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Elizabeth Bouvia v. Riverside Hospital: Suicide, Euthanasia, Murder: The Line Blurs

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ELIZABETH BOUVIA v. RIVERSIDE HOSPITAL: SUICIDE, EUTHANASIA, MURDER: THE LINE BLURS

I. INTRODUCTION

In November 1983, the California Superior Court was presented with a question of first impression. In a case which attracted considerable media attention, *Elizabeth Bouvia v. Riverside Hospital*,[1] the court was asked to decide whether it should authorize the state to assist a physically disabled person to commit suicide. This question arose after Elizabeth Bouvia, who is physically disabled,[2] arranged for voluntary psychiatric admission to Riverside Hospital. She subsequently disclosed her intent to stop eating, and thereby die by starvation. She requested that hospital staff provide her with pain medication and hygienic care until she died. She stated that she no longer wished to live because of her disability, and that because of her disability, she was physically unable to commit suicide.

Shortly thereafter, Riverside informed Bouvia that when her body weight fell below a certain level, steps would be taken to force-feed her.[3] Bouvia sought and obtained counsel[4] to avoid such action. She filed a petition for Temporary Restraining Order and Preliminary and Permanent Injunction in the California

1. Bouvia v. Riverside, No. 159780 (Super. Ct. Riverside filed Dec. 16, 1983).

2. Elizabeth Bouvia, 26 years old, was born with cerebral palsy (CP), a non-progressive condition, which in her case affects ability to control motor movements. She requires assistance in bathing, dressing, and the eating of most foods. She utilizes an electric wheelchair for mobility. She experiences pain as a result of arthritis. She has lived both in institutional settings, and in ordinary housing with the assistance of attendants. She has a bachelor's degree in social work. As of the time of this action, she had been unable to obtain employment in her field.

3. Riverside cited as authority for such action the Lanterman-Petris-Short Act of 1967, CAL. WELF. & INST. CODE § 5150 (West 1984), which provides that a person may be temporarily detained for evaluation and treatment when he or she, "as a result of mental disorder, is a danger to others, or to [her] himself . . . ." Force-feeding is accomplished through use of a nasogastric tube, i.e., a tube which is inserted through the nose into the stomach, through which nutrients are delivered.

4. Bouvia was represented by Richard Scott, in collaboration with the American Civil Liberties Union (ACLU).

Superior Court, requesting that the Court enjoin Riverside from force-feeding her or discharging her from the hospital.[5] In a decision outlined below, the hospital was enjoined from discharging Bouvia against her will, but her request to enjoin force-feeding was denied. That denial was stayed until January 1984 to permit application for appellate relief.[6] In December 1983, Riverside staff determined that Bouvia's physical condition from starvation constituted a medical emergency. The hospital consequently sought and was granted a temporary restraining order to force-feed her. Force-feeding continued until Bouvia checked out of Riverside early in 1984. Her admission had at all times been voluntary. The California Supreme Court denied a petition[7] for hearing on the substantive controversy of her case.[8] As of the date of this writing, plans to appeal her denied injunction have been dropped.

This Note will address the issues as they were presented to the court, analyze the court's decision, and in so doing explore the potential social and legal ramifications of a contrary result.

II. ARGUMENTS AND DECISION

A. *Summary of Plaintiff's Arguments*

Central to the plaintiff's case was the thesis that a fundamental right exists to terminate one's own life. Some individuals, she asserted, are not able to commit suicide because of a physical disability which prevents them from being able to manually control the means. These individuals require assistance to exercise this fundamental right.[9] Bouvia asserted that she was physically unable to commit suicide, and therefore, intended to die by

5. Complaint for Temporary Restraining Order, Preliminary and Permanent Injunctions Against Violations of Civil Rights to Privacy, Bouvia v. Riverside, No. 159780 (Super. Ct. Riverside filed Dec. 16, 1983).

6. *Id.* at 1248-49.

7. Petition for Hearing, Bouvia v. Superior Court, No. 4 Civ. 33225 (Cal. Sup. Ct., filed Dec. 1983).

8. N.Y. Times, Dec. 28, 1983, § 6 at 1, col. 16. California Supreme Court refused to hear emergency appeal from order and to block hospital from discharging her.

9. *See* Memorandum of Points and Authorities to California Superior Court in Support of Application for Temporary Restraining Order and Preliminary and Permanent Injunction, Bouvia v. Riverside, No. 159780, at 8-36 (Super. Ct. Riverside filed Dec. 16, 1983).

starvation. She requested that she be allowed to remain in the hospital without being force-fed, in order to be provided with pain medication and hygenic care until she succumbed to starvation.

Because of her physical disability, Bouvia argued, the denial of such assistance was in effect to deny her fundamental right to terminate her life. Such denial of assistance and therefore denial of a fundamental right, solely because an individual is not physically able to exercise that right without assistance, amounts to discrimination on the basis of disability. The foundation of Bouvia's case, then, rested on the allegation that Riverside's action violated federal and state statutes which prohibit discrimination on this basis.[10] In support, the petition addressed four pivotal issues.

1. Refusal of Unwanted Medical Treatment

Bouvia argued that the assistance she required to eat, i.e., someone other than herself lifting food from plate to mouth, constituted medical treatment. As a competent adult, she had a right to refuse such treatment. Citing *Cobbs v. Grant*,[11] Bouvia asserted the generally recognized principal that all competent adults, without minor dependents, have the right to refuse medical treatment, even if such refusal results in their death.

2. Suicide

Anticipating the hospital's argument that voluntary starvation constituted suicide, Bouvia's counsel drew an analogy between a refusal to accept assistance in eating (as well as nutrition through nasogastric tube), and the decision of an individual to forego life-sustaining kidney dialysis treatment. The latter could, of course, refuse such medical treatment under *Cobbs*, irrespective of the existence of an underlying fatal illness. While a patient receiving dialysis treatment is not usually terminally ill while supported by that treatment, he or she will die if treatment is discontinued.

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10. Rehabilitation Act § 504, 29 U.S.C. § 794 (1973). CAL. GOV'T. CODE § 11135 (West 1976).

11. 8 Cal. App. 3d 229, 104 Cal. Rptr. 505 (1972).

Similarly in Bouvia's case, counsel contended, her disability would become terminal if she refused to accept assistance from others in activities that she could not otherwise accomplish unaided, i.e., bringing most kinds of food items to her mouth. Hence, like the dialysis candidate who refused dialysis, "petitioner is not committing suicide . . ."[12] when she chooses not to seek or accept assistance in eating.

3. Right to Privacy

Bouvia's petition found further support in the explicit right of privacy in the California Constitution. Counsel contended that such constitutional right to privacy includes the right to freedom of choice and self-determination of medical treatment. Thus, Bouvia's fundamental right of privacy was violated by not allowing her to refuse medical treatment, i.e., to refuse assistance in eating, or force-feeding.

4. Application of Suicide Statute

A major concern of the hospital was possible criminal liability. Under California law, a person who "aids, or advises, or encourages another to commit suicide is guilty of a felony."[13] Bouvia contended that refusing to be fed was not committing suicide but rather exercising her fundamental rights. Providing her with care during starvation would not be aiding in an act of suicide, but instead would merely be giving her standard medical care while she succumbed to the natural result of her disability.

B. *Summary of Defendant's Arguments*

Riverside Hospital asserted that Bouvia did not have the right to end her life, by virtue of any statutory, constitutional, ethical or moral theory.[14] In the alternative, even if Bouvia did have such a right, it was overridden by compelling state interests

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12. Petition for Hearing, Bouvia v. Superior Court, Riverside County No. 4 Civ. 33225 at 26 (Cal. Sup. Ct. filed Dec. 1, 1983).

13. CAL. PENAL CODE § 401 (West 1976).

14. Application for Preliminary and Permanent Injunction, Memorandum of Points and Authorities, Bouvia v. Riverside, No. 159780 (Super. Ct. River. filed Dec. 16, 1983).

in the preservation of life, and in the prevention of suicide.

In addition to these state interests, the hospital claimed that to allow and assist Bouvia to die within hospital confines would have a devastating effect on the medical staff and administration at Riverside Hospital. A number of staff had expressed their unwillingness to participate in Bouvia's dying process, citing medical ethics, which require that a hospital staff do everything possible to save and prolong life.

The hospital argued that to allow Bouvia to die within the hospital would have a debilitating effect on patients in the hospital. There is an inherent contradiction in assisting one person to die while attempting to work with other persons close by who were experiencing life crises, some of whom may have attempted suicide. The court was convinced that if they granted Bouvia's request, it would have a devastating effect on other patients at Riverside.

Moreover, the hospital argued that to grant Bouvia's wishes would amount to participation in the crimes of murder, conspiracy, and aiding and abetting suicide. To assist her in these acts would not only subject the county to criminal and civil liability, but would result in censure from the licensing authority of the hospital, its doctors and its nurses.

C. *Superior Court Decision*

Judge Hews issued the court's decision on December 16, 1983, denying plaintiff's request for preliminary and permanent injunctions.[15] The court determined that the ultimate issue was "whether or not a severely handicapped, mentally competent person who is otherwise physically healthy and not terminally ill has the right to end her life with the assistance of society."[16] The court concluded that she did not.[17]

The court based its decision entirely on the constitutional issues presented, i.e., the right to privacy and self-determination

15. Bouvia v. Riverside, No. 159780 (Super. Ct. Riverside filed Dec. 16, 1983).
16. *Id.* at 1244.
17. *Id.*

recognized under the first, fourth, fifth and fourteenth amendments of the United States Constitution, and Article 1, Section 1 of the California Constitution.[18]

The court concluded that the plaintiff did have a fundamental or preferred right to terminate her own life and refuse medical intervention,[19] but not while she was not terminal, and not with the assistance of society. Those fundamental rights were overcome by strong state and societal interests.[20]

The strongest state interest cited was preservation of life.[21] The court made a factual determination that Bouvia was not terminal.[22] Further, plaintiff's counsel showed no legal precedent for the notion that a non-terminal person with a disabling but non-progressive physical condition should be allowed to terminate his or her life because of a sincere desire to do so by reason of the disability.[23]

The next state interest cited was prevention of suicide.[24] While plaintiff's cerebral palsy was not terminal, the court reasoned, "self-starvation with the assistance of society would be."[25] The California Natural Death Act[26] authorizes persons to direct that further medical care be withheld following a determination that death is imminent. The court found that "[t]he Act does not permit any affirmative act or omission to end life other than to permit the natural process of dying."[27] The court determined that plaintiff was not a qualified patient under this Act,[28] as her death as proposed would not be "natural,"[29] but would be

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18. *Id.*
19. *Id.*
20. *Id.* at 1247.
21. *Id.* at 1245.
22. *Id.* at 1242.
23. *Id.* at 1245.
24. *Id.*
25. *Id.*
26. CAL. HEALTH & SAFETY CODE §§ 7185-7195 (West 1976).
27. Bouvia v. Riverside, No. 159780 at 1247 (Super. Ct. Riverside filed Dec. 16, 1983).
28. CAL. HEALTH & SAFETY CODE § 7187(f) "Terminal condition" is defined as "an incurable condition caused by injury, disease or illness which, regardless of the application of life-sustaining procedures, would, within reasonable judgment, produce death, and where the application of life-sustaining procedures serve only to postpone the moment of death of the patient."
29. Bouvia v. Riverside, No. 159780 at 1246 (Super. Ct. Riverside filed Dec. 16,

voluntary starvation. Logically, the court reasoned, it would be the result of suicide.[30] The court further determined that whether or not forcing nutrients was termed medical treatment was not outcome-determinative under the factual setting, since the case could be decided on state interest grounds.[31] Therefore, forced-feeding of an otherwise non-terminal patient was permissible.[32]

The court cited the state interest in maintenance of the integrity of the medical profession.[33] While it is recognized that the dying are often more in need of comfort than of treatment,[34] the court noted that plaintiff was not dying. Established ethics of the medical profession clearly outweighed and overcame her rights of self-determination, according to the court.[35]

The court also considered the interests of third parties. Those parties included other patients in Riverside Hospital, as well as similarly situated physically handicapped persons in the United States. It was the opinion of the court that the interest of these third parties would be adversely affected by granting plaintiff's request for an injunction.[36]

The court made the following factual findings in arriving at a decision: (1) plaintiff was mentally competent to make decisions affecting her life; her decision was reached primarily because of the nature and extent of her disability, and not because of recent experiences such as non-employment, miscarriage, and a failed marriage,[37] (2) plaintiff was not terminal; cerebral palsy is not a progressive disability[38] because all of plaintiff's bodily systems were fully functional,[39] (3) plaintiff was physically unable to take her own life; her mind and intellect were normal,[40] (4) to grant plaintiff's request would have a profound adverse

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1983).

30. *Id.*
31. *Id.* at 1248.
32. *Id.* at 1247.
33. *Id.* at 1246.
34. *Id.*
35. *Id.*
36. *Id.* at 1243.
37. *Id.* at 1242.
38. *Id.*
39. *Id.* at 1243.
40. *Id.* at 1241.

effect on the medical staff, nurses, administration, and patients of Riverside General Hospital,[41] and (5) such an order would have an adverse effect on other similarly situated handicapped persons.[42]

III. ANALYSIS

The main question the court considered was whether to grant the state authority to assist a physically disabled person to commit suicide.[43] This Note undertakes to demonstrate that a negative answer is mandated. Given the negative stereotypes widely held about disability, such a decision would put a judicial stamp of approval on these stereotypes, thereby reinforcing and perpetuating them. In addition, the policy behind penal sanctions against assisting persons to commit suicide is applicable to persons with or without disabilities, and an exception to the rule should not be granted solely on the basis of disability. Finally, plaintiff's analysis of the purpose and application of section 504 of the Rehabilitation Act of 1983 is erroneous; section 504 is not applicable to this case.

A. *History of Negative Stereotyping and Exclusion*

In order to appreciate the significance of a ruling in favor of Bouvia, and the judicial stamp of approval it would represent, it is necessary to examine the evolution of societal attitudes about disability. That evolution is still in progress, but many of the underlying themes in the historical treatment of persons with disabilities are prevalent today. An awareness of these recurring themes is critical to an understanding of the influence they may have on court decisions that can reinforce societal attitudes about disabled persons.

Prejudice against disabled persons reaches far back in history.[44] In colonial times, harsh environmental conditions caused

41. *Id.* at 1243.

42. *Id.*

43. Bouvia v. Riverside, No. 159780 at 1244 (Super. Ct. Riverside filed Dec. 16, 1983).

44. A. DEUTSCH, THE MENTALLY ILL IN AMERICA 334 (1949). The ancient Spartans assumed that disabled children would never contribute to society. Consequently, Greek law mandated that such children be killed.

a premium to be placed on physical stamina. Immigration laws excluded persons with disabilities.[45] Those who were unable to support themselves were "farmed out" to households which received public assistance for their care. This system was largely abandoned in the later 19th century after it was discovered that care providers were collecting fees and locking up their charges in attics or cellars to starve or freeze to death.[46]

In the early 1800s, almshouses were established to house disabled persons along with elderly people, juvenile delinquents and prostitutes. These facilities were merely custodial and often unsanitary and overcrowded.[47] In the 1850s, these almshouses were replaced by state supervised institutions which provided some education and training. The goal of these latter institutions was to enable disabled persons to leave and return to their own communities.[48]

These facilities were replaced in the later 1800s by institutions which operated under a "benevolent shelter" philosophy to protect disabled people from society. These institutions provided no training, as return to home communities was not a goal. Rather, great numbers of disabled persons were permanently housed in large warehouses far from population centers.[49]

This "protective isolation" model was replaced in the early 1900s by the notion that it was society that needed protection from disabled people. Social Darwinism spawned a eugenics movement which asserted that the ills of society were the result of physical and mental disabilities, particularly those that were hereditary. Persons with disabilities were considered to be "subhuman creatures" and "waste products," who were a drain on

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45. Frank G. Bowe, *Civil Rights Issues of Handicapped Americans Public Policy Implications*, a consultation sponsored by the U.S. Commission on Civil Rights, May 1980. Mental and physical disability are still grounds for denial of immigration to the U.S. 8 U.S.C. § 1182(a) (1976).

46. Burton, *Federal Government Assistance for Disabled Persons: Law and Policy in Uncertain Transition*, 12 LAW REFORM DISABILITY RIGHTS B5 (1982).

47. ten Broek and Matson, *The Disabled and the Laws of Welfare*, 54 CALIF. L. REV. 809, 811 (1966).

48. Wolfensberger, "The Origin of Our Institutional Models," *Changing Patterns in Residential Services for the Mentally Retarded*, Robert B. Kupel and Wolf Wolfensberger, ed. (Washington, D.C.: President's Committee on Mental Retardation, 1969), 65-66.

49. *Id.* at 94-100.

society and the cause of "pauperism, degeneracy and crime."[50] Huge custodial institutions were created to isolate persons with disabilities, sometimes housing as many as 5,000 to 6,000 people. These facilities were vastly underbudgeted.[51]

By the late 1920s, eugenic theories,[52] which held that the human race was deteriorating genetically, were refuted. The underlying rationale for segregating disabled people from society was thus eliminated. Unfortunately, institutionalization as a way of reacting to disability was strongly entrenched by then, and even today is a prevalent mode of "caring for" persons with disabilities.[53]

The first and second world wars prompted legislation to provide vocational rehabilitation programs for returning disabled veterans. In the last ten years, Congress has passed Civil Rights laws which seek to guarantee basic civil rights to persons with disabilities.[54] Passage of such laws, however, cannot quickly overcome the effects of exclusion of disabled persons from American society since its inception. During the last two hundred years, the evolution of America's architecture, values, heritage, cities, transportation and communication networks, has

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50. *Id.* at 102, 106-07. *See also* Burgdorf, Jr. and Burgdorf, *The Wicked Witch is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 TEMP. L.Q. 997-1000 (1977). An article calling for a sterilization statute in Kentucky, for example, issued the following warning:

> Since time immemorial, the criminal and defective have been the "cancer of society." Strong, intelligent, useful families are becoming smaller and smaller; while irresponsible, diseased, defective families are becoming larger. The result can only be race degeneration. To prevent this race suicide we must prevent the socially inadequate persons from propagating their kind, i.e., the feebleminded, epileptic, insane, criminal, diseased, and others.

Note, *A Sterilization Statute for Kentucky* 23 KY. L.J. 168, 168 (1934).

51. Some institutions actually competed to see which could reduce costs the most, with little concern for the welfare of residents or the quality of their environment. "Farm colonies" exploiting the labor of mentally retarded residents became common. *See supra* note 48, at 119-22.

52. Eugenics advocated several strategies for dealing with the propagation of handicapped people. These included prohibitions on marriage and sexual intercourse, compulsory sterilization, segregation from community with the opposite sex, and euthanasia. Burgdorf, *supra* note 26, at 998-99.

53. Vocational Rehabilitation Act, Ch. 107, 40 Stat. 617 (1918).

54. Rehabilitation Act, 29 U.S.C. § 794 (1973). Education for All Handicapped Children Act, 20 U.S.C. §§ 1401-1461 (1976 and Supp. V 1981).

taken place without the presence of disabled persons. The barriers which face disabled persons, as they enter society, are enormous.[55]

Because of this historical isolation of persons with disabilities and the resulting lack of contact with nondisabled people, it is not surprising that the latter have limited accurate knowledge about disabled people. Sociological and psychological studies consistently find that nondisabled persons commonly hold certain prejudicial attitudes toward disabled people. These attitudes can be reduced to four main categories.[56]

The first is the prevailing feeling of discomfort and embarrassment on the part of many nondisabled people when in the presence of persons with visible handicaps. Such uneasiness may reflect deeper fears, the handicap symbolizing universal vulnerability to death, disease and injury. Whatever the cause, disabled people encounter the reaction of aversion every day they venture out into the world.[57]

Patronization and pity are the second category of attitudes held toward disabled people. Charitable acts or events such as telethons, often make real contributions to disabled people and their families. Critics have questioned the motivation of such programs, however, and the way they reflect and affect attitudes about disability. Such telethons generally depict persons with disabilities as permanently helpless, ill, and childlike. Many nondisabled people often respond according to a perceived moral obligation to "help" disabled people, without considering whether such help is needed, or in fact may be a hindrance. A resulting oversolicitousness toward persons with disabilities denies them expression of personal autonomy. Such "benevolent paternalism" reflects an attitude that "such poor, blighted creatures as these must be protected from the world, instead of helped to become part of it,[58] and that they are less than full

55. F. BOWE, HANDICAPPING AMERICA (1978).

56. UNITED STATES COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 22-27 (1983).

57. One disabled writer reported, "I have been served meals in separate dining areas of restaurants since, as the owners were quick to point out, I might upset the other customers and lessen their enjoyment of the meal." Gitler, *Fair Employment and the Handicapped: A Legal Perspective*, 27 DE PAUL L. REV. 953, 969 n.52 (1978).

58. SOCIAL AND REHAB. SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION AND WEL-

human beings.

Stereotyping is the third attitude, the label "handicapped" conjuring images which have nothing to do with flesh and blood individuals. Nondisabled persons generally have false assumptions and expectations about persons with disabilities, how they should behave, and what their abilities are. One noted psychologist has selected phrases which graphically identify the unstated feelings underlying common stereotypes about disabled people: the Subhuman Organism, the Menace, the Unspeakable Object of Dread, the Object of Pity, the Holy Innocent, the Diseased Organism, the Object of Ridicule, the Eternal Child.[59] These stereotypes make it difficult for nondisabled people to discover a disabled person's actual personality. Disabled people are consequently faced with difficulties in overcoming first impressions, in establishing common grounds of communication, and in forming relationships because they must deal with the "additional burden of eliminating false assumptions about who and what they are."[60]

The fourth attitude is stigmatization. To be disabled is to be different from others in a negative way. This value judgment about difference converts disability into a "badge of disgrace."[61] According to many sociologists and educators, the single most serious problem for handicapped people is learning to avoid, deal with or manage the stigma that confront them.[62]

The history of discrimination outlined above, and the prevalence of prejudicial attitudes still held today, set the stage for the discrimination which faces persons with disabilities in all critical areas of life. Public education systems, for example, have consistently underserved and undereducated handicapped persons. In 1975, a congressional study found that more than half of the eight million disabled children in the U.S. were not receiving

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FARE, LEGAL RIGHTS OF THE DISABLED AND DISADVANTAGED (1969).

59. WOLFENSBERGER, THE PRINCIPLE OF NORMALIZATION IN HUMAN SERVICE 16-24 (1972).

60. UNITED STATES COMMISSION ON CIVIL RIGHTS, *supra* note 56, at 25.

61. R. BURGDORF, THE LEGAL RIGHTS OF HANDICAPPED PERSONS, 49 (1980). "A federal court has noted that the stigmatization accompanying some handicaps can be likened to a 'sentence of death.' " Penna. Ass'n for Retarded Children v. Commonwealth of Penna., 343 F. Supp. 279, 295 (E.D. Pa. 1972).

62. M. EISENBERG, DISABLED PEOPLE AS SECOND CLASS CITIZENS 9-11 (1982).

appropriate educational services which would enable them to have full equality of opportunity.[63] Disabled children, despite recent legislation designated to address this problem, have been largely relegated to "separate but equal" special education schools, where they typically receive substandard education.[64] These schools often do not consider serious study to be necessary, because of the presumption that when the children grow into disabled adults they can not participate as full members of society. Many disabled adults report that as children in special education schools, their classes consisted mainly of coloring and recess.[65]

Overall, disabled people receive much less education than their nondisabled peers. Fifty-seven percent of disabled adults have not finished high school, compared to 23% of the nondisabled population. This disparity widens as one goes up the education scale.[66] Lack of adequate primary and secondary education puts higher education beyond the reach of many disabled adults, regardless of intellectual ability. The mechanisms which operate to keep disabled persons out of the mainstream of life start early, and work effectively to relegate many disabled adults to unemployment and poverty.

Statistical studies show that disabled persons are vastly underemployed. Unemployment rates among disabled workers are between fifty and seventy-five percent. Of those who are hired, many are channeled into unskilled, low paying positions with limited opportunity for advancement.[67] Employers hold the same stereotypes that other members of the general public do.

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63. 20 U.S.C. § 1400(b)(Supp. IV 1980).

64. By classifying the child as handicapped and referring him or her to a separately financed and organized school bureaucracy, schools had legitimized a dual system of education: "regular" education for nonhandicapped children and "special" education for handicapped or minority ones. The former was substantially better financed and staffed than the latter which became a classroom of last resort.

Campbell v. Talladega County Bd. of Ed., 518 F. Supp. 47 (N.D. Ga. 1981).

65. Interviews with disabled adults who went to special education schools as children, Berkeley, California (Feb. 1984).

66. REHAB. GROUP INC., DIGEST OF DATA ON PERSONS WITH DISABILITIES, Tables 5, 17 (1979).

67. PRESIDENT'S COMMITTEE ON EMPLOYMENT OF THE HANDICAPPED, HANDICAPPED RIGHTS AND REGULATIONS, 49 (Apr. 5, 1983).

Research shows that employers rank disabled persons below all other minority groups as likely to be hired.[68] Numerous cases illustrate how blanket discrimination excludes disabled persons from employment.[69] Employer prejudices persist, despite studies which show that disabled workers, once hired, perform as well as or better than their nondisabled coworkers.[70]

Persons with disabilities are denied avenues for expression of even the most basic private rights. This is particularly evident in the area of family life.[71] The California Supreme Court directly addressed these stereotypes in the case of *In re Marriage of Carney*.[72] In that case, a father's custody of two small children was challenged by the mother after he became disabled. The trial court gave "great weight" to the father's "physical handicap and its presumed adverse effect on his capacity to be a good father for the boys."[73] The court determined that the father could not be a fit parent because his disability "prevented a normal relationship"[74] with the children. Custody was awarded to the mother, despite the fact that she had not seen the children since the separation five years earlier, and that she was not financially able to take responsibility for them. On the other hand, testimony showed that the father was financially sound, and that he was providing a good home life for the children.

The California Supreme Court reversed the custody award, stating that physical disability was not permissible as "prima fa-

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68. Oversight Hearings Before the Subcommittee and the Handicapped, Senate Committee on Labor and Public Welfare, 49th Cong., 2d Sess. 629062 (1976).

69. *E.g.*, Heuman v. Board of Ed. of N.Y., 320 F. Supp. 623 (1970). Plaintiff, after receiving her teaching credentials, was denied a license to teach in New York City schools on the grounds that being confined to a wheelchair, she was physically and medically unsuited for teaching. After suit was brought, the Board of Education reversed itself and offered plaintiff a license and a teaching position.

70. Bulletin by the U.S. Department of Labor, Bureau of Labor Standards entitled *Workmen's Compensation and the Physically Handicapped Worker* (1961). Overcompensation in order to counteract low expectations is an example of the heroism, inspiration, or "super-crip" syndrome. *See infra* note 102.

71. "Historically, child-custody suits have almost always ended with custody being awarded to the non-disabled parent regardless of whether the affectional or socio-economic advantages could have been offered by the disabled parent." 1 VASH, THE PSYCHOLOGY OF DISABILITY 155 (1981).

72. 24 Cal. 3d 725, 598 P.2d 36, 157 Cal. Rptr. 383 (1979).

73. *Id.* at 733, 598 P.2d at 40, 157 Cal. Rptr. at 387.

74. *Id.* at 735, 598 P.2d at 42, 157 Cal. Rptr. at 388.

cie evidence of a person's unfitness as a parent . . . ."[75] The court condemned the lower court's stereotyping of the father "as a person deemed forever unable to be a good parent simply because he is physically handicapped. Like most stereotypes, this is both false and demeaning."[76] The Court stated:

> [H]owever limited his bodily strength may be, a handicapped parent is a whole person to the child who needs his [or her] affection, sympathy, and wisdom to deal with the problems of growing up. Indeed, in such matter his [or her] handicap may well be an asset. Few can pass through the crucible of a severe disability without learning enduring lessons in patience and tolerance.[77]

While the court reached an appropriate result in *Carney*, this case is an exception to the norm. Disabled adults are often discouraged from having children. Involuntary sterilization is still common.[78]

In sum, disabled persons are often denied opportunities and rights that most nondisabled people take for granted. Additional examples include a denial of the right to vote,[79] to hold public office,[80] or to obtain a driver's license.[81] Many states restrict the right of physically and mentally disabled persons to marry,[82] and to enter into contracts.[83] Disabled persons are denied the right to immigrate, and in some cases, to even visit the United States.[84] Such pervasive discrimination has led many to conclude that disabled persons are relegated to "second class citizenship."[85]

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75. *Id.* at 736, 598 P.2d at 42, 157 Cal. Rptr. at 389.

76. *Id.* at 737, 598 P.2d at 42, 157 Cal. Rptr. at 389.

77. *Id.* at 739, 598 P.2d at 44, 157 Cal. Rptr. at 391.

78. Burgdorf and Burgdorf, *supra* note 50, at 1013-33. Murdock, *Sterilization of the Retarded: A Problem or a Solution?* 62 CAL. L. REV. 921-22 (1974). Verster, *Eliminating the Unfit—Is Sterilization the Answer?* 27 OHIO ST. L.J. 613, 619 (1966).

79. Funk, *A Disenfranchised People: Disabled Citizens and the Fundamental Right to Vote*, in LAW REFORM IN DISABILITY RIGHTS, B-1-B-21 (1981).

80. *In re* Killeen, 20 N.Y.S. 209 (1923).

81. MISS. CODE ANN. §§ 49-7-19 (1972).

82. Burgdorf and Burgdorf, *A History of Unequal Treatment*, 16 SANTA CLARA LAWYER 861 (1975).

83. *Id.* at 861-62.

84. 8 U.S.C. § 1182(a) (1976). R. BURGDORF, *supra* note 61.

85. M. EISENBERG, *supra* note 62. *See also* Funk, *Disability Rights: From Caste to Class—The Humanization of Disabled People*, in LAW REFORM IN DISABILITY RIGHTS A-5 (1981).

The above history of societal stereotyping is relevant because many of its underlying premises were evident in the *Bouvia* case, both in the media coverage, and in Bouvia's pleadings. Such stereotyping might also directly impact other court decisions which might involve similar or related issues.

B. *Personification of Negative Stereotypes*

Elizabeth Bouvia's case represented to the public, to her attorney, and to a lesser extent, to the court, the negative stereotypes outlined above. Bouvia's presence in the hospital drew considerable media attention, putting her on the evening news and in newspapers for months.[86] The manner in which the story was presented reflected attitudes the general public holds toward disability.[87] The story was typically presented in melodramatic or tragic headlines, such as "Fights for Right to Die,"[88] and "Life of Agony."[89]

Rather than address the social or political implications of the case, this media coverage merely reflected images many nondisabled people have about what it would be like to be disabled.[90] Society still sees disability as a very unfortunate situation, in fact, it is often seen as one of the worst things that can happen to an individual.[91] Society feels sorry for Bouvia, the generic pity that it feels for all disabled people.[92] Acquiring or being born with a disability is viewed as a "great and enduring tragedy, which forever ends the person's chances to enjoy life."[93]

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86. Peters, *Society's Victim*, THE DISABILITY RAG 29 (Feb.-March 1984).

87. Hahn, *A Misunderstood Case*, THE DISABILITY RAG 9 (Feb.-March 1984).

88. L.A. Daily Journal, Dec. 8, 1983, at 1, col. 9.

89. Open Forum, ACLU of Southern California, Newsletter, Feb. 1984.

90. "When you try to talk to a nondisabled reporter and explain what's going on in this case it becomes clear most of them don't know what you're trying to say." Hahn, *supra* note 87, at 10. "Used to writing 'in spite of' stories about individuals overcoming their handicaps, the press is unfamiliar with dealing with disability as an 'issue,'" Peters, *Myth and Media: Where Are Our Voices?*, THE DISABILITY RAG, 8, 8 (Feb.-March, 1984).

91. Peters, *supra* note 90, at 29.

92. "Society still feels sorry for the Elizabeth Bouvias of the world. It is a basic emotion that modern, civilized society carries around with it at all times, ready to be pressed into service when trying to place Elizabeth Bouvias into some context it can deal with. The emotion is pity. Pity has been oppressing, depressing us all our lives." *Id.*

93. Weinberg and Williams, *How the Physically Disabled Perceive Their Disabilities*, 44 JOURNAL OF REHAB. 31 (July, Aug. and Sept. 1978-79).

Media coverage of the Bouvia case echoed the feeling on the part of many that being disabled is a fate worse than death.[94] These perceptions persist, despite evidence to the contrary. Research findings show that disabled and nondisabled persons generally rate their lives as equally satisfying.[95] When the story first appeared, in fact, strong rebuttal was heard from disabled individuals and groups, protesting the exploitation of irrational fears and false stereotypes in the way the story was presented.[96]

The language in Bouvia's initial complaint against Riverside Hospital illustrates that even to Bouvia's counsel, the case typifies the worst stereotypes about disability. For example, throughout pleadings to the superior court,[97] such stigmatizing language as "horribly afflicted, degrading, incurable,"[98] "fulfillment is impossible"[99] is used. One can only conclude from this language that the briefs merely express counsels' beliefs on the subject, beliefs shared by the general public.[100]

Even the court falls back upon stereotypes in its decision. It encourages Bouvia to live so that "she can be a symbol of hope"

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94. Peters, *supra* note 86, at 9.

95. Cameron, Gradinger, Kostin and Kostin, *The Life Satisfaction of Nonnormal Persons*, 41 CONSULTING AND CLINICAL PSYCHOLOGY 207, 214 (1973). Research findings do not support the notion that persons with disabilities are less happy. Weinberg and Williams, *supra* note 93, at 32, conducted a study to elicit the attitudes of disabled persons. Responses to a questionnaire showed that 8% of the respondents saw their disability as the worst thing that ever happened to them, 11% as a terrible thing, 19% as a cause of frustration, and 60% as an inconvenience or fact of life. Asked whether if given one wish they would wish to no longer be disabled, 49% answered yes, 51% no. Asked whether being disabled had any advantages, 49% answered yes, including: opportunity to overcome a challenge, being more sensitive and tolerant to other people as a result, special treatment such as draft exempt status, opportunity to have a wider range of experiences, opportunity to meet people from different backgrounds, greater appreciation of life, being more realistic about life, opportunity to help educate and give hope to other people. For a discussion of the discrepancy between expected and actual perception of disability of disabled persons, see Wright, *Sensitizing Outsiders to the Position of the Insider*, 22 REHABILITATION PSYCHOLOGY 136-41 (1973).

96. Disabled people who have been trying to get their voices heard in the Bouvia case are doing it because they feel the issue has been terribly misunderstood by the media. Peters, *supra* note 90. *See also* Hahn, *supra* note 86.

97. Points and Authorities for plaintiff, *supra* note 9.

98. *Id.* at 14, 16, 20.

99. *Id.* at 10 (citing *In re* Brooks Estate, 32, Ill.2d 361 (1965)).

100. "It is even pity perhaps, that makes attorney and physician Richard Scott, in a peculiarly ignorant defense, note that 'quadraplegics can't work.' It is, perhaps, pity that inspired the ACLU of Southern California to take the case." Wyman, *Rainbow to Power*, THE DISABILITY RAG, 28, 29 (Feb.-March 1984).

to other disabled people.[101] This expectation of heroism[102] is the flip side of pity, and puts equivalent limitations on what a disabled person can be, expecting superhuman qualities, rather than subhuman ones.[103]

C. *Judicial Stamp of Approval*

It is crucial that the court not put its judicial stamp of approval on negative stereotypes about disability. This would result if it were to allow the state to assist an individual to die only because he or she has a disability. Judicial decisions which are based upon societal prejudices merely reinforce those prejudices, making them even more difficult to eradicate.[104] Courts have in the past sanctioned the segregation and exclusion of disabled persons.[105] It is only in the last two decades that this

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101. Bouvia v. Riverside, No. 159780 at 1247 (Super. Ct. Riverside filed Dec. 16, 1983).

102. The same thought was expressed by Riverside Hospital psychiatrist Donald Fisher, who said that "her life could become an example of heroism to others," and that she ought to be proud of how much she has overcome in getting her degree and getting to live on her own. Peters, in the DISABILITY RAG notes, "Fisher speaks for society. In his suggestion lies much of Bouvia's problem. Society expects heroism of her, and she doesn't want to deliver." Peters, *supra* note 86, at 28.

103. Society recognizes the reality of a disabled person's life as heroism, the achievement of a lifestyle as overcoming adversity. And society is right. It is right not because living disabled is anything that in itself should be heroic. It's right because society has not changed despite what we tell ourselves.

Id. at 29.

104. Often cited as a case in which judicial decision was based upon stereotypes, and which reinforced those stereotypes, is Muller v. Oregon, 208 U.S. 412 (1908). In upholding the constitutionality of an Oregon statute which limited the number of hours women could work in a given day, the court reasoned "woman has always been dependent upon man . . . [because of his] superior strength . . . . As minors, . . . she has been looked upon in the courts as needing especial care . . . . In the struggle for subsistence she is not an equal competitor with her brother." *Id.* at 421, 422. This stereotype of women as childlike and in need of protection is analogous to the perception that persons with disabilities are perpetual children. Contrast this with a judicial decision which sought to address the effects of a long history of racial discrimination, Grigs v. Duke Power Co., 401 U.S. 424 (1971). "What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.* at 431. This interpretation and conclusion is analogous to the intent of Congress in enacting disability civil rights legislation. *See supra* note 11 & 84.

105. *E.g.*, "For the feeble-minded and epileptics are not the only persons in the community whose elimination as undesirable citizens would, or might in the judgment of the Legislature, be a distinct benefit to society." Smith v. Board of Examiners of Feeble-Minded, 85 N.J.L. 46, ___, 88 A. 963, 966 (1913).

approach has been altered with the passage of disability civil rights legislation.[106]

Legislators have made clear their intent regarding the direction of public policy toward persons with disabilities. Both the state and federal governments now pursue the commendable goal of total integration of handicapped persons into the mainstream of society. The legislature declares that "It is the policy of this state to encourage and enable disabled persons to participate fully in the social and economic life of the state . . . ."[107]

By enacting disability civil rights statutes in so many substantive and administrative areas,[108] legislators have shown a

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> Merritt has been a crippled and defective child since his birth, being afflicted with a form of paralysis which affects his whole physical and nervous make-up. . . . It appears that he is normal mentally, and that he kept pace with the other pupils. . . . [However,] the right of a child . . . to attend the public schools . . . cannot be insisted upon when its [sic] presence therein is harmful to the best interests of the school. This, like other individual rights, must be subordinated to the general welfare.

Beattie v. Bd. of Ed. of City of Antigo, 169 Wis. 231, 232, 172 N.W. 153, 154 (1919). *But cf., Carney*, 24 Cal. 3d 725, 157 Cal. Rptr. 383, 598 P.2d 36 (1979) in which the court explicitly rejected lower court reasoning that a disabled parent could not have a "normal" relationship with his [or her] children. "Such stereotypes have no place in our law." *Id.* at 725, 157 Cal. Rptr. at 383, 598 P.2d at 36.

106. Rehabilitation Act § 504, 29 U.S.C. § 794 (1973). CAL. GOV'T CODE § 11135, § 19230(a) (West 1976).

107. CAL. GOV'T CODE § 19230(a) (West 1976).

108. *See, e.g.*, CAL. WELF. & INST. CODE § 19000 (declares policy of rehabilitation for employment); CAL. GOV'T CODE 11135 (bars discrimination against handicapped in state-funded programs); *Id.* § 19230 et seq. (requires affirmative action programs for handicapped employment by state agencies); *Id.* § 19702 (bars discrimination in state civil service); CAL. LAB. CODE § 1420 (West 1973) (bars discrimination by private employers or labor unions); *Id.* § 1735 bars discrimination in employment on public works; CAL. CIV. CODE §§ 54, 54.1 (West 1968) (guarantees access to public transportation, public accommodations, and rented housing); CAL. EDUC. CODE § 56700 et seq. (creates special educational program for physically handicapped students); CAL. BUS. & PROF. CODE 126.6 (West 1974) (bars discrimination by holders of professional licenses); CAL. GOV'T CODE § 4450 et seq. (West 1968) (requires handicapped access to buildings and facilities constructed with public funds); CAL. HEALTH & SAF. CODE § 19955 et seq. (access to private buildings open to the general public); CAL. PUB. RES. CODE § 5070.5(c) (West 1974) (access to public recreational trails); *see also* CAL. VEH. CODE §§ 22507.8, 22511.5 et seq. (West 1970) (special parking privileges for handicapped drivers). Similar legislation has been enacted on the federal level. (*See, e.g.*, Architectural Barriers Act, 42 U.S.C. §§ 4151-4157 (1968) (requires handicapped access to public buildings constructed, leased, or financed by the federal government); Rehabilitation Act § 502, 29 U.S.C. § 792 (1973) (creates Architectural and Transportation Barriers Compliance Board to ensure compli-

clear trend away from negative stereotyping and discrimination. Treatment of persons with disabilities is to follow the intent of Civil Rights Statutes such as section 504 of the Rehabilitation Act of 1973.[109] Thus, the courts have clear guidance as to what public policy toward persons with disabilities is to be. The court would be acting contrary to this policy if it were to sanction plaintiff's arguments. Such a sanction would be putting a judicial stamp of approval on the negative stereotyping those arguments reflect.

D. *Prohibitions Against Assisting a Person to Commit Suicide*

1. Policy

Suicide is not and has never been a crime in California.[110] However, anyone who "deliberately aids, or encourages, or advises another to commit suicide," is guilty of a felony.[111] Policy considerations underlying this prohibition recognize the possibility of mistake, accident, or abuse in such circumstances. Since the person who is assisted is not later available for questioning, there is no way to determine whether the suicide was genuine, or whether elements of accident or duress were involved.

2. Exception to Policy and Possible Abuse

The policy considerations which underly prohibitions against assisting suicide are equally relevant to disabled and nondisabled persons. To make an exception to these prohibitions on the basis of disability would open the doors to possible abuse. Since many people believe it is not possible for a disabled person to have a good life, removing liability in cases where the assistee is disabled would make it too easy for people to act on those assumptions, rationalizing that they were doing the "kind

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ance with Architectural Barriers Act and promote removal of "architectural, transportation, and attitudinal barriers confronting handicapped individuals"); Urban Mass Transportation Assistance Act § 8, 49 U.S.C. § 1612 (1970) (declares federal policy that mass transit systems be designed for access by handicapped); *see also* 40 C.F.R. pt. 609 (1978) (regulations concerning access to major transit systems receiving federal financial assistance).

109. 29 U.S.C. § 794 (1973).

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

111. *Id.* at 903, 5 Cal. Rptr. at 31. CAL. PENAL CODE § 401 (West 1970).

thing."

Society in large part rejects life as a disabled person.[112] Publication of Bouvia's story, consciously or unconsciously, triggered in the public mind a common reaction that "if I were in that position, I'd want to die too."[113] "Widespread public support for early detection and abortion of physically defective infants [sic] is also indicative of the belief that the disabled have less of a chance for the good life."[114] Recent Baby Doe cases have brought to public attention a pervasive practice of withholding medical care to newborn infants with birth defects, resulting in their death.[115] This practice often exists because "families of deformed infants . . . [fear] that they and their other children [will] become socially enslaved, economically deprived, and permanently stigmatized."[116]

The arguments used for mercy killing of disabled infants and disabled adults are the same. "It is a very short step from the right to die to a duty to die. Behind all of it is society's belief that disabled people have a duty to die."[117] Many disabled persons housed in institutions are already subject to widespread abuse, including dangerous physical conditions, sexual abuse, gross understaffing, and medical experimentation.[118] In such settings, persons who express dissatisfaction with their life situation may be interpreted as expressing a desire to commit suicide. They are more likely to be assisted if no liability were attached.

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112. "We know society rejects life as a disabled person. We either know that or we are fools, lying to ourselves." Peters, *supra* note 86, at 3.

113. *Id.* at 9.

114. Weinberg and Williams, *supra* note 93, at 31.

115. For a discussion of withholding of medical services to infants with disabilities, see Amicus Brief of Disability Rights Education and Defense Fund, American Academy of Pediatrics v. Margaret Heckler, Sec. U.S. Dept. Health & Human Services, Civ. No. 83-0774. "Section 504 requires that medical standards be applied equitably . . . that medical services not be denied *solely* because a person is handicapped." Amicus Brief at 2.

116. Duff and Campbell, *Moral and Ethical Dilemmas in the Special Care Nursery*, 289 NEW ENG. J. MED. 890 (1973).

117. Peters, *supra* note 86, at 10. Others have observed that the issues would have been presented differently if the Baby Jane Doe suit had been filed by an attorney or pediatrician with spina bifida (Baby Doe's disability). "I can't help but believe public debate would have had a different ring." Johnson, *The Right is the Wrong Group to Plead Our Rights* in THE DISABILITY RAG 11, 11 (Feb.-March 1984).

118. Rosenhan, *On Being Sane in Insane Places*, 179 SCIENCE 250-58 (1973).

If a disabled person has expressed a serious intention to commit suicide but begins to vacillate, the "helper" may not be inclined to hear or take seriously a change of mind. He or she may go ahead and assist despite the disabled person's hesitation, believing that a meaningful life is not possible for that person. These are some of the possibilities for mistakes or coercion which penal sanctions were intended to prevent.

Counselors in the area of substance abuse by disabled persons report that there are always physicians in the community who overprescribe pain and sleep medications and tranquilizers for their patients who have disabilities.[119] These doctors probably do so from a sense of frustration that "nothing more can be done" for that person, or that he or she must be in a great deal of psychological pain which must be relieved. A great number of disabled people are subject to such circumstantial addiction. The drugs involved can often be lethal if taken in the wrong dosage or combination.

Newly disabled persons would also be vulnerable. It is likely that there would be people around them who would believe they would want to die if they would become disabled. If no liability were attached, the latter might offer the disabled person "a way out," so that she or he "wouldn't have to live that way" or "be a burden to his or her family."[120] With the availability of such assistance, many newly disabled persons might commit suicide who would otherwise not do so. Given the low status ascribed to persons with disabilities and the considerable difficulties inherent in many disabling conditions, suicide is a serious option. A newly disabled person, however, should have the opportunity to find out what life is like for him or her as a disabled person. The most reasonable choice can only be made from the vantage point of experience, after exposure to different aspects of disability. This is the kind of opportunity for in-depth consideration, free from interference, which penal sanctions were intended to

119. Interview with former substance abuse counseling staff, Center for Independent Living, Berkeley, California (Feb. 1984).

120. "Discrimination on the basis of handicap . . . often occurs under the guise of extending a helping hand or a mistaken restrictive belief as to the limitations of handicapped persons." Pushkin v. Regents of University of Colorado 658 F.2d 1372, 1385 (10th Cir. 1981). Such a benevolent or helping hand approach was rejected by the court in Pushkin in which plaintiff was denied admission to the University's residency program because he had multiple sclerosis and used a wheelchair. *Id.* at 1372, 1383.

protect.

3. Drawing the Line

Because of the existence of negative stereotypes, it would be difficult to draw the line in determining who is or is not able to commit suicide without assistance. Bouvia requested assistance from the state because she asserted that she was physically unable to commit suicide without it. Persons who use wheelchairs are often viewed as requiring help to do virtually everything, even though this is rarely the case.[121] It is common knowledge in the disabled community that persons more severely disabled than Bouvia can and do commit suicide in a variety of ways if they so desire.[122] Hence, the factual finding by the court that Bouvia was unable to commit suicide unassisted was based on false stereotypes and was erroneous. Because of this inherent difficulty in determining ability to commit suicide, it is inevitable that courts would sometimes reach enormous conclusions. This would bypass safeguards against mistake or accident intended by the Code.

4. Disability and Disease

Stereotypical attitudes tend to reflect confusion about disability and disease, promoting the possibility of abuse or mistake. Persons with disabilities are often seen as being ill, their physical difference a sign of sickness or disease.[123] People who use wheelchairs are often referred to as "patients," when in fact they may not have seen a doctor or the inside of a hospital in years. This lumping together of disability and disease is illustrated by the American Civil Liberty Union's (ACLU) policy on euthanasia.[124] In it, the ACLU maintains "assistance in the act of consensual euthanasia is not illegal," when requested by individuals

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121. Society believes disabled people ought to be dependent. To be disabled is to be dependent by nature. To allow vast changes in the way disabled people live would shake the very foundations of this belief." Rosen, *Dependency*, in THE DISABILITY RAG 23 (Feb.-March 1984).

122. Interview with former counseling staff, Center for Independent Living, Berkeley, California (Feb. 1984).

123. Hahn, *supra* note 87, at 10.

124. Policy Guide of the American Civil Liberties Union, Euthanasia policy #267 (1981).

who are either "terminally ill or totally and permanently disabled."[125] Thus, two very different and distinct states are lumped together and referred to as if they were analagous. ACLU policy does not reflect an awareness that illness and disability involve very different issues in terms of health, access, societal attitudes and expected longevity.[126]

Disability and illness are not synonymous, though they may overlap. Many disabilities are stable, and once acquired do not in themselves prevent the individual from enjoying good health and a normal life span. Examples of such disabilities include post-poliomyelitis (polio), cerebral palsy, spinal cord injuries, blindness and deafness. Other disabilities, such as multiple sclerosis and muscular dystrophy, are progressive in nature and may, in fact, shorten life span and severely affect health.

Counsel for Bouvia confused disability and terminal illness in their arguments. They claimed that her disability is terminal, and that because she requires assistance in eating most foods her actions would not constitute suicide.[127] The rationale being that without such assistance Bouvia's disability would naturally result in her death by starvation. Counsel further asserted that feeding Bouvia necessarily constituted medical treatment as defined in *Cobbs*.[128]

Counsel for Bouvia misinterpreted the issues presented in this case. Bouvia has cerebral palsy, a disability which falls into the nonprogressive category. Cerebral palsy is not an illness and it is not terminal; it does not require medical treatment to prolong life. It is a disability which is relatively stable and which, in Bouvia's case, necessitates that in eating most foods, someone other than Bouvia, bring the food from plate to mouth. Bringing

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125. *Id.* at 256, 257.

126. Some observers feel this failure on the part of the ACLU to distinguish disability and illness was based on societal attitudes that "If I were in that position, I'd want to die too," and in fact this attitude "motivated the ACLU to take the case." Hahn, *supra* note 87, at 10. Referring to the joined policy re disability and terminal illness: When we discovered that we were very upset. Of course, a lot of people seem to think of the two as being in similar categories. The case simply reflects what society thinks disability is," Hahn, *supra* note 87, at 9, 10.

127. Points and Authorities for plaintiff. Bouvia v. Riverside No. 159780 at 8-36 (Super. Ct. Riverside filed Dec. 16, 1983).

128. 8 Cal. App. 3d 229, 104 Cal. Rptr. 505 (1972).

food to mouth is not medical treatment. It does not require any special medical training or licensing. Eating is a natural life activity.

As the superior court noted in its decision, all of Bouvia's bodily systems were fully functional and she was not ill or terminal.[129] The act of suicide involves a decision to end a life that would otherwise continue. Bouvia's decision to stop eating was specifically intended to result in death by starvation. As such, it constituted an intent to commit suicide.[130] While the *Bouvia* court correctly separated the conditions, the possibility that other courts would confuse disability with terminal illness is great. This is the kind of possibility for mistake that penal sanctions were intended to prevent.

5. Denial of Granting Exception to Penal Sanctions

As discussed above, research shows that negative assumptions about the quality of life of disabled people are deeply entrenched in society. Many institutions in which disabled persons are housed are understaffed and underfunded, and abuse against those institutionalized is still a problem. It is difficult, and in most cases impossible, to draw the line in determining who is or is not able to commit suicide without assistance. The general public tends to confuse disability with disease and assumes that all persons with disabilities are ill.

These attitudes and problems would leave the door open for abuse if penal sanctions against assisting suicide were removed when the person being assisted is disabled. The superior court may have recognized this possibility in its decision. In denying Bouvia's request for injunctive relief, it recognized the overriding interests of similarly situated persons, stating that "her death under these circumstances would have a profound effect on other similarly situated disabled persons."[131] The court may have realized that to grant such a request would set a precedent dangerous to disabled people in general.

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129. Bouvia v. Riverside, No. 159780 at 1242, 1243 (Super Ct. Riverside filed Dec. 16, 1983).

130. *Id.* at 1245.

131. *Id.* at 1240.

IV. APPLICATION OF SECTION 504 OF REHABILITATION ACT OF 1973

Section 504[132] is a Civil Rights Statute, enacted to reverse the effects of a history of discrimination and segregation, and to eliminate attitudinal and physical barriers to full and equal participation in society.[133] Its language was patterned after, and is almost identical to that in Title VI and Title IX of the Civil Rights Act of 1964. Section 504 reads in pertinent part: "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his [or her] handicap, be excluded from participation in, be denied the benefit of, or be subject to discrimination under any program or activity, receiving Federal financial assistance."[134]

Section 504 was intended to include disability within the general body of Federal anti-discrimination law. The underlying theme for all measures which it mandates is "integrationist."[135] Under section 504, the results of two hundred years of attitudinal and architectural barriers are to be examined, with the goals of taking steps to remove such barriers.[136] Thus, public buildings are now generally required to be ramped and to have accessible bathrooms, printed materials available to the public are to be made available in braille for blind persons, public meetings are to be accompanied by sign language interpreters in order to be accessible to deaf persons, and so on.[137]

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132. 29 U.S.C. § 794 (1973).

133. Brief of Amici Curiae, Disability Rights Education and Defense Fund, Berkeley Califorinia, to Supreme Court, Consolidated Rail v. LeStrange, No. 82-862 at 7-11 (Oct. 1984).

134. 29 U.S.C. § 794. This language, similar to that in Title VII, was a result of an awareness on the part of Congress that disabled persons face prejudice and stereotyping very much like that directed at women and other minorities.

135. Amicus Brief, LeStrange, *supra* note 133, at 8, "integrationist," *i.e.*, to integrate disabled persons into the mainstream of life rather than to segregate.

136. "The time has come to firmly establish the right of these Americans to dignity and self-respect as equal and contributing members of society and to end the virtual isolation of millions of children and adults from society." 118 CONG. REC. § 32310 (Sept. 26, 1972) (statement of Sen. Hubert Humphrey).

137. "Section 504 was enacted to prevent discrimination against all handicapped individuals, . . . in relation to federal assistance with employment, housing, transportation, education, health services, among other federally-aided programs." *S. Rep. No.* 1297, 93d Cong., 2d Sess. 38.

Section 504 was a direct challenge to traditional notions and stereotypes about disability.[138] The historical approach to disability, as outlined above, has been to segregate and exclude disabled persons from the rest of society. Section 504, on the other hand, was intended to remove discriminatory practices and thereby enable persons with disabilities to participate in all areas of society.[139] The statute also provides that, in some cases, reasonable accommodation and auxiliary services may be necessary to provide opportunity for full and equal participation. Bouvia requested auxiliary services in the form of pain medication and hygienic care. The following case illustrate examples of auxiliary services and reasonable accommodation intended under section 504.

The removal of a discriminatory practice and provision of reasonable accommodation were illustrated in *Coleman v. Casey Bd. of Ed.*[140] In that case, a single leg amputee was denied employment as a bus driver under a state regulation which prohibited persons without two legs from driving buses. The court held this regulation to violate section 504, as there was no evidence to indicate that two legs were necessary to drive a bus safely. The court further found that plaintiff was qualified to drive a bus, and was not hindered in any way from doing so because he had one leg. All that was necessary to drive the bus was a hand clutch, which the court determined to be a reasonable accommodation to his disability.

Provision of auxiliary services to afford equal access was addressed in *Jones v. Illinois Dept. of Rehab. Services.*[141] In that case, a deaf student requested that the services of a sign language interpreter be provided so he could attend and benefit from university classes. While no policy prohibited this student from attending the university because he was deaf, he could not benefit from instruction without the services of a sign language interpreter. The court determined an interpreter should be pro-

138. Amicus Brief, to Supreme Court, consolidated Rail v LeStrange, No. 82-862 at 7-11 (Oct. 1984).

139. Section 504 "confirms the federal interest in developing the opportunities for all individuals with handicaps to live full and independent lives." Community Television of S. Cal. v. Gottfried, 459 U.S. 498, 508 (1983).

140. 510 F. Supp. 301 (W.D. Ky. 1980).

141. 689 F.2d 724 (7th Cir. 1982).

vided so the student could have true access to university instruction.

Bouvia sought services under section 504 which were altogether different from those illustrated by the cases above. She did not request removal of a discriminatory practice, or auxiliary services which would provide her with access. Section 504 mandates equal access for disabled persons to programs or services which are available to everyone, sometimes requiring auxiliary aids to reach that result. Riverside Hospital does not have a program to assist persons to commit suicide. If it did, Riverside would have to ensure that the benefits of that program were available to disabled and non-disabled persons alike. Persons who could not take advantage of the program because they were disabled could reasonably request auxiliary services to enable them to have access to the program.

Bouvia's request that Riverside provide her with care when she is in stable health and wishes to die voluntarily is not a request for aid to ensure equal access, since no such program exists. Section 504 does not mandate access to programs not available to anyone else. Hence, the auxiliary services which she requests because of her disability do not fall within the scope of section 504.

It is clear from the requested application of section 504 that counsel misconstrued the underlying purpose of that statute. Section 504 was intended to aid in the removal of prejudices and barriers. Counsels' arguments reflected the very stereotypes sought to be eliminated under the statute. If the court had adopted those arguments, it would have reinforced those prejudices and barriers. Such a result would have been in direct opposition to the intent of Congress in enacting the statute. Bouvia did not cite section 504 to provide her with full and equal access to areas of life from which disabled persons have traditionally been excluded. Consequently, section 504 is not properly applied to the facts of the case.[142]

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142. "The argument that a disabled person has a right to [this kind of assistance] is a distortion of the things the disability rights movement stands for." Longmore, in THE DISABILITY RAG 10, (Feb.-March 1984).

V. CONCLUSION

Elizabeth Bouvia's case presented unique legal questions. She argued that penal sanctions designed to protect the general public discriminate against her because she is disabled. She wished to apply a statute that is designed to facilitate entry into life, to facilitate her exit from life. Her statements to the press graphically described the very real personal hardships associated with her disability.[143] The reasons for her request should not be ignored. However, the manner in which her case was presented showed no awareness of the societal inequities which may or may not have played a role in her decision.[144] State sanctioned death has long been an assumption for persons with disabilities.[145] It is the right to exist which has not been fully recognized.[146] It is the reality of those external forces which make her interpretation of the statute dangerous to disabled people in general.[147] In rejecting Bouvia's arguments, the court recognized that if it were to grant Bouvia's request, its decision "would have an adverse effect on other similarly situated handicapped persons."[148]

*Belinda Stradley**

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143. For statement by Elizabeth Bouvia, see RAG, *supra* note 86, at 5 entitled "I am fully aware . . ."

144. I remember watching a goose trapped in the space between two farm buildings. A barking dog was terrifying it. There was enough space for it to have escaped, but it seemed totally occupied in avoiding the sharp teeth of its very present threat. It could have turned and retreated. But it was hypnotized by the confusion caused by the threat to its integrity. Somehow that poor goose keeps coming to my mind as I read the bizarre details of Bouvia's travail. What can we do, other than to grieve with her that society has not prepared a good place for us to flourish, and to help her overcome the weariness in the struggle to endure.

Owen, *The Goose Girl; The Right to Die*, in THE DISABILITY RAG 4 (Feb.-March, 1984).

145. Interview with Arlene Mayerson, staff attorney for the Disability Rights Education and Defense Fund, Berkeley, California (Feb. 1984).

146. *Id.*

147. "If she got the court ruling she's asking for . . . that would be a precedent endangering all other disabled people." Hahn, *supra* note 87, at 10.

148. Bouvia v. Riverside, No. 159780 at 1243 (Super. Ct. Riverside filed Dec. 16, 1983).

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