Court*[49] found that the right to disconnect life support systems was not limited to terminally ill or comatose patients.[50] This case involved a 70-year-old man who suffered from multiple nonterminal illnesses but who was not expected to live more

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45. *Id.*

46. Barber v. Superior Court, 147 Cal. App. 3d 1006, 1016, 195 Cal. Rptr. 484, 491 (1983). The court concluded that, " . . . the cessation of 'heroic' life support measures is not an affirmative act but rather a withdrawal or omission of further treatment . . . 'disconnecting' of mechanical devices is comparable to withholding the manually administered injection or medication. Further, we view the use of intravenous administration of nourishment and fluid, under the circumstances, as being the same as the use of the respirator or other form of life support equipment." *Id.*

47. *Id.*, at 1016-1017, 195 Cal. Rptr. 491. "A physician has no duty to continue treatment, once it has proved to be ineffective." *Id.*

48. Smith, *supra* note 39 (citing and quoting *Barber* at 1019, 195 Cal. Rptr. at 491.)

49. Bartling v. Superior Court, 163 Cal. App. 3d 186, 194-95, 209 Cal. Rptr. 220, 224-225 (1984).

50. *Id.*

than a year.[51] He had executed a "living will" which expressed his desire that medical care be terminated in the event he became terminally ill and incompetent.[52] In addition, he executed a Durable Power of Attorney for Health Care granting his wife the power to make medical decisions in the event he became incompetent.[53] He also wrote out a formal declaration that he wished to end treatment knowing that his death would result, and he completed a form releasing the hospital and physicians from all liability connected to his decision to stop treatment.[54]

The court, recognizing that the patient's right to autonomy is founded on the constitutional right of privacy, stated that " . . . 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 or doctors."[55] The assertion that the state, in this particular situation, has interests in protecting against suicide was dismissed.[56] The court held that the state's interest was only in protecting persons from " 'irrational self-destruction.' "[57] The decision in *Bartling* appears to stand for the proposition that when one chooses to end one's life at an earlier point in time (versus prolonging the time of death through the use of a respirator) because treatment offers no hope, the decision does not fall within the legal definition of suicide or suicide assistance.

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51. *Id.* at 189, 192, 209 Cal. Rptr. at 220-221, 223.

52. *Id.* at 190-191, 209 Cal. Rptr. at 222.

53. *Id.* at 191, 209 Cal. Rptr. at 222.

54. *Id.*

55. *Id.* at 195, 209 Cal. Rptr. at 225. In addition, the court stated that the state's recognition of these rights is expressed in the Natural Death Act, CAL. HEALTH & SAFETY CODE §§ 7185-7195 (West Supp. 1987), and in CAL. ADMIN. CODE tit. 22, § 70707(6) (1980). *Bartling*, 163 Cal. App. 3d at 194 & n.5, 209 Cal. Rptr. at 224 & n.5.

56. *Id.* at 196, 209 Cal. Rptr. at 225. (quoting Superintendent of Belchertown v. Saikewicz, 373 Mass. 728, 370 N.E. 2d 417, 426 n.11 (1977)).

> The interest in protecting against suicide seems to require little if any discussion. In the case of the competent adult's refusing medical treatment such an act does not constitute suicide since (1) in refusing treatment the patient may not have the specific intent to die, and (2) even if he did, to the extent that the cause of death was from natural causes the patient did not set the death producing agent in motion with the intent of causing his own death.

Id.

57. *Id.* at 196, 209 Cal. Rptr. at 226. (quoting Superintendent of Belchertown v. Saikewicz, 373 Mass 728, 370 N.E. 2d at p. 426 n.11 (1977)).

In 1986, the California Court of Appeal in *Bouvia v. Superior Court*,[58] extended the right to refuse treatment to a woman suffering from cerebral palsy who was neither comatose, vegetative, nor suffering from a terminal illness.[59] The court found that a person's own assessment of his or her quality of life is enough to justify the decision to withdraw a mechanical feeding device (nasogastric tubes). The court stated,

> 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 conditional approval by ethics committees or courts of law. It is a moral and philosophical decision that, being a competent adult, is hers alone.[60]

The court also reiterated that the right to refuse treatment was not an affirmative action which traditionally is characteristic of a suicide or an assisted suicide.[61] The court's distinction between

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58. Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 1135, 1142-44, 225 Cal. Rptr. 297, 299-300, 304-305 (1986).

59. *Id.*

60. *Id.*, at 1143, 225 Cal. Rptr. at 305.

61. *Id.*, at 1144, 225 Cal. Rptr. at 305-306. However, numerous ethicists and medical doctors disagree with this interpretation.

> Virtually all Americans now agree that the suffering of terminally ill patients must end through the acceleration of the patient's death. The controversy today surrounds not the goal of death, but the means. Permitting the administration of a life-terminating drug, if intended by the patient, is morally indistinguishable from commonly acceptable practices of withholding or withdrawing life-sustaining technologies, including food and hydration, from a terminally ill patient, an action that will surely result in death.

Gianelli, *A right to die: Debate intensifies over euthanasia and the doctor's role*, AM. MED. NEWS, 9, 15, Jan. 7, 1991 (quoting Sheldon F. Kurtz).

> Noting that we have relatively little trouble with passive euthanasia, thinkers such as James Rachels have attempted to argue that there is no moral difference between letting people die and killing them. If we are prepared at a certain point to withhold further treatment, therefore, we should also be ready to take positive steps to hasten death. Understanding the moral equivalent of passive and active euthanasia should, in this way, expose the inconsistency of our beliefs and nudge us in the direction of a more rational policy in dealing with the bodies of people who lack both unconsciousness and the future prospect of it.

Lachs, *Active Euthanasia*, 1 J. OF CLINICAL ETHICS, 113, Summer 1990.

> Decisions about nontreatment have an invisibility that decisions about directly causing death do not have, even though

the right to refuse treatment and an affirmative act which is characteristic of suicide or assisted suicide is a subject of debate among the commentators. For example, one commentator stated that Bouvia "did not seek to refuse medical interventions she found personally intolerable; she sought to end her life because she found living intolerable."[62]

Justice Compton, in a concurring opinion in *Bouvia*, focused on the right to die and not the right to refuse medical treatment. In so doing, Justice Compton came to the conclusion that this right includes the right to assisted suicide stating that, "[t]he 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 . . . include the ability to enlist the help from others, including the medical profession, in making death as painless and as quick as possible."[63]

While the law continues to evolve, organized religion refuses to view suicide as an alternative under any circumstances. Modernly, the Catholic Church interprets the act of suicide as a "violation of the divine law."[64] Likewise, contemporary Judaic and

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> they may have the same result . . . . We often try to ameliorate these situations by administering pain medication or symptom control at the time we are withholding treatment, but these are all ways of disguising the fact that we are letting the disease kill the patient rather than directly bringing about death. But the ways diseases kill people are far more cruel than the way physicians kill patients when performing euthanasia or assisting in suicide. Batlin, *Euthanasia: The Way We Do It, The Way They Do It*, 6 J. of Pain and Symptom Management, 18, 22, July 1991.

62. Annas, *When Suicide Prevention Becomes Brutality: The Case of Elizabeth Bouvia*, HASTINGS CENTER REP., Apr. 1984, at 21; *see also* Kurtz, *A Right to Die*, AM. MED. NEWS, Jan. 7, 1991, 9, at 15 (stating, "The controversy today surrounds not the goal of death, but the means. Permitting the administration of a life-terminating drug, if intended by the patient, is morally indistinguishable from commonly accepted practices of witholding or withdrawing life-sustaining technologies, including food and hydration, from a terminally ill patient, an action that will surely result in death"). Kurtz, *A Right to Die*, AM. MED. NEWS, Jan. 7, 1991, 9, at 15.

63. *Bouvia*, at 1147, 225 Cal. Rptr. at 307 (Compton, J., concurring).

64. For example, in 1990, Pope John Paul II stated,

> . . . No one is permitted to ask for this act of killing, either for himself or for herself or for another person entrusted to his or her care, nor can he or she consent to it [. . .] Nor can any authority legitimately recommend or permit such an action. For it is a question of the violation of the divine law, an offense against the dignity of the human race, a crime against

Protestant doctrines reject suicide.[65] Clearly, the recent California cases (*Barber*, *Bartling*, and *Bouvia*) do not reflect prevailing religious beliefs regarding suicide or what constitutes assisted suicide.

> life, and an attack on humanity.
>
> It may happen that, by reason of prolonged and barely tolerable pain, for deeply personal or other reasons, people may be led to believe that they can legitimately ask for death or obtain it for others. Although in these cases the guilt of the individual may be reduced or completely absent, nevertheless the error of judgement into which the conscience falls, perhaps in good faith, does not change the nature of this act of killing, which will always be in itself something to be rejected.

The Right to Voluntary Euthanasia, 10 WHITTIER L. REV. 489, 522, n. 135. (1988) (quoting The Sacred Congregation for the Doctrine of the Faith, His Holiness Pope John Paul II, The Vatican's Declaration on Euthanasia, 1980).

65. Marzen, *supra* note 10 at 20 (1985) (citing N. St. John-Stevas, THE RIGHT TO LIFE at 59 (1964)). "The infrequency of suicide among the Hebrews, however, was most probably due to their religious creed's positive emphasis on the value of life and the special providence of God." *Id.*

See also Steinfels, *At Crossroads, U.S. Ponder Ethics of Helping Others Die*, N. Y. Times, Oct. 28, 1991 at A2, col. 2. Rabbi David Bleich, a professor of Tulmeed and Ethics at Yeshiva University stated, "Autonomy does not extend to one's own life. Man's body and life is the property of the creator." *Id* at A15. Rabbi Israel Reisner, chairman of the subcommittee on biomedical ethics for Conservative Judaism's Committee on Jewish Law and Standards stated, "Assisted suicide and euthanasia are clearly unacceptable." *Id.*

See also Marzen, *supra* note 10 at 20 (1985) (citing M.P. Battin, ETHICAL ISSUES IN SUICIDE at 31 (1982)). "After the exile, prohibitions of suicide were included in the Rabbinic and Talmudic writings, expressed in stories and in mourning and funeral sanctions." *Id. See also* Domini, Cohen, & Gonzalez, *Jewish and Christian Attitudes on Suicide*, 20 J. RELIGION & HEALTH 203 (1981). Cf. THE ENCYCLOPEDIA OF THE JEWISH RELIGION 367 (1966); 15 ENCYCLOPEDIA JUDAICA 490 (1971). "Only for the sanctification of the name of the Lord would a Jew intentionally take his own life or allow it to be taken as a symbol of his extreme faith in God. Otherwise, intentional suicide would be strictly forbidden because it constitutes a denial of the Divine creation of man, of the immortality of the soul and of the atonement of death." *Id.*

For Protestant opposition to suicide see 7 INTERPRETER'S BIBLE 592 (1951) which states, "no man has the right to play providence to his own life. *Id.*; 11 The NEW SCHAFF-HERZOS ENCYCLOPEDIA OF RELIGIOUS KNOWLEDGE 132 (1964) which states, "The Christian Church has naturally condemned utterly an act which she cannot but regard as absolute negation of the fear of God and of trust in him, and as an insult alike to divine judgement and to divine grace. It is, therefore, inadvisable to break down the barriers erected by law and custom against suicide, for such procedure would only invite greater laxity of public opinion." *Id.*; BAKER DICTIONARY OF CHRISTIAN ETHICS 652 (1973) which indicates the Christian Church's opposition to suicide. See also C. Everett Koop, *The Challenge of Definition*, in Mercy Murder, and Morality: Perspectives on Euthanasia, HASTINGS CENTER REP. 1, 2 (Special Supplement, Jan./Feb. 1989). "To me, any such ambivalence [where the term euthanasia means "good death"] is inconsistent with the Judeo-Christian tradition within which I was raised, a tradition which, for me, places a consistent and primary emphasis on the supreme value of human life." *Id.*

D. EMERGING ATTITUDES: POLITICAL, PRIVATE, MEDICAL

Secular institutions' attitudes regarding the issues of suicide and assisted suicide continue to evolve. In 1986, the Council on Ethical and Judicial Affairs of the American Medical Association issued guidelines on the withholding and withdrawing of medical treatment. These guidelines are consistent with the *Bartling* decision and the results of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research.[66]

The American Medical Association's position that active euthanasia is contrary to the medical profession standards[67] has been the subject of much debate, and that position may be shifting.[68] In fact, in May of 1988 the San Francisco Medical Society

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66. Smith, *supra* note 37 at 367-68.

67. Rachels, *Active and Passive Euthanasia*, 292 NEW ENG. J. OF MED. p. 78 (1975) (citing a statement adopted by the House of Delegates of the American Medical Association on Dec. 4, 1973 which states, " 'The intentional termination of the life of one human being by another - mercy killing - is contrary to that for which the medical profession stands and is contrary to the policy of the American Medical Association' "). *Id.* Note, however, that "the original Greek version of the [Hippocratic] Oath prohibits the physician from giving a deadly drug, even when asked for it; but the original version also prohibits performing surgery and taking fees for teaching medicine, neither of which prohibitions has survived into comtemporary medical practice." Batlin, *Euthanasia: The Way We Do It, The Way They Do It*, 6 J. of Pain and Symptom Management, 18, 21, July 5, 1991.

68. The Journal of the American Medical Association (while owned and published by the AMA is editorially independent) recently published an article, *It's Over Debbie*, 259 J. A.M.A. 272 (1988) describing a mercy killing in order to provoke debate among the medical community and public. The following is a tailored description of the situation. A rotating gynecology resident injected 20 mg of morphine sulphate into a 20-year-old woman who was dying of ovarian cancer. The 80-pound woman was having "unrelenting" vomiting as the result of an alcohol drip administered for sedation. She was suffering from severe air hunger, and was receiving nasal oxygen. She had suprasternal and intercostal retractions with her rapid inspirations. In addition, she was hooked up to an IV. She had not eaten or slept in two days. She had not responded to chemotherapy and was receiving supportive care only. Her only words to the resident were, "Let's get this over with." In a later editorial staff article, the author stated,

> [w]e believe that the JAMA is the right place for issues in American Medicine to be debated, and there is much to debate. Technological prolongation of the dying process, the emotional and monetary costs of terminal illnesses, the costs and benefits of our lengthening life span, and the invasion of the bedside by lawyers and courts are only a few examples . . . . Despite traditional ethics and law, the medical profession may be pressured to confront the forbidden zone of active euthanasia head-on. We can ignore the pressure, we can decline to participate or even to discuss the subject, we can try

published the results of a survey distributed to its members regarding euthanasia.[69] Seventy percent of the respondents stated that patients should have the option of requesting active euthanasia when faced with a terminal illness.[70] Forty-five percent of the respondents stated that they would carry out the patient's request for active, voluntary euthanasia.[71]

A recent Louis Harris poll of 1,254 adults indicates that the majority of current public opinion believes in the patient's right of autonomy.[72] The 1985 Louis Harris poll found that eighty five percent of those polled, "believed that a terminally ill patient 'ought to be able to tell his doctor to let him die.' "[73] Eighty-two percent believed this patient directive included the withdrawal of the mechanical feeding device.[74] Note, however, that in 1988 a ballot initiative called the California Humane and Dignified Initiative failed to obtain the required *number* of signatures to

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> to repress the movement and strive to prevent any alternative paths. Or we can consider the development of finite ethical guidelines in what may be seen as a continuum from type 1 to type 6, [previously in this article, the author offered six major types of euthanasia with examples] from passive to active euthanasia, involving informed and consenting patients, [footnote omitted] close family members, appropriate religious advisors, and knowledgeable, consenting physicians, all deliberating together over time with full disclosure and documentation. Pain and suffering, quality of life, productivity, and financial costs to individuals and society must be weighed together against perceived benefits of preventing death by prolonging dying.

Lundberg, *'It's Over, Debbie' and the Euthanasia Debate*, 259, J. A.M.A., 2142-2143 (1988). More recently, the Journal of the American Medical Association published an article by Dr. Timothy Quill which evoked enormous discussion within the medical community and the nation as a whole. Quill, *Death and Dignity: A Case of Individualized Decision Making*, 324 J. A.M.A., 691 (1991). Dr. Quill prescribed barbiturates indicating the amount needed for sleep and the amount needed to commit suicide. Diane, the patient, was diagnosed with acute leukemia. Diane rejected the recommended course of chemotherapy which provided a 25% chance of recovery. Dr. Quill had a long standing relationship with Diane. Dr. Quill believed Diane's decision to commit suicide was reasonable based on extended discussions with Diane and her family. No charges based on a grand jury finding were brought against Dr. Quill.

69. Heilig, *The SFMS Euthanasia Survey: Results and Analyses*, SAN FRANCISCO MED., May, 1988 at 24-26. The survey generated a thirty-nine percent return rate and included viewpoints representing a wide range of religious affiliations. *Id.*

70. *Id.* at 24.

71. *Id.* at 25.

72. G. Smith, *supra* note 39 at 367.

73. *Id.* (citing Wallis, *To Feed or Not to Feed*, TIME, Mar. 31, 1986, at 60).

74. *Id.*

qualify for the November 1988 ballot.[75] The proposed initiative provided that medical doctors could practice active euthanasia (could provide a lethal injection to certain qualified patients).[76] Two major reasons have been cited for the initiative's failure to attract the required number of signatures, "[t]oo little attention was paid to the organizational details of such a precedential enterprise and the measure's advocates took too much comfort in public opinion polls - both their own and others."[77] Aside from the failure of the California Humane and Dignified Initiative to qualify for the ballot, other states continue to enact legislation enabling advanced directives, illustrating the trend toward emphasizing the primacy of individual autonomy and privacy rights.[78] Today, many medical ethicists' opinions regarding as-

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75. Parachini, *The California Humane and Dignified Death Initiative*, in *Mercy, Murder and Morality: Perspectives on Euthanasia*, HASTINGS CENTER REP., 1, 10 (Special Supplement, Jan./Feb. 1989).

> To exercise the right to be killed by a doctor, a patient would have to be certifiably terminal. A durable power of attorney would be executed in which the patient conveyed authority to order his or her death to someone else in the event a comatose or otherwise mentally disabling condition ensued . . . . [T]he State Bar of California's Congress of Delegates . . . endorse[d] the plan, but the endorsement was not binding on the group as a whole.

Id.

See *infra* note 8 which discusses why a similar initiative was defeated by Washington state voters in November of 1991. Paulson, *Aid in dying initiative is rejected*, Seattle Post Intelligence, Nov. 6, 1991, at A1, col. 1.

76. Parachini, *supra* note 76 at 10.

77. *Id.*

78. Fry-Revere, *Legal Trends in Bioethics*, J. OF CLINICAL ETHICS p. 88-89, (1990).

> An Ohio bill allowing people to designate a power of attorney for health care decisions if they should, at a later date become incompetent was signed into law on June 28, 1989. Similar laws were recently passed in Virginia, Oregon, Texas, and the District of Columbia. Minnesota has a new living will statute that went into effect on August 1, 1989 . . . . North Dakota also has a new living will statute . . . . allows advance directives for health care only when the patient is terminally ill . . . . the act allows termination of feeding only if the food can not be 'physically assimilated' or if the procedure will be 'unreasonably painful' . . . . Several states have also amended their living will statutes. Colorado's definition of life support that can be withheld or withdrawn now includes artificial feeding. Texas's definition of terminal illness now includes irreversible conditions. And Montana's statute contains a new provision prohibiting emergency medical personnel from acting contrary to a living will . . . . The Patient Self Determination Act, a bill requiring all states to have laws pertaining

sisted suicide are inconsistent with the current California law. In situations where the suicidal person has an underlying terminal and painful condition or is in an advanced state of decrepitude, medical ethicists assert that, "[p]hysicians and surrogates alike must be ready and willing to decide not to intervene in the dying process, indeed to hasten it, when they see the autonomy and dignity of patients threatened."[79] Currently, some medical ethicists have argued that there is "no important moral difference" between active and passive euthanasia, thereby justifying active euthanasia in particular cases.[80]

One of the principal arguments supporting the proposition that there is no intrinsic moral difference in a physician letting a patient die and killing that patient focuses on "motive, intention, and outcome."[81] In cases involving patients who are suffering with HIV disease, physicians often decide to withhold treatment in order to avoid the prolongation of pain and suffering. However, the motive to avoid pain and suffering must be taken to its logical conclusion. The withholding of treatment may cause the patient to suffer a relatively slow and painful death. Therefore, once the initial decision is made to not prolong the patient's pain and suffering, active euthanasia is preferable to passive euthanasia. Active euthanasia is preferable because active euthanasia is consistent with the humanitarian motive to avoid pain and suffering in the case of a patient suffering from a terminal illness or condition. Arguably, the performance of ac-

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> to advance directives in health care, was introduced in the US Congress jointly by Senators John C. Danforth (R-MO) and Daniel Patrick Moynihan (D-NY) on October 17, 1989. S1766 requires medical institutions to inform patients of their right to make medical treatment decisions, including the right to refuse treatment, as a condition of continued participation in federal Medicare and Medicaid programs. The bill also requires that health care facilities ask patients whether they have written directives, that the wishes of patients be recorded and periodically reviewed, and that health care institutions have bioethics committees to educate staff and the community on ethical issues and to provide guidance on specific cases.

Id.

79. Miller, *Death with dignity and the right to die: sometimes doctors have a duty to hasten death*, 13 J. OF MED. ETHICS 81 (1987).

80. Rachels, *Active And Passive Euthanasia*, 292 NEW ENG. J. OF MED. 78 (1975).

81. Kuhse, *Active and Passive Euthanasia - Ten Years into the Debate*, 1(2) EUTHANASIA REV. 108 (1986).

tive euthanasia on behalf of a person with advanced HIV disease does not constitute constructive assisted suicide (which ultimately subjects the physician to criminal and civil sanctions involving murder). Active euthanasia, in this situation, is a rational and humanitarian response to the patient's needs and desires.

III. CRIMINAL LIABILITY

Criminal sanctions may be brought against any person who participates in the suicide, rational or not, of a person with HIV disease. Criminal sanctions from murder in the first degree, to involuntary manslaughter, may be imposed against a person who participates directly in the death of the person with HIV disease. This type of participation is also known as a "mercy killing." Criminal sanctions may also be brought against a person who indirectly participates or assists a person to commit suicide, rational or not. In fact, California criminalized assisted suicide in 1873.[82] This law has remained unchanged to this date and applies to any person who assists a person with HIV disease to commit suicide. This section examines these laws as well as their application to situations involving "mercy killings" and suicide assistance in the case of a person suffering from a severe or terminal illness.

A. HOMICIDE

Under California Penal Code section 187(a), "[m]urder is the unlawful killing of a human being, or a fetus, with malice aforethought."[83] According to section 189, first degree murder is the "willful, deliberate and premeditated," killing of another, all other kinds of murders [being] of the second degree.[84] Section

82. CAL. PENAL CODE § 401 (Deering 1987).

83. CAL. PENAL CODE § 187 (Deering Supp. 1991).

84. CAL. PENAL CODE § 189 (Deering Supp. 1991).

> All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree.

Id.

192(a) states that voluntary manslaughter is "the unlawful killing of a human being without malice" but mitigated "upon a sudden quarrel or heat of passion."[85] On the other hand, section 192(b) declares that involuntary manslaughter is the product of a criminal, nonfelonious negligent act.[86] Actually performing the event that ends the life of a person who has HIV disease falls within these various forms or definitions of homicide.

In 1986, the Supreme Court of California in *In re Joseph G.*, stated that

> the key to distinguishing between the crimes of murder and of assisting suicide is the active or passive role of the defendant in the suicide. If the defendant merely furnishes the means, he is guilty of aiding a suicide; if he actively participates in the death of the suicide victim, he is guilty of murder.[87]

The court was merely reiterating the rule set forth in *People v. Matlock*, a 1959 California Supreme Court decision that active participation in the taking of a life is criminal homicide rather than assisting suicide.[88]

B. Exceptions to a Murder Charge

The only possible exception to a murder charge is a suicide pact where one of the two people in the pact survives and there is no indication of fraud.[89] Consent to homicide is no defense in

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85. Cal. Penal Code § 192(a) (Deering Supp. 1991).

86. Cal. Penal Code § 192(b) (Deering Supp. 1991). "Involuntary — in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. This subdivision shall not apply to acts committed in the driving of a vehicle." *Id.*

87. *In re* Joseph G., 34 Cal. 3d 429, 436, 667 P.2d 1176, 1180, 194 Cal. Rptr. 163, 167 (1983). The court, however refused to apply this "literal formulation" to the facts of *In re* Joseph G. because the case involved a suicide pact (the intention was that both participants die) versus assisting a suicide (where only one person is intended to die). *Id.*

88. *Id.*, at 436, 667 P.2d at 1180, 194 Cal. Rptr. at 167 (citing Matlock, 51 Cal. 2d at 682, 336 P.2d at 505 (1959)). The suicide victim was killed as a result of a direct injury (strangulation) that the defendant inflicted upon him. *Id.*

89. *In re* Joseph G., *supra* note 87 at 439, 667 P.2d at 1182-83, 194 Cal. Rptr. at 169-70. A minor was charged with murder under California Penal Code section 187 and aiding and abetting under California Penal Code section 401. The minor entered into a suicide pact with a friend, Jeff W., also a minor. Joseph G. drove a car, which also contained his friend, off a cliff. Only Joseph G. survived. The court held that the minor's actions fell more properly within the statutory definition of aiding and abetting a suicide

any jurisdiction in the United States.[90] Therefore, aside from an unsuccessful suicide pact (which may trigger prosecution under California's aiding and abetting statute), a person who pulls the trigger, administers the lethal dose or smothers the person/patient with HIV disease is guilty of murder. However, as discussed in subsequent sections, it appears that the courts treat true "mercy killings" not as first degree murder but as lesser offenses.

C. "MERCY KILLINGS": MODERN TREATMENT

Between 1920 and 1983 there were only three convictions in the U.S. of criminal homicide which involved some aspect of assisted suicide. All were convictions of manslaughter.[91] According to recent studies, the more appropriate homicide charge, if in fact one is brought, would be voluntary manslaughter. The the-

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and not murder. *Id.*

90. Sheffer, *supra* note 7, at 351.

91. People v. Campbell, 124 Mich. App. 333, 336, 335 N.W.2d 27, 30 (1982). Most recently, Judge Gerald McNally of Oakland County District Court, Michigan, dismissed murder charges against Dr. Jack Kavorkian. Dr Kavorkian connected a 54-year-old woman suffering with Alzheimer's disease to his homemade suicide machine. The judge held that the prosecutor had failed to prove that Dr. Kavorkian had planned and carried out the death of Janet Adkins. It was Janet Adkins who caused her own death when she pushed the button on the suicide machine. Dr. Kavorkian sat by her side and watched her die. Michigan has no assisted suicide laws. Four days after Janet Adkins' death, a civil injunction was imposed prohibiting Dr. Kavorkian from using his suicide machine on another patient. This case prompted another assisted suicide in Michigan. In August, Betram Harper, 72, of Loomis, California was charged with murder after flying to Michigan so that his wife, Virginia, could commit suicide. His wife, Virginia, was 69 and was suffering from terminal breast cancer. Lewin, *Judge Clears Doctor of Murdering Woman with a Suicide Machine*, N. Y. Times, Dec. 14, 1990, at A1, col. 1. On Oct. 23, 1991 Dr. Kavorkian assisted two more women in killing themselves. Wilkerson, *Rage and Support for Doctor's Role in Suicide*, N. Y. Times, Oct. 25, 1991, at A1, col. 2. Sherry Miller, 43 of Roseville, Michigan, had suffered the last twelve years of her life with multiple sclerosis. Ten months before her death she stated in a court hearing, "I went from a cane to a walker to a wheelchair. I can't walk. I can't write. It's hard for me to talk. I can't function as a human being . . . What can anybody do? Nothing. I want the right to die." Id. Marjorie Wantz, 58 of Sodus, Michigan, had a "painful but non-terminal pelvic disease that reportedly left her unable to walk and unable to sleep for more than a couple of hours at a time," Id. Mrs. Wantz stated, "After three and one-half years I cannot go on with this pain and agony . . . No doctor can help me anymore. If God won't come to me, I'm going to find God. I can't stand it any longer." Id. Dr. Kavorkian was indicted by a grand jury for the murder of Sherry Miller and Majorie Wantz and for the delivery of a controlled substance. *Inventor of Device for Suicide* is charged with murdering 2, N.Y. Times, Feb. 6, 1992, at A7, col. 1. Most recently, Dick Bauer of Cripple Creek, Colorado was acquitted of manslaughter "for giving his chronically ill mother the gun that she used to kill herself a few minutes later. . . ." *Acquittal in Aided Suicide*, N.Y. Times, Feb. 15, 1992, at A5, col. 2.

ory is

> that, although the death in fact was intended to occur as it did, it was under circumstances where the actor was not really in control of his own conduct. Certain psychological reports indicate that the act of assistance frequently is a response to pressures created by the victim's dependency or aggressiveness . . . if of sufficient intensity, it ought to operate in the mitigation of the mental element prerequisite to murder.[92]

The trial courts in California seem to be following this formula. For example, in July of 1986 Thomas Baker of Martinez, California, forced a nurse at gun point to disconnect his cancer stricken father's life support system. Baker pleaded guilty to a negotiated plea of voluntary manslaughter, receiving a sentence of not more than one year in jail and five years probation.[93] In September of 1986 Orange County, California, prosecutors dropped a murder charge and recommended probation of Jay McFadden, who pleaded guilty to a lesser charge for the alleged "mercy killing" of his wife, who had been suffering from multiple sclerosis.[94] In January of 1986, Wallace Cooper of San Gabriel Valley pled guilty to a voluntary manslaughter charge in a "mercy killing" of his uncle (Cooper injected his uncle with a lethal dose of morphine and digoxin), who was suffering from three terminal illnesses: congestive heart failure, kidney failure, and chronic intestinal bleeding. Pasadena Superior Court Judge Coleman Stewart sentenced Cooper to five years probation, finding that Cooper's actions were motivated by compassion and not malice.[95] These cases indicate that where a true "mercy killing" can be established, the California courts will allow a lesser charge of voluntary manslaughter. However, as indicated above, the punishment varies; some pleas result in a probated sentence, while others result in incarceration.

These decisions indicate that the courts look carefully at the condition of the patient and the motive of the mercy killer. While a murder charge is possible against a person who helps an

92. Garbesi, *The Law of Assisted Suicide*, 3 ISSUES IN L. & MED. 97-98 (1987) [hereinafter Garbesi].

93. L.A. Times, July 11, 1986, at 28, col. 3.

94. L.A. Times, Sept. 19, 1986, at 1, col. 5.

95. L.A. Times, Jan. 30, 1986, at 1, col. 1.

HIV disease patient commit suicide, voluntary manslaughter according to the theory above is more likely. In this situation the condition of the person with HIV disease and the motive of the person charged with the crime may be distinguishable from the facts surrounding a first degree murder charge.

D. Implications of a "Mercy Killing": Estate Disposition

The conviction, and perhaps even an acquittal of murder or voluntary manslaughter, may lead to other, noncriminal, legal repercussions. Section 250 of the California Probate Code states that

> [a] person who feloniously and intentionally kills the decedent is not entitled to . . . [a]ny property, interest, or benefit under the will of the decedent, including any general or special power of appointment conferred by the will on the killer and any nomination of the killer as executor, trustee, or guardian made by the will . . . [The killer is also not entitled to] [a]ny property of the decedent by intestate succession.[96]

Note that courts have interpreted section 254 of the California Probate Code, which was replaced by section 250,[97] to mean that persons who plead to a lesser charge of voluntary manslaughter are still subject to the probate court's finding, that the killing was unlawful and intentional.[98] In other words, the probate

96. Cal. Prob. Code § 250 (Deering 1987).

97. California Probate Code section 258 was effectively repealed on Jan. 1, 1985. The section stated that, "No person who has unlawfully and intentionally caused the death of a decedent . . . shall be entitled to any portion of the estate or to take under any will of the decedent . . . . A conviction or acquittal on a charge of murder or voluntary manslaughter shall be conclusive determination of the unlawfulness or unlawfulness of a causing of death, for the purposes of this section." Cal. Prob. Code § 258 (Deering 1981). However, section 254 added by Stats. 1984, c. 527, section 3 and amended by Stats. 1989, c. 21, section 2, which is applicable to estates of decedents who died on or after Jan. 1, 1985, provides the same as section 258. Section 254 states that, "[A] final judgement of conviction of felonious and intentional killing is conclusive . . . . In the absence of a final conviction . . . the court may determine by a preponderance of the evidence whether the killing was felonious and intentional . . . ." Cal. Prob. Code § 254 (Deering 1990).

98. Estate of McGowan, 35 Cal. App. 3d 611, 111 Cal. Rptr. 39 (1973). Jean McGowan shot and killed her husband and was charged with murder. Her attorney subsequently negotiated a plea of nolo contendere under California Penal Code section 1016 (3)) to involuntary manslaughter under California Penal Code section 192(2). The court of appeal reversed the probate court's finding that, " . . . since respondent was acquitted of the charge of murder by reason of her conviction of involuntary manslaughter,

court may, upon its own findings, determine by a preponderance of the evidence that a person is guilty of a felonious and intentional killing.

According to sections 250 and 254 of the California Probate Code, the finding of guilt by the probate court would result in the preclusion of succession to any part of the estate, whether intestate or by will. In 1973, the California Court of Appeal in *Estate of McGowan*[99] held that a negotiated plea from murder to voluntary manslaughter will not preclude the probate court from making its own findings as to whether the evidence establishes beyond a reasonable doubt that a killing was unlawful and intentional. The court stated that "[t]he acquittal in such instance (a conviction resulting from a nolo contendere or other bargained plea to a lesser offense) does not establish innocence of the greater crime charged, but merely means that the prosecution and the defendant have concluded that it is to their mutual advantage not to proceed to the ordeal of a trial in the particular case."[100]

In addition, California's Probate Code section 254 provides the criteria for determining whether a killing was felonious and intentional.[101] California Probate Code indicates that even if there has been an acquittal for murder by the criminal court, the probate court may determine by a preponderance of the evi-

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pursuant to the conclusive presumption of Probate Code section 258, she was entitled to succeed to all of the community property and one-half of the separate property (Prob. Code, § 223)." *Id.* at 615, 111 Cal. Rptr. at 42. The court of appeal held that where there is a plea of nolo contendere, the court must " . . . independently examine the facts in order to determine whether the defendant actually committed the offense alleged for the purposes of the particular proceeding (cf. Davis v. Aetna Insurance Company, 279 F. 2d 304, 311)." *Id.* at 618, 111 Cal. Rptr. at 44-45.

99. *Id.* at 613-618, 111 Cal. Rptr. 39, 40-45.

100. *Id.* at 619, 111 Cal. Rptr. at 44-45.

101. California Probate Code section 254 provides the criteria in determining whether the killing was felonious and intentional, stating:

> (a) A final judgement of conviction of felonious and intentional killing is conclusive for purposes of this part. (b) In the absence of a final judgement of conviction of felonious and intentional killing, the court may determine by a preponderance of evidence whether the killing was felonious and intentional for the purposes of this part. The burden of proof is on the party seeking to establish that the killing was felonious and intentional for the purposes of this part.

CAL. PROB. CODE § 254 (Deering Supp. 1990).

dence whether the killing was felonious and intentional.[102] In fact, the Court in *McGowan* stated that section 250 "clearly . . . appl[ies] to persons who have not been convicted of anything or even charged."[103] As a result, people who plead to involuntary manslaughter, or who have not been convicted of murder or even charged with murder, may be precluded from acting as the executor, trustee, or guardian of the decedent's will. Further, the person who has been found by the probate court to have unlawfully killed, may be prevented from succession to any part of the estate whether succession occurs through the decedent's will or intestate. For example, if someone otherwise entitled to receive portions of the estate challenged the disposition, persons like McFadden, Baker, and Cooper[104] would be subject to the probate court's finding on whether or not there had been an unlawful and intentional killing. Note, however, that the type of suicide assistance necessary to fall under section 250 calls for the assister to actually and intentionally perform the killing. Therefore, persons who assist an HIV disease patient with suicide in the form of encouragement, or by the provision of "how to" information or the means, will probably not meet the requirement of an intentional killing.

E. "Mercy Killing:" Effect on Disposition of Insurance

In addition, the *McGowan* court held that section 258 (replaced by 250(b))[105] of the Probate Code also applies to insurance proceeds. The court held that even if a beneficiary of a life insurance policy takes under contract and not through the estate, public policy would dictate that the beneficiary be precluded from receiving the benefits. The court stated that " . . . the rule that a beneficiary who unlawfully kills the insured is precluded from recovering on the instrument (citations omitted) is not based solely on the Probate Code section 258, but has a much wider foundation rooted in public policy that

102. *McGowan*, Cal. 3d, at 619, 111 Cal. Rptr. at 44-45.

103. *Id.* at 617, 111 Cal. Rptr. at 43.

104. *See* text *infra* p. 21-23.

105. California Probate Code section 258 was repealed by Stats. 1983, c. 842, section 19, operative Jan. 1, 1985. However, California Probate Code section 250(b) (added by statutes 1984, c. 527, section 3) serves to replace the intention to prevent insurance proceeds from passing to the person who feloniously and intentionally kills the decedent, stating "Property appointed by the will of the decedent to, or for the benefit of, the killer passes as if the killer had predeceased the decedent . . . . " Cal. Prob. Code § 250(b) (Deering 1981).

prohibits the killer from obtaining title to property as the fruit of his crime (citation omitted)."[106] In the event of a finding of an unlawful and intentional killing, the contingent beneficiaries would become entitled and, if none, then the proceeds become part of the insured's estate. In conclusion, sections 250 and 254 of the California Probate Code would affect the disposition of any insurance proceeds.

F. "Mercy Killing" and Physician Liability

In California, physicians who comply with all the requirements of a "living will" (Natural Death Act) or durable power of attorney for health care will not be guilty of murder for the withdrawal or withholding of life-support systems of any nature, as previously discussed.[107] Furthermore, in other states there are newspaper reports of acquittals of physicians who allegedly performed the death-causing act. For example, a physician in New Hampshire who administered a fatal air embolism into the blood vessel of a carcinoma patient and a physician in New York who allegedly administered a fatal injection to a comatose patient were both acquitted of assisting-suicide charges.[108] A Michigan district court dismissed murder charges against Jack Kavorkian who provided the suicide victim with his homemade suicide machine.[109]

G. Prosecution Under the Aiding and Abetting Statute

While suicide itself is not a crime in California, assisted suicide does constitute a crime. California has created a "sui generis crime of aiding and abetting suicide."[110] California Penal Code section 401 states that, "[e]very person who deliberately aids, or advises, or encourages another person to commit suicide, is guilty of a felony."[111] The California Supreme Court has addressed the issue of assisting the suicide of another person in

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106. *McGowan*, 35 Cal. 3d, at 615, 111 Cal. Rptr. at 43.

107. *See* text *infra* p. 10.

108. Engelhardt and Malloy, *Suicide and Assisting Suicide: A Critique of Legal Sanctions*, 36 Sw. L. J. 1003, 1029 (1982) (citing N.Y. Times Mar. 7, 1950, at 1, col. 1. and Houston Chronicle, June 22, 1973, section 4, at 10, col. 1.).

109. Lewin, *Judge Clears Doctor of Murdering Woman with a Suicide Machine*, New York Times, Dec. 14, 1991, at A1, col. 1. See *infra* note 91.

110. *In re* Joseph G., 34 Cal. 3d 429, 434, 667 P.2d 1176, 1179, 194 Cal. Rptr. 163, 166 (1983).

111. Cal. Penal Code § 401 (Deering 1987).

two cases. In 1959, the Court in *People v. Matlock* held that section 401 did not apply where a " 'person actively performs or actively assists in performing the overt act resulting in death.' "[112] The defendant strangled the victim at the victim's request because the victim desired death because he (victim) faced the possibility of imprisonment. The victim wished to appear as though he had been murdered for insurance purposes.[113]

The court stated that section 401 " 'contemplates some participation in the events leading up to the commission of the final overt act, such as furnishing the means for bringing about death,—the gun, the knife, the poison, or providing the water, for the use of the person who commits the act of self murder.' "[114] Under the court's analysis of section 401 in *Matlock*, providing the means or assisting in the administration of the means such as bringing the water to be used or holding the cup so that the person might drink from it, while not constituting a murder charge, would violate section 401.

The California Supreme Court in *In re Joseph G.*, held that the only exception to a murder charge is the true and mutual suicide pact (in a situation where one person survives the double suicide attempt).[115] In light of this ruling, a person with HIV disease who survives a double or mutual suicide attempt would be guilty of violating section 401 and not murder.

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112. People v. Matlock, 51 Cal. 2d 682, 694, 336 P.2d 505, 511 (1953) (quoting State v. Bouse, 199 Ore. 676, 702-03, 264 P.2d 800, 812, 823-25 (1953)). The court of appeal held that instructions based on California Penal Code section 401 (aiding and abetting a suicide) were properly refused. The defendant was charged with first degree murder. The defendant by his own account actively strangled and killed the victim. The trial was remanded primarily on evidentiary matters. *Matlock*, at 694, 698, 336 P.2d at 511, 515.

113. *Id.* at 689-91, 336 P. 2d at 507.

114. *Id.* at 694, 336 P.2d at 511. (quoting State v. Bouse, 199 Ore. 676, 702-03, 264 P. 2d 800, 812, 823-25 (1953)).

115. *In re* Joseph G., 34 Cal. 3d at 436, 67 P. 2d at 1180, 194 Cal. Rptr. at 1167. The court held that,

> . . . either (1) the mutual suicide pact in which one party provides the means (e.g., poison or lethal weapons) but each individual kills himself independently pursuant to the agreement; or (2) the circumstances of the present case, in which the pact envisions both parties killing themselves simultaneously with a single instrumentality. As will be seen, in both of the latter situations the proper criminal liability to be attached is for aiding and abetting suicide rather than for murder.

Id. See infra pp.8-9 for discussion of the underlying policy reasons for CAL. PENAL CODE § 401. *See infra* p.20 for facts and further discussion of the case.

While it is clear that providing the means for or actively assisting in a suicide constitutes a violation of section 401, it is not altogether clear what the test for encouragement is or whether providing "how to" information would violate section 401. However, a 1988 civil case which discusses section 401 sheds some light on what may constitute a violation of section 401. The California Court of Appeal in *McCollum v. CBS, Inc.*,[116] reiterated that some active and intentional participation in the events leading to the suicide are required in order to sustain a 401 violation. The court stated, "To satisfy the burden of section 401, defendants would have to (1) have specifically intended . . .[the victim's] suicide and (2) have had a direct participation in bringing it about."[117]

The court held that a rock musician who records and disseminates music whose lyrics encourage suicide does not specifically intend or directly participate in bringing a particular suicide about, even, as in this case, where the victim listened to the music just before killing himself. The court stated that

> [i]t is not sufficient simply to allege that defendants intentionally did a particular act. It must also be shown that such act was done with the intent to cause injury [citation omitted]. In other words, plaintiffs would have to allege that defendants intended to cause John's [victim] suicide and made the subject recorded music available for that purpose.[118]

The court stated, "There are no allegations of any kind that defendants had any knowledge of, or intent with respect to, John himself or any other particular listener."[119]

Applying the *McCollum* analysis, it would seem that section 401 would not apply to two specific situations. The first situation involves an omission to act, for example, where a person suffering from HIV disease (who does not exhibit suicidal tendencies) indicates that he or she believes in the concept of rational suicide and the listener does not disagree. The second sit-

116. McCollum v. CBS, Inc., 202 Cal. App. 3d 989, 1007, 249 Cal. Rptr. 187, 198 (1988).

117. *Id.*

118. *Id.*, at 1006, 249 Cal. Rptr. at 197.

119. *Id.*, at 106-107 n.12, 249 Cal. Rptr. at 197, n.12.

uation where it seems clear that section 401 would not apply, is where a person states hypothetically that they do not believe in damned souls as a result of rational suicide. For example, if a person says to an HIV disease sufferer (who does not exhibit suicidal tendencies) that they do not believe that persons who commit rational suicide have damned souls, section 401 would not apply. These acts in and of themselves would not show intent to cause the victim to commit suicide, nor is it likely that these acts would be construed as directly participating in assisting suicide. Likewise, it would seem that informing a person of a booklet such as that published by the Hemlock Society,[120] which provides case histories of suicides including details of the methods used, would not constitute direct participation or intent to cause the victim to commit suicide.[121] This fact pattern is very closely analogous to the situation in *McCollum* in that the provision of the material which discusses or encourages suicide is not provided with the specific intent to cause a particular suicide, as long as there is no knowledge of suicidal tendencies.. However, as noted above, the court's point, that the defendants did not have "any knowledge of, or intent with respect to John himself,"[122] indicates that a person who knows of another's suicidal thoughts and has a substantial relationship with that person might have a duty to prevent the suicidal person from harming himself or herself. For example, if a lover, best friend, family member, or priest asserts that suicide under these conditions (AIDS-related suffering) is reasonable, the court may find that the close relationship gives rise to an intent because of the implied influence of these persons on the victim. In addition, knowledge of a suicidal tendency will in all likelihood be easier to prove where there is a close relationship. While there are no cases on point providing any guidance as to the resolution of this particular fact pattern, *McCollum*, by analogy, indicates that these actions by lovers, best friends, family members and reli-

120. Golden, *A Time to Die; Increasingly, the ill are turning to suicide out of horror at the expensive, intrusive, lonely, prolonged nightmare that so called natural death has become.*, The Boston Globe, Oct. 7, 1990, Sec. magazine, p.16. "The Hemlock Society which has 33,000 members and has sold more than 100,000 copies of its how to book, LET ME DIE BEFORE I WAKE, exalts suicide as a uniquely dignified and courageous way to die." *Id.* More recently the Hemlock Society has published "Final Exit", a best seller, which is a suicide manual. Steinfels, *At Crossroads, U.S. Ponders Ethics of Helping Others Die*, N. Y. Times, Oct. 28, 1991, at A1 col. 2.

121. *Suicide Guide to Be Published*, The L.A. Daily J., Aug. 23, 1980, col. 3, p.2.

122. *McCollum*, 202 Cal. App. 3d at 1007, n.12, 249 Cal. Rptr. at 197, n.12.

gious counsel could be considered within the aiding and abetting statute prohibiting the encouragement of suicide.

IV. CIVIL LIABILITY

A. Types of Lawsuits Brought on Behalf of Deceased

Absent a statute (e.g., wrongful death or survivorship actions), common law dictates that there is no personal cause of action for the death of an individual.[123] Under common law, the death of the individual terminated all actions the deceased could have brought for tortious conduct.[124] California, by statute, provides for two distinct causes of action, the wrongful death action[125] which does not provide punitive damages and the survivorship action which provides punitive damages.[126] However, it should be noted that because of the diminished life expectancy of persons with HIV disease, pecuniary damages, which are based on the loss of value which the surviving relatives would have received from the decedent had the decedent not been killed, will be uniquely limited. Also, depending on the condition of the person with HIV disease and the assister's motives, the public may not be willing to impose punitive damages against the person who assists a suicide or participates in a "mercy killing."

California Civil Procedure Code section 377 provides for an original and distinct claim for wrongful death brought by the deceased person's beneficiaries such as the spouse, parent, or child.[127] This action is brought against the person whose negli-

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123. Knuth, *Civil Liability for Causing or Failing to Prevent Suicide*, 12 Loy. L.A.L. Rev. 967, 968 (1979) (citing W. Prosser, Law of Torts § 126, at 898 (4th ed. 1971)) [hereinafter Knuth].

124. *Id.*

125. Cal. Civ. Proc. Code § 377 (Deering 1987).

126. Cal. Prob. Code § 573 (Deering 1987).

127. Cal. Civ. Proc. Code § 377 (Deering 1987). Section 377(b) defines heirs as:

> (1) Those persons who would be entitled to succeed to the property of the decedent according to the provisions of Part 2 (commencing with Section 6400) of Division 6 of the Probate Code, (b) Whether or not qualified under paragraph (1), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, and parents . . . . and (3) Minors, whether or not qualified under paragraphs (1) or (2), if , at the time of the decedent's death, they resided for the previous 180 days in the decedent's house-

gent or willful conduct caused the death.[128] Because the statute focuses on the wrong to the beneficiaries, the damages are limited to pecuniary losses.[129] Damages for the survivor's emotional distress are not recoverable.[130] In addition, punitive damages are not recoverable[131] except where provided through consolidation of a survivorship action.[132]

Pecuniary losses suffered by the surviving relatives include the loss of the value of the companionship, support services, and contributions which the survivors would have received from the victim had death not occurred. These losses would be calculated relative to that person's life expectancy. These losses would be limited due to the short life expectancy of a person with an HIV disease diagnosis. Current medical evidence indicates that most deaths occur within two years of an AIDS diagnosis.[133] For example, if the person with HIV disease was at the end stages of the disease, these losses would be far less than those losses calculated for a person who has just been diagnosed with HIV disease.

California Probate Code section 573 provides that the executor or administrator of the estate may bring an action for dam-

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> hold and were dependent upon the decedent for one-half or more of their support.

Id.

128. CAL. PROB. CODE § 377(a) (Deering 1981).

129. Knuth, *supra* note 123 at 968 (citing Reyna v. City of San Francisco, 69 Cal. App. 3d 876, 880, 138 Cal. Rptr. 504, 507 (1977)).

130. *Id.*, (citing Krouse v. Graham, 19 Cal. 3d 59, 72, 562 P.2d 1022, 1028, 137 Cal. Rptr. 863, 869 (1977)).

131. *Id.*, (citing Pease v. Beech Aircraft Corp., 38 Cal. App. 3d 450, 462, 113 Cal. Rptr. 416, 424 (1974)).

132. CAL. CIV. PROC. CODE § 377(a) which states,

> In every action under this section, such damages may be given as under all the circumstances of the case, may be just, but shall not include damages recoverable under Section 573 of the Probate Code . . . . Any action brought by the personal representative of the decedent pursuant to the provisions of Section 573 of the Probate Code may be joined with an action arising out of the same wrongful act or neglect brought pursuant to the provisions of Section 573 of the Probate Code, such actions shall be consolidated for trial on the motion of any interested party.

Id.

133. Chaisson, *Living with AIDS*, 263 J. A.M.A. 434 (1990).

ages sustained prior to death.[134] The damages recoverable include compensatory and punitive or exemplary but not damages for pain, suffering, or disfigurement.[135] Punitive damages are over and above those which would compensate the plaintiff for the pecuniary loss. Punitive damages are based on the public policy that the defendant's conduct is outrageous and must be punished proportionately, thereby making an example of the defendant in addition to providing solace to the plaintiff.[136]

Because there are no civil cases involving assisting suicide, it is difficult to predict whether or to what extent punitive damages would be imposed on the defendant. The two criminal cases of physician acquittal[137] indicate that the public does not consider the actual performance of the death-causing act on a person suffering from terminal illness to be outrageous conduct.[138] Because HIV disease is currently considered a painful and disfiguring terminal illness, juries in California may likewise not impose punitive damages if the defendant can establish that his or her motive was not for personal gain but was derived from compassion.

B. Negligence Per Se: Penal Code Section 401 Violation

Under certain circumstances, violations of criminal statutes subject the defendant to civil as well as criminal liability.[139] The terms of a statute in essence create a specific duty of care, and when the statute is violated the duty is deemed to have been breached, giving rise to the term "negligence per se".[140] In 1967, the California Legislature codified the doctrine of negligence per se as a rebuttable presumption affecting the burden of proof.[141]

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134. Cal. Prob. Code § 573 (Deering 1987).

135. Knuth, *supra* note 123 at 969 (citing Cal. Prob. Code § 573 (West 1956) (amended 1961)).

136. W. Prosser and P. Keeton, The Law of Torts, 9-10 (5th ed. 1984).

137. Engelhardt and Malloy, *Suicide and Assisting Suicide: A Critique of Legal Sanctions*, 36 Sw. L. J. 1003 (1982) (citing N.Y. Times Mar. 7, 1950, at 1, col. 1. and Houston Chronicle, June 22, 1973, section 4, at 10, col. 1.)

138. *See* text *infra* p. 26.

139. W. Prosser and P. Keeton, The Law of Torts, 220 (5th ed. 1984).

140. *Id.* at 220, n. 2.

141. Cal. Evid. Code § 669 (Deering 1986).

> (a) The failure of a person to exercise due care is presumed if: (1) He violated a statute, ordinance, or regulation of a public entity; (2) The violation proximately caused death or injury to person or property; (3) The death or injury resulted from an

However, California courts have not as yet determined whether section 401 (the prohibition against aiding and abetting a suicide) would provide the basis for a negligence per se private right of action against a person who assisted a suicide.

While most negligence per se cases involve violations of the Vehicle Code,[142] the doctrine is not limited to these types of violations. In 1988, the Court of Appeal in *McCollum* refused to decide or discuss whether section 401 would entitle the plaintiffs to a jury instruction on negligence per se because section 401 was not applicable to the victim's suicide.[143] However, in 1984, the California Court of Appeal reversed a trial court's summary judgment and instead held that "verbal encouragement to commit assault with a deadly weapon [is] affirmative conduct sufficient, as a matter of law, to impose civil liability for damages ensuing from that assault."[144] *Michael R. v. Jeffrey B.* was an action on behalf of a minor who was shot in the eye with a marble. The defendant told the boy who shot the marble at the plaintiff, "Hey, shoot; go for it."[145] By analogy, an analysis of the statute (section 401) indicates that a violation of section 401 would likely entitle plaintiffs to a jury instruction of negligence per se.

In order for a criminal statute to establish a specific duty of care for civil negligence, the following requirements must be

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> occurrence of the nature which the statute was designed to prevent; and (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted. (b) This presumption may be rebutted by proof that: (1) The person violating the statute, ordinance, or regulation did what might be reasonably expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law; or (2) The person violating the statute, ordinance, or regulation was a child and exercised the degree of care ordinarily exercised by persons of his maturity, intelligence, and capacity under similar circumstances, but the presumption may not be rebutted by such proof if the violation occurred in the course of an activity normally engaged in only by adults and requiring adult supervision.

Id.

142. WITKIN, TORTS § 531.

143. *McCollum*, 202 Cal. App. 3d n.13, at 1007, 249 Cal. Rptr. n.12 at 197.

144. Michael R. v. Jeffrey B., 158 Cal. App. 3d 1059, 1063-1064, 205 Cal. Rptr. 312, 316 (1984).

145. *Id.* at 1064, 205 Cal. Rptr. at 316.

met: (1) the statute itself must be clear and unambiguous; (2) the legislative purpose must have been to prevent the type of injury actually suffered by the plaintiff (here the decedent); and (3) the legislature must have intended to protect a class of persons of which the plaintiff (decedent) is a member.[146] In addition, California Evidence Code section 669(a)(1),(2) requires that the plaintiff prove that the statute was violated and that the violation proximately caused the death or injury.[147]

In light of the above, the first element or question in determining if a violation of California Penal Code section 401 can lead to a civil action based on negligence per se is whether the statute is clear and unambiguous. The statute imposes the duty, defines the conduct, and specifies of whom it is required.[148] The statute imposes the duty on "every person".[149] The conduct is defined as one who "deliberately aids, or advises, or encourages another person to commit suicide."[150] Thus, at first glance it would appear that this element meets the test necessary for the application of the negligence per se doctrine. However, one could argue that section 401 is ambiguous and vague. It is unclear as to what constitutes the act of deliberately aiding, or advising, or encouraging another person to commit suicide. There are many possible scenarios. The types of suicide assistance a person can provide vary from the seemingly innocent to what appears at first glance to be murder.[151] As a result, some acts may not con-

146. W. PROSSER and P. KEETON, THE LAW OF TORTS, 222-227 (5th ed. 1984).

147. CAL. EVID. CODE § 669(a)(1), (2) (Deering 1986).

148. California Penal Code SECTION 401 states, "Every person who deliberately aids, or advises, or encourages another person to commit suicide, is guilty of a felony." CAL. PENAL CODE § 401 (Deering 1987).

149. *Id.*

150. *Id.*

151. In order to illustrate the difficult question of what constitutes suicide assistance and the imposition of criminal and civil liability the varying degrees of assistance are divided below into five categories. 1. ENCOURAGEMENT: First, the assister recognizes that the AIDS patient is considering suicide. Encouragement is possible by the passive act of simply not disagreeing or by active reassurance. For example, reassurance occurs by the listener simply stating that the listener understands or that the listener doesn't believe that the patient's soul will be damned forever. Encouragement by omission is basically the absence of discouragement. 2. PROVISION OF "HOW TO" INFORMATION: This can be accomplished by directly providing or referring to literature on "how to" commit suicide. 3. PROVIDING THE MEANS: This can be accomplished, for example, by intentionally or unintentionally providing a gun or a sufficient amount of medication to a person who objectively appears suicidal. 4. ASSISTING IN THE ADMINISTRATION OF THE MEANS: This could be accomplished by holding a cup of water to the patient's mouth enabling that person to swallow a lethal dose. Another ex-

stitute aiding, or advising, or encouraging another person to commit suicide.

The second element or question in determining if a violation of California Penal Code section 401 can lead to a civil action based on negligence per se is whether the legislative purpose is to prevent the type of injury suffered by the plaintiff. The legislature made the violation of section 401 a felony offense. The criminal punishment of the offense was meant to ". . . discourage the actions of those who might encourage suicide."[152] Therefore, if an individual deliberately aids, advises, or encourages a person with HIV disease to commit suicide, which as a result occurs, then that injury (the suicide) is what the legislature meant to prevent by the provision of the statute. As a result, it appears that the second element necessary for the application of the negligence per se doctrine to Penal Code section 401 is met.

The third element or question, in determining if the negligence per se doctrine may be applied to a violation of Penal Code section 401, is whether the legislature must have intended to protect the class of persons of which the plaintiff (deceased) is a member. Because the aiding and abetting statute is designed to protect persons from committing suicide, any person who commits suicide as a result of encouragement from another is within the class of persons the legislature sought to protect.

California holds that the violation of a statute creates a rebuttable presumption of negligence.[153] Even if the presumption

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ample would include helping the person to the garage where the patient ultimately dies of carbon monoxide poisoning. 5. ACTUALLY PERFORMING THE ACT WHICH ENDS THE PATIENT'S LIFE: Upon the request of the patient (usually where the patient is physically incapable of accomplishing the act), the person/assister actually performs the act such as pulling the trigger of the gun, administering a lethal dose (ie. intravenously) or by smothering. These stages are those defined in *Criminal Liability For Assisting Suicide*, 86 COLUM. L. REV. at 358. However, the definitions were tailored for the purposes of this article.

152. *In re* Joseph G., 34 Cal.3d 429, 437, 67 P.2d 1176, 1181, 194 Cal. Rptr. 163,168 (1983) (quoting Note, *Criminal Aspects of Suicide in the United States*, 7 N.C. CENT. L.J. 156, 162 (1975)).

153. Satterlee v. Orange Glenn School District, 29 Cal. 2d 581, 588, 177 P.2d 279, 283 (1947). "An act which is performed in violation of an ordinance or statute is presumably an act of negligence, but the presumption is not conclusive and may be rebutted by showing that the act was justifiable or excusable under the circumstances. Until so rebutted it is conclusive." *Id.* This holding is consistent with a later adopted code, CAL. EVID.

is not rebuttable, in certain circumstances, a statutory violation may be excused. In 1958, the California Supreme Court held that a person may be excused for the violation of a statute if "he has sustained the burden of showing that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law."[154] Some guidance as to what constitutes an excuse may be found in the Restatement of Torts, Second (1965) which provides for the following excuses:

> (a) the violation is reasonable because of the actor's incapacity; (b) he neither knows or should know of the occasion for compliance; (c) he is unable after reasonable diligence to comply; (d) he is confronted by an emergency not due to his own misconduct; (e) compliance would involve a greater risk of harm to the actor or to others.[155]

The actor's incapacity may provide the excuse in the case of assisting the suicide of a person suffering from a terminal illness. As previously discussed,[156] where, "the act of assistance. . . [was] in response to pressures created by the victim's dependency or aggressiveness, if of sufficient intensity it may establish lack of capacity."[157] Therefore, the persons who could assert this excuse would be those who could establish a very close and substantial relationship with the victim such as a spouse or significant other (e.g., gay lover, Shanti worker). It is unlikely that any of the other acceptable excuses for violating a statute provided above would apply to the circumstances surrounding a HIV disease-related suicide. One could argue that the release from pain and suffering would fall within subsection (e), in that compliance with Penal Code section 401 would result in greater harm to the deceased and others. As yet, the courts have not considered that the release from pain and suffering would constitute

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CODE § 669. *See infra* note 125.

154. Alarid v. Vanier, 50 Cal. 2d 617, 327 P.2d 897, 900 (1958). *See also*, the California Supreme Court in Martin v. Martin 82 Cal. 2d, 733, 187 P.2d 78 (citing Satterlee v. Orange Glenn School Dist., 29 Cal. 2d, 581, 177 P.2d 279 (1947) which stated, "A presumption of negligence arises from the prima facie showing, which must be rebutted by evidence that the violation was justifiable or excusable"). Martin v. Martin 82 C.A. 2d, 733, 187 P.2d 78 (1947).

155. RESTATEMENT (SECOND) OF TORTS § 288A (1965).

156. *See* text *infra* p. 458.

157. Garbesi, *supra* note 92 at 97-8.

an excuse.

Causation in fact and proximate cause will be less difficult to establish where the person provided the means or assisted in the administration of the means which caused the death of the HIV disease patient. On the other hand, it will be much more difficult to establish that a person who provides "how to" information or who encourages suicide by verbal support (or omission to discourage suicide) was the cause of the victim's death.

Reliance on the knowledge and theories of psychiatrists will aid in making the determination whether or not the defendant's conduct was the substantial cause of the victim's suicide. The current literature illustrates that suicide is the result of internal processes and that external events are not the substantial cause of the suicide but are merely incidental or precipitating.[158] Based on this determination, imposing liability on any particular person who stated that he or she believed in rational suicide or did not discourage rational suicide, by analogy would be inappropriate. In fact, Prosser states that "[a]n act or an omission is not regarded as a cause of an event if the particular event would have occurred without it."[159] Therefore, if the defendant establishes that his or her conduct was not the substantial cause of the suicide, then the plaintiff's case would fail.

However, if the plaintiff does establish cause in fact, then the final step is proof that the defendant's conduct was the proximate cause of the victim's injury (suicide). Because the immediate cause of the suicide is the victim's own action, the critical question is whether the victim's act is an independent or dependent intervening act.[160] If the victim's act is considered a

158. *Civil Liability for Causing or Failing to Prevent Suicide*, *supra* note 112 at 970-971.

159. *Civil Liability for Causing or Failing to Prevent Suicide*, *supra* note 25, at 972 (quoting W. PROSSER, LAW OF TORTS, § 41 at 238 (4th ed. 1971)).

160. *Id.* at 974.

> Proximate cause is an issue in any tort action, but it is particularly important when the defendant's conduct was not the immediate cause of injuries. Since the immediate cause of death in one who commits suicide is his own action, suicide is an act that intervenes between the defendant's negligence and the injured person's death. Intervening acts [footnote omitted] are classified as either dependent or independent under general tort principles. A dependent intervening act does not in-

dependent intervening act, then the defendant's (person assisting suicide) acts are treated as the proximate cause of the victim's harm.[161] If the victim's act is considered an independent intervening act, then the chain of causation has been interrupted and the defendant is not the proximate cause of the victim's injury.[162]

The court of appeal in *Schrimsher v. Bryson* stated," The general test of whether an independent intervening act, which operates to produce an injury, breaks the chain of causation is the foreseeability of that act."[163] In 1960, the California Court of Appeal in *Tate v. Cononica*, stated in dicta that a voluntary suicide (not the result of an "uncontrollable impulse") might be considered an independent intervening act which would break the chain of causation.[164] The question of proximate cause will

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terrupt the chain of causation and the defendant's conduct remains the proximate cause of the harm sustained by the plaintiff [footnote omitted]. An independent intervening act supersedes the defendant's conduct as the cause in fact of the plaintiff's injuries and relieves the defendant of liability [footnote omitted].

Id.

161. *Id.*

162. *Id.*

163. *Id.* at 975 n.42 (quoting Schrimsher v. Bryson, 58 Cal. App. 3d 660, 664, 130 Cal. Rptr. 125, 127 (1976)).

164. Tate v. Canonica, 180 Cal. App. 2d 898, 915, 5 Cal. Rptr. 28, 40 (1960).

> [T]hat where the negligent wrong only causes a mental condition in which the injured person is able to realize the nature of the act of suicide and has power to control it if he so desires, the act becomes an independent intervening force and the wrongdoer cannot be held liable for the death. On the other hand, if the negligent wrong causes mental illness which results in an uncontrollable impulse to commit suicide, then the wrongdoer may be held liable for the death . . . . [T]he decedent's act must be voluntary, in the sense that he could, in spite of his mental illness, have decided against suicide and refrained from killing himself.

Id.

But note, the court stated,

> Where defendant, intended by his conduct, to cause serious mental distress or serious physical suffering, and such mental distress is shown to be a "substantial factor in bringing about" (Rest., Torts sections 279, 280) the suicide, a cause of action for the wrongful death results, whether the suicide was committed in a state of insanity, or in response to an irresistible impulse, or not.

Id.

Tate was an action alleging intentional or negligent infliction of emotional distress. De-

depend on whether at the time of the defendant's conduct, the defendant could foresee that the victim was suicidal. The answer to the question will depend on the particular facts of the situation. Note that the level of dependency may weigh heavily on whether the defendant's act was the cause of the suicide. For example, foreseeability may be more easily established where the defendant is the primary caregiver to the person who commits suicide. In this situation, defendant's knowledge of suicidal tendencies may be successfully imputed through circumstantial evidence. It is clear, however, that if the victim tells the defendant that he or she is contemplating suicide and the defendant then provides the suicide victim with poison, then foreseeability has been firmly established.

Because the court requires foreseeability of the intervening act (victim's suicide), it is unlikely that courts today will hold persons responsible for a victim's act if they did not have the direct knowledge of the victim's suicidal tendencies.[165] For example, it is unlikely that persons will be held responsible because of implied inferences of suicidal tendencies which may be drawn from a conversation with a person with HIV disease who asks another what they think (ethically) of suicide or what literature is available on the subject of suicide.

C. NEGLIGENCE: NONPROFESSIONAL

The court of appeal, in *McCollum v. CBS, Inc.*, stated that the threshold question in determining whether there is a claim for negligence is whether there is any duty owed to the plaintiff. The court stated that foreseeability was only one of several factors to be weighed in determining whether a duty is owed.[166] The Supreme Court in *Nally*,[167] listed succinctly the other factors which include:

> . . . the degree of certainty that [he] suffered injury; the closeness of the connection between the [defendant's] conduct and the injury suffered; the moral blame attached to the [defendants]: the

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fendants by their conduct caused a person serious mental distress which resulted in that person committing suicide. *Id.*

165. Knuth, *supra* note 123 at 975, n.42, (quoting Schrimsher v. Bryson, 58 Cal. App. 3d 660, 664, 130 Cal. Rptr. 125, 127 (1976)).

166. *McCollum*, 202 Cal. App. 3d at 1004, 249 Cal. Rptr. at 195.

167. *See* text *infra* p. 479.

> policy of preventing future harm; the extent of the burden to the [defendants] and the consequences to the community of imposing liability for the breach; and the availability, cost, and prevalence of insurance for the risk involved.[168]

The court in *McCollum*[169] held that the plaintiffs failed to establish that the defendants had a duty.[170] This case involved a rock musician (and others involved in writing and distribution) who recorded music whose lyrics encouraged suicide.[171] The victim shot and killed himself while listening to defendant's music.[172] The court held that the victim's suicide was not reasonably foreseeable, that there was no close connection between the defendants' music production and distribution and the teenager's death, that no moral blame could be imputed to the defendants, and, most significantly, that the imposition of a duty which would restrict artistic speech is unacceptable.[173] This case provides support for the First Amendment right to distribute material such as that of the Hemlock Society in light of the fact that the court has found no duty to exist between the writer, publisher, or distributor and an unknown suicide victim who listens to or reads the material before killing him/herself.

However, the factors announced in determining whether there is a duty must be carefully scrutinized in light of the situation surrounding a person with HIV disease who commits suicide. For example, a lover, family member, or friend who inadvertently makes a death-causing agent available to a suicidal person may be found to have not only had a duty of care (to prevent harm) but to have breached that duty. A special relationship, which by its nature creates a duty, may arise, as a result of the family relationship or in assuming the role of a care provider for that individual. For example, the more dependent the person with HIV disease is on the care provider the more likely a special relationship will be imposed.

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168. Nally v. Grace Community Church, 47 Cal.3d 278, 293, 763 P.2d 948, 956, 253 Cal. Rptr. 97, 105 (1988) (citing Rowland v. Christian, 69 Cal. 2d 108, 113, 70 Cal. Rptr. 97, 443 P. 2d 561 (1968)).

169. *See* text *infra* p. 465.

170. *McCollum*, 202 Cal. App. 3d at 1005-06, 249 Cal. Rptr. at 196-97.

171. *Id.* at 994, 249 Cal. Rptr. at 189.

172. *Id.* at 995, 249 Cal. Rptr. at 189.

173. *Id.* at 1005-06, 249 Cal. Rptr. at 197.

In light of the fact that society's attitudes are changing regarding the rational suicide of a terminally ill person, the public policy of preventing suicide may change as well. However, as a matter of law, the court would probably find a duty due to the presence of a special relationship of custody or control and the current public policy to prevent suicide.

D. Brief Discussion: Other Possible Causes of Actions

1. *Professional Negligence of Physicians*

The general principles which ordinarily govern in negligence cases also apply in medical malpractice claims. The duty to prevent a foreseeable suicide may arise out of a special relationship between the suicidal person and his or her physician. Therefore, as in any other case founded upon negligent conduct, the burden of proof rests on the plaintiff in a medical malpractice case to show a lack of the requisite skill or care on the part of the defendant. The standard applied in medical malpractice cases must take into account the specialized knowledge or skill of the defendant physician.[174]

Through the use of expert testimony, the plaintiff must prove that the physician breached his or her duty to prevent suicide. The plaintiff must show that the treating physician's particular act or omission to act was not within the standard of care among other competent physicians. By analogy, a physician who prescribes medications in potentially lethal dosages to a person known to be suicidal, such as a person with HIV disease, would in all probability be found to have breached his or her duty. This is a likely result if it can be established that the physician knew or should have known of the victim's suicidal tendency.

In addition, a physician (psychiatrist) who treats a patient on an out-patient basis, and who has knowledge that the patient is likely to attempt suicide, has a duty to take reasonable steps to prevent the harm, and failure to do so will subject the psychiatrist to a medical malpractice action. For example, a physician who knows that his or her patient is in imminent danger of committing suicide has a duty to prevent such an action, whether it

174. McCoid, *The Care Required Of Medical Practitioners*, 12 Vand. L. Rev. 549,558 (1959); W. Prosser, Torts § 32 (4th ed. 1971).

be by commitment to an institution or some other type of appropriate treatment. In 1978, the California Court of Appeal in *Bellah v. Greenson* stated that the precautionary steps that could or should have been taken by a psychiatrist treating a person with known suicidal tendencies presented a purely factual question to be resolved by a jury.[175]

There may be some circumstances where the plaintiff does not have to use expert witnesses to show a breach of duty and may instead rely on the doctrine of res ipsa loquitur.[176] The California Supreme Court in *Meier v. Ross*, reversed a judgment in favor of the physician and remanded for a new trial the wrongful death action by the patient's widow and minor children.[177] The physician (psychiatrist) admitted the patient after a suicide attempt to a psychiatric wing of the hospital where he was in charge. The patient subsequently jumped to his death through an open window.[178] The court held that a jury instruction of res ipsa loquitur was proper because the duty required that the physician protect the decedent from his own acts whether voluntary or involuntary.[179] Once the breach is established, the plaintiff would have to prove additional elements of causation in fact and proximate cause.[180]

2. *Special Duty: Religious Counsel Malpractice*

In 1988 the California Supreme Court in *Nally v. Grace Community Church*[181] refused to impose a duty on all nontherapists to refer potentially suicidal persons to licensed medical practitioners.[182] The supreme court reversed the court of appeal judgment and dismissed the wrongful death action by the parents of a suicide victim against a church and its pastoral

175. Bellah v. Greenson, 81 Cal. App. 3d 614, 620, 146 Cal. Rptr. 535, 538 (1978). In this mal-practice action, plaintiffs/parents brought an action for wrongful death against a psychiatrist who was treating their daughter. The plaintiffs alleged that the psychiatrist had failed to prevent their daughter from committing suicide. The court held that the psychiatrist had a duty to prevent the suicide. *Id.*

176. *Meier*, 69 Cal 2d at 427, 445 P.2d at 524-25, 71 Cal. Rptr. at 908-09.

177. *Id.* at 435, 445 P.2d at 530, 71 Cal. Rptr. at 914.

178. *Id.* at 424-25, 445 P.2d at 523, 71 Cal. Rptr. at 907.

179. *Id.* at 426-27, 445 P.2d at 524, 71 Cal. Rptr. at 908-09.

180. *See* text *infra* p. 473.

181. Nally v. Grace Community Church, 47 Cal. 3d 278, 297, 763 P.2d 948, 959, 253 Cal. Rptr. 97, 108 (1988).

182. *Id.*

counselors.

The supreme court found that the plaintiffs did not establish that the defendants had a duty to prevent the suicide.[183] The court held that a nontherapist counselor who provides counseling to a potential suicidal person on secular or spiritual matters does not give rise to a duty to refer that person to professional care.[184] The duty to refer is limited to hospitals and physicians, psychiatrists, and psychologists who are professionals and who have control over the environment.[185] The court stated,

> [o]ne can argue that it is foreseeable that if a nontherapist counselor fails to refer a potentially suicidal individual to professional, licensed therapeutic care, the individual may commit suicide. While under some circumstances counselors may conclude that referring a client to a psychiatrist is prudent and necessary, our past decisions teach that it is inappropriate to impose a duty to refer-which may stifle all gratuitous or religious counseling-based on foreseeability. Mere foreseeability of harm or knowledge of danger is insufficient to create a legally cognizable special relationship giving rise to a legal duty to prevent harm.[186]

Therefore, this case would support the proposition that the family members in a wrongful death suit of a person with HIV disease, will not be able to establish that a clergy person or other volunteer nonprofessional has a duty to refer a potentially suicidal person to a medical professional.

3. *Negligent Infliction of Emotional Distress*

In September of 1989, the California Court of Appeal in *Holliday v. Jones*[187] held that

> in order to recover for the negligently inflicted emotional distress damages, a plaintiff must either have a special relationship to the defendant

183. *Id.* at 304, 763 P.2d 948, 964, 253 Cal. Rptr. 97, 113.
184. *Id.* at 292-96, 763 P.2d at 956-58, Cal. Rptr. at 105-08.
185. *Id.*
186. *Id.* at 297, 763 P.2d at 959, 253 Cal. Rptr. at 108.
187. Holliday v. Jones, 215 Cal. App. 3d 102, 264 Cal. Rptr. 448, (1989) *modified*, 214 Cal. App. 3d 465 (1989).

> (*Marlene F.*), be the direct object of some aspect of the defendant's conduct (*Molien*) or personally witness a negligently caused physical injury to a closely related primary victim (*Dillon*; *Ochoa*; *Thing*). Beyond these categories, the only exception seems to be the recovery by spouses of loss of consortium damages.[188]

The court noted that the California Supreme Court has made a policy decision that costs associated with attempting to compensate intangible losses are socially significant and can no longer be ignored.[189] Therefore, any action brought for the negligent infliction of emotional distress regarding the assistance of suicide must fit within the narrowly defined circumstances cited above in *Holliday*.

The supreme court in *Marlene F. et al., v. Affiliated Psychiatric Medical Clinic, Inc.*,[190] held that damages were recoverable for negligent infliction of emotional distress because the injury to the plaintiffs was foreseeable.[191] In this case, two mothers sued the psychiatrist for the emotional harm each received because the psychiatrist molested their sons.[192] Both mothers and their sons were patients of the psychiatrist.[193] The court stated, "It bears repeating that the mothers here were the patients of the therapist along with their sons, and the therapist's tortious conduct was accordingly directed against both."[194] This decision indicates that a spouse, parent, or child of a suicide victim would not fall within the special relationship required to state a claim for emotional distress unless that member could establish that the defendant's conduct was directed against him or her as well as the suicide victim. In other words, the therapist must know or should have known that his or her actions toward the suicidal victim would directly injur and cause severe emotional

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188. *Id.*, at 111, 264 Cal. Rptr. at 453 (1989) *modified*, 214 Cal. App. 3d 465 (1989).

189. *Id.* at 107, 264 Cal. Rptr. at 450.

190. Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc., 48 Cal. 3d 583, 770 P.2d 278, 257 Cal. Rptr. 98 (1989).

191. *Id.* at 591, 770 P.2d at 283, 257 Cal. Rptr. at 103. "It is no less foreseeable that a mother who consults a therapist for purposes of stabilizing and improving her relationship with her son, and who commits herself and her son to the therapist's care, would feel betrayed and suffer emotional distress upon learning that the therapist had, during the course of the treatment, sexually molested her son." *Id.*

192. *Id.* at 585-86, 770 P.2d at 279, 257 Cal. Rptr. at 99.

193. *Id.*

194. *Id.* at 591, 770 P.2d at 282, 257 Cal. Rptr. at 103.

distress to the family member.

In addition, the court of appeal in *Newton v. Kaiser Foundation Hospitals*[195] held that a duty of care may arise from contract.[196] The court held that Kaiser had a duty to the mother because Kaiser entered into a contract with the mother to provide care and treatment for herself and child during the birth process. The child sustained permanent and irreparable paralysis of the upper arm because of the unnecessary and excessive traction to the child's head with forceps at delivery.

Therefore, a contract between a medical professional and another person such as the parent of a person with HIV disease may give rise to the duty not to inflict emotional damage negligently on the parent. For example, a physician whose negligent conduct causes the suicide of a minor suffering from AIDS could be liable to the parent (who entered into a contract for the care of the son) for emotional distress.

The court, in *Molien v. Kaiser Found. Hosp.*,[197] found that a physician owed a duty of care to the patient's husband because the physician instructed Mrs. Molien to have her husband examined, confirming that the "tortious conduct was directed to him as well as to his wife."[198] Here, the physician incorrectly diagnosed Mrs. Molien with syphilis.[199] Because of the nature and transmission of the disease, the diagnosis led to marital mistrust which resulted in divorce.[200] The husband brought an action for negligent infliction of emotional distress, which was upheld.[201] However, in the case of a person with HIV disease who commits suicide, it is unlikely that a spouse, parent, or child of the suicide victim could establish that the physician intended to direct the "tortious conduct" at the victim's survivors.

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195. Newton v. Kaiser Foundation Hospitals, 184 Cal. App. 3d 386, 392, 228 Cal. Rptr. 890, 894 (1986).

196. *Id.* at 392, 228 Cal. Rptr. at 894.

197. Molien v. Kaiser Found. Hosp., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1983).

198. *Id.* at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.

199. *Id.* at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832.

200. *Id.* at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832-33.

201. *Id.* at 919, 933, 616 P.2d at 814, 823, 167 Cal. Rptr. at 832, 841.

In *Dillon v. Legg*,[202] the Supreme Court of California held that a mother who saw her daughter killed by a car as she crossed an intersection was entitled to emotional damages.[203] The supreme court stated that the "chief element" in establishing liability is the foreseeability of the injury to the mother.[204] The court considered such factors as plaintiff's distance from the scene of the accident, whether the plaintiff observed the accident sensorially and contemporaneously and whether the victim and the plaintiff were closely related.[205] Application of these factors to a situation where a person with HIV disease commits suicide would require that the closely related person be present and observe the suicide both sensorially and contemporaneously.

V. CONCLUSION: CALIFORNIA COURTS SHOULD DISTINGUISH THE CASE OF A RATIONAL SUICIDE AND PROTECT THOSE PERSONS, THEIR LOVED ONES, AND HEALTH CARE PROVIDERS FROM UNJUST LEGAL RAMIFICATIONS

California case law[206] has recognized the right of nonterminally ill persons to terminate life support systems including feeding mechanisms. The court of appeal in *Bartling* dismissed the state's interests in protecting the sanctity of life, stating that the state's interest is in protecting persons from irrational suicides. The court in *Bouvia* stated that the choice of a nonterminally ill person to withdraw a life-sustaining feeding tube is a moral and philosophical decision that was hers alone in light of her own assessment of her quality of life.

These decisions demonstrate that the California courts recognize that the choice to end one's life when suffering from a painful and debilitating illness under the circumstances is rational. These decisions illustrate that the California courts have adopted the majority of the medical profession's scientific finding that mental illness underlying suicide does not apply to the situation of persons suffering from painful and debilitating illness.

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202. Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
203. *Id.*, at 730, 747-748, 441 P.2d at 914, 924-925, 69 Cal. Rptr. at 74, 84-85.
204. *Id.* at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.
205. *Id.*
206. *See* text *infra* p. 447.

Justice Compton, who provided the concurring opinion in *Bouvia*, stated that "[t]he right to die is an integral part of our right to control our own destinies . . . [which includes] the ability to enlist help from others . . . in making death as painless and as quick as possible."[207] In essence, Justice Compton is advocating that persons who choose not to live any longer by refusing medical treatment should not have to die of malnutrition and dehydration. Instead, a person should be able to enlist a physician who would end his or her life through a planned, quick, and painless injection.

As this article has pointed out, California's laws, as well as their application, do not reflect the concept of rational suicide. However, the fact that California's laws regarding "mercy killings" are applied inconsistently indicates that society is uncomfortable in applying these laws in situations involving a rational suicide. For example, some physicians who actively assist a suicide are prosecuted and found innocent.[208] Others (nonphysicians) who assist a suicide plead guilty to voluntary manslaughter and receive varying sentences.[209] The varied application of the law in California in and of itself speaks to the need to confront the issue of assisting rational suicide.

Because suicide under the circumstances of a debilitating illness is considered rational, those who aid the suicide or perform a "mercy killing" should be free of criminal prosecution of either murder, manslaughter, or aiding and abetting a suicide. The state interests cited in *In re Joseph G.*[210] are not applicable to the situation of a terminally ill person. The person who assists a loved one who is dying of an HIV disease condition does so not for personal gain but out of compassion. The state's interest in the sanctity of life is severely diminished, if not absent, given the fact that the person requests to die because his or her life is without quality, purpose, or contribution and instead is filled

207. *Bouvia*, 179 Cal. App. 3d at 1147, 225 Cal. Rptr. at 307 (Compton, J., concurring).

208. Engelhardt and Malloy, *Suicide and Assisting Suicide: A Critique of Legal Sanctions*, 36 Sw. L. J. 1003 (1982) (citing N.Y. Times Mar. 7, 1950, at 1, col. 1. and Houston Chronicle, June 22, 1973, section 4, at 10, col. 1.) A physician in New York and another physician in New Hampshire were both acquitted where each physician had administered a fatal injection. *Id.*

209. *See* text *infra* p. 459.

210. *See* text *infra* p. 444.

with anxiety and pain. Therefore, the courts should not apply the criminal or relevant civil statutes to a true "mercy killing" or an assisted suicide. These laws are applicable only to those suicides which are irrational and motivated by personal gain.

Labeling participation in rational suicide as a criminal action results in the isolation of the terminally ill from their family, their physicians, and other caregivers. This deprives them of a peaceful and dignified ending of their life. Often, the terminally ill are forced to spend their last hours alone in order to protect the ones they love from criminal or civil actions. Until the laws are changed or interpreted differently rational suicides will continue to take place in secrecy under conditions which lack support and comfort.