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# Bouvia v. Superior Court: The Death Option

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# *Bouvia v. Superior Court*: The Death Option

In California, individuals have a fundamental right to refuse medical treatment, even if they may die as a result.[1] Prior to 1986, the courts addressed the issue of whether patients could lawfully refuse life-sustaining medical treatment when they are "terminally ill,"[2] or require life-support equipment to remain alive.[3] In *Bouvia v. Superior Court*,[4] however, the patient was neither terminal nor in need of mechanical means to stay alive.[5] Elizabeth Bouvia had severe cerebral palsy[6] and was maintained at a public hospital in Los Angeles County.[7] The medical and dietary staff had determined that Bouvia was not consuming sufficient nutrients.[8] To counteract the deficiency, Bouvia was force-fed through a nasogastric tube.[9] Bouvia filed a petition for a temporary restraining order and preliminary and permanent injunctions, requesting that the court enjoin the hospital and medical staff from force-feeding her.[10] The lower court concluded that the nasogastric tube was necessary to prolong Bouvia's life.[11] In addition, the court found that the state had an

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1. *See, e.g.*, Barber v. Superior Court, 147 Cal. App. 3d 1006, 1015-16, 195 Cal. Rptr. 484, 489 (1983); Bartling v. Superior Court (*Bartling I*), 163 Cal. App. 3d 186, 194, 209 Cal. Rptr. 220, 224 (1984). There is, however, no right to collect damages from the physicians and hospital because the patient's demand to refuse medical treatment was not honored. Bartling v. Glendale Adventist Medical Center (*Bartling II*), 184 Cal. App. 3d 961, 971, 229 Cal. Rptr. 360, 364 (1986).

2. A condition which is "terminal" has been defined as: "[an] incurable condition caused by injury, disease, or illness, which, regardless of the application of life-sustaining procedures, would, within reasonable medical judgment, produce death, and where the application of life-sustaining procedures serve only to postpone the moment of death of the patient." CAL. HEALTH & SAFETY CODE § 7187(f) (West Supp. 1987).

3. For example, the California Court of Appeal for the Second District granted a request for an order to disconnect the respirator in *Bartling I*, 163 Cal. App. 3d 186, 197 n.8, 209 Cal. Rptr. 220, 226 n.8.

4. 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986), *review denied*, May 21, 1986.

5. *Id.* at 1135-36, 225 Cal. Rptr. at 299-300.

6. *Id.*

7. Bouvia was being maintained at High Desert Hospital, in Lancaster, California. The hospital is maintained and staffed by the County of Los Angeles. Rust, *Courts Rule on Feeding: Quadriplegic's Refusal Upheld*, AM. MED. NEWS, May 2, 1986, at 1, col. 3.

8. *Bouvia*, 179 Cal. App. 3d at 1136, 225 Cal. Rptr. at 300.

9. *Id.* A nasogastric tube is "a stomach tube passed through the nose." STEDMAN'S MEDICAL DICTIONARY 1495 (5th Unab. Law. ed. 1982).

10. *Bouvia*, 179 Cal. App. 3d at 1134, 225 Cal. Rptr. at 298.

11. *Id.*

interest in preserving life, rather than in providing the means for terminating life.[12] The court of appeal reversed. Relying on earlier appellate rulings, the court held that a noncomatose patient, diagnosed as likely to live for fifteen to twenty years,[13] has the right to refuse any medical treatment, even if doing so creates a life-threatening condition.[14]

Part I of this note summarizes the *Bouvia* decision.[15] The legal background of the right to refuse medical treatment is examined in part II.[16] Finally, part III discusses the possible ramifications of the opinion in *Bouvia*.[17]

## I. The Case

### *A. The Facts*

Elizabeth Bouvia is a twenty-eight year old quadriplegic who has suffered from cerebral palsy since birth.[18] With the exception of two fingers, she is unable to move any part of her body below her neck.[19] Bouvia's condition leaves her in continuous pain for which she requires morphine periodically injected into her chest through a permanently attached tube.[20]

Since 1983, Bouvia has been attempting to enforce her asserted right to receive pain-killing medications while refusing nourishment.[21] Bouvia first made her request after she arranged for a voluntary psychiatric admission to Riverside General Hospital.[22] Shortly after her admission, Bouvia disclosed her intention to stop eating and to die of starvation.[23] Bouvia also requested that the hospital staff continue to provide pain medication and hygienic care

12. *Id.* at 1135, 225 Cal. Rptr. at 299.
13. At the time of the appellate decision, Elizabeth Bouvia was 28 years old. The trial court found that Bouvia had the physical capacity to live an additional 15 to 20 years. *Id.* at 1142, 225 Cal. Rptr. at 304. *See infra* notes 45-48 and accompanying text (noting that because Bouvia was found to be able to live for an additional number of years, the determination of her fate should be measured by the quality of life for those years).
14. *Bouvia*, 179 Cal. App. 3d at 1137, 225 Cal. Rptr. at 300.
15. *See infra* notes 18-80 and accompanying text.
16. *See infra* notes 81-183 and accompanying text.
17. *See infra* notes 184-225 and accompanying text.
18. *Bouvia*, 179 Cal. App. 3d at 1135, 225 Cal. Rptr. at 299.
19. *Id.* at 1136, 225 Cal. Rptr. at 300.
20. *Id.*
21. *Id.*
22. *See* Cox, *Disabled Woman's Request to Die Raises Legal Furor*, L.A. Daily J., Dec. 8, 1983, at 1, col. 3.
23. *Id.*

until her death.[24] Bouvia indicated that she no longer wished to live because of her disability, and that she required their assistance because the disability rendered her physically unable to commit suicide.[25]

The hospital administration informed Bouvia that when her body weight fell below a certain level, steps would be taken to force-feed her.[26] Bouvia filed a petition with the Superior Court of Riverside County requesting that the court enjoin the hospital from force-feeding or discharging her.[27] The court issued an order enjoining the hospital from discharging Bouvia against her will, but refused to enjoin the force-feeding.[28] Bouvia checked out of Riverside Hospital and abandoned an appeal of the ruling.[29]

Attempts to find a suitable facility or residence of her own proved difficult.[30] Because Bouvia was without means of financial support, she was limited to facilities that accepted patients receiving public assistance.[31] Eventually, Bouvia was admitted to High Desert Hospital, a public hospital in Lancaster, California.[32]

The medical staff of High Desert Hospital was aware of Bouvia's previous desire to starve herself to death.[33] Fearing that her weight loss might reach a life-threatening level, Bouvia's physicians inserted a nasogastric tube to carry nutrients to her stomach.[34] The tube was inserted against her will and contrary to her written instructions.[35] Once again, Bouvia obtained legal assistance to contest a medical

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24. *Id.*

25. *See* Note, Elizabeth Bouvia v. Riverside Hospital: *Suicide, Euthanasia, Murder: The Line Blurs,* 15 GOLDEN GATE U.L. REV. 407 (1985) (discussion of Bouvia's initial attempt to assert her right to refuse medical treatment). The Note includes a projection of the negative implications that a court ruling to permit Bouvia to starve to death in the hospital would have upon those members of society who live with physical disabilities. *Id.* at 414-31.

26. *Id.* at 407.

27. Bouvia v. County of Riverside, No. 159780 (Super. Ct. Riverside Dec. 16, 1983).

28. *Id.*

29. *See Bouvia,* 179 Cal. App. 3d at 1136, 225 Cal. Rptr. at 300.

30. *Id.*

31. *Id.* Bouvia's maintenance in a public facility raised the issue of whether the staff of a public facility had a greater right to impede Bouvia's autonomy because the state would, in theory, become a party to her actions and the state has a strong interest in preserving the lives of its citizens. *Id.* at 1142, 225 Cal. Rptr. at 304.

32. *Id.* at 1135, 225 Cal. Rptr. at 299-300. *See also* Rust, *Courts Rule on Feeding: Quadriplegic's Refusal Upheld,* AM. MED. NEWS, May 2, 1986, at 1, col. 3.

33. *Bouvia,* 179 Cal. App. 3d at 1136, 225 Cal. Rptr. at 300.

34. *Id.*

35. Her instructions were dictated to her lawyers, written by them, and signed by her by means of her making a feeble "x" on the paper with a pen which she held in her mouth. *Id.* at 1136 n.2, 225 Cal. Rptr. at 300 n.2.

decision. The trial court declined to issue a preliminary injunction requiring removal of the nasogastric tube and prohibiting the insertion of other similar devices without her consent.[36] Bouvia's appeal of that decision is the subject of this note.

### *B. The Opinion*

The court of appeal in *Bouvia* held that the right to refuse medical treatment is basic and fundamental, and is recognized as a part of the right to privacy protected by both the state and federal constitutions.[37] The court next examined whether that right applies to the rejection of life-sustaining treatment, especially when the desire to disconnect life-support equipment is met with objections by the patient's physicians and hospital.[38] American courts have long held that a patient has the right to refuse medical treatment, even when doing so presents a risk to the patient's health or life.[39] Prior to *Bouvia*, California courts had addressed the right to refuse life-sustaining medical treatment with regard to patients who were close to death,[40] or had been diagnosed as terminal or comatose.[41]

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36. *Id.* at 1134, 225 Cal. Rptr. at 299.

37. *Id.* at 1137, 225 Cal. Rptr. at 301. Article I, § 1 of the California Constitution states as follows: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and *privacy*." CAL. CONST. art. I, § 1 (emphasis added). The United States Supreme Court has held that the right of privacy is a penumbra of the first, third, fourth, fifth, and ninth amendments of the United States Constitution. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

38. *Bouvia*, 179 Cal. App. 3d at 1138, 225 Cal. Rptr. at 301.

39. *See, e.g., In re* Osborne, 294 A.2d 372 (D.C. App. 1972) (action to require a necessary blood transfusion for a patient who refused on religious grounds); Satz v. Perlmutter, 379 So. 2d 359 (Fla. 1980) (action to disconnect a respirator from a 73 year old man who suffered from Lou Gehrig's Disease); *In re* Spring, 380 Mass. 629, 405 N.E.2d 115 (1980) (action to withdraw hemodialysis treatment from a 70 year old man suffering from permanent and irreversible kidney disease and senility); Superintendent of Belchertown v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977) (action to discontinue chemotherapy treatments of a mentally retarded leukemia victim); Lane v. Candura, 6 Mass. App. 377, 376 N.E.2d 1232 (Mass. App. 1978) (action to require the amputation of a gangrenous leg); *In re* Conroy, 98 N.J. 321, 486 A.2d 1209 (1985) (action for removal of a nasogastric feeding tube from an 84 year old woman with serious and irreversible physical and mental impairments); *In re* Quackenbush, 156 N.J. Super. 282, 383 A.2d 785 (1978) (action to require the amputation of both legs due to a gangrenous condition); Schloendorff v. Society of New York Hosp., 211 N.Y. 125, 105 N.E. 92 (1914) (action for damages following an unconsented surgery to remove a fibroid tumor).

40. *Bartling I*, 163 Cal. App. 3d 186, 209 Cal. Rptr. 220. *See infra* notes 125-37 and accompanying text (discussion of *Bartling I*).

41. Barber v. Superior Court, 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484 (1983) (criminal action against two physicians who, at the family's request, removed all life-support devices from a comatose patient). *See infra* notes 104-18 and accompanying text (discussion of *Barber*).

The court in *Bouvia* affirmed a previous appellate ruling that stated that the right to refuse medical treatment also applies to competent[42] patients who would prefer death to a life sustained by life-support devices.[43] The right allows competent and informed patients to determine their own fates.[44]

The appellate court holding is particularly significant because the trial court found that, with sufficient nourishment, Bouvia could live an additional fifteen to twenty years.[45] The court of appeal found the trial court's measurement of Bouvia's life solely on *quantitative* terms to be in error.[46] Instead the court reasoned that the proper determination must give at least equal weight to the *quality* of a patient's life.[47] If a patient is denied the right to refuse medical treatment because a court, a physician, or an ethics committee has decided that the patient might continue to live for a certain period of time, the right effectively loses all value and meaning.[48]

Bouvia was a patient in a public facility which, according to the hospital, makes the state a party to acts and omissions of the hospital and its staff.[49] In defense of their decision to maintain the nasogastric tube, the physicians and administrators of the hospital asserted the interests of the state in preserving life,[50] preventing suicide,[51] protecting innocent third parties,[52] and maintaining the

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42. Bouvia was found competent to choose her medical treatment because she was not incapacitated by age, unconciousness, mental disease, or disability. *Bouvia*, 179 Cal. App. 3d at 1141, 225 Cal. Rptr. at 303.

43. *Id.* at 1138, 225 Cal. Rptr. at 301 (citing *Bartling I*, 163 Cal. App. 3d at 189, 209 Cal. Rptr. at 220-21). Bouvia was not, however, dependent upon a machine to continue living. Bouvia objected to the use of a device of modern technology which would force-feed her. *Id.* at 1136, 225 Cal. Rptr. at 300.

44. *Id.* at 1138, 225 Cal. Rptr. at 301.

45. *Id.* at 1142, 225 Cal. Rptr. at 304. The physicians and administrators of the hospital noted that Bouvia was not terminal, as was Herbert, *Barber*, 147 Cal. App. 3d at 1010, 195 Cal. Rptr. at 486, nor near death, as was Bartling, *Bartling I*, 163 Cal. App. 3d 186, 192, 209 Cal. Rptr. 220, 223. Because Bouvia had a prognosis of continuing to live for several years, her decision appeared to be less a decision to terminate life-support systems than a decision to starve herself to death. *Bouvia*, 179 Cal. App. 3d at 1142, 225 Cal. Rptr. at 304.

46. *Bouvia*, 179 Cal. App. 3d at 1142, 225 Cal. Rptr. at 304.

47. *Id.*

48. *Id.* at 1143, 225 Cal. Rptr. at 304.

49. *Id.* at 1142, 225 Cal. Rptr. at 304.

50. *Id.*

51. *Id.*

52. *Id.* Courts have supported judicial intervention to compel medical treatment when the patient is the parent of a minor child, based on an extension of the *parens patriae* doctrine. This doctrine refers traditionally to the role of a state as sovereign and guardian

ethical integrity of the medical profession.[53] Despite the legitimacy of these objectives, the court held that if the right of self-determination was to have any meaning at all, that right must be paramount to the asserted state interests.[54]

Another issue addressed by the court concerned Bouvia's request for medical treatment in the form of pain-killers.[55] The hospital argued that the request precluded Bouvia from accepting medical treatment such as morphine injections, while simultaneously rejecting other essential treatment such as nutrition.[56] Because Bouvia was without funds to enter a private hospital, she was compelled to remain under the care of the public hospital.[57] Although her stay was obligatory upon the hospital, the court held that the hospital could not refuse or deny Bouvia's request to be relieved from pain and suffering by morphine injection merely because she had refused nasogastric feeding.[58] The choice to refuse nasogastric feeding was found to be an exercise of Bouvia's fundamental right to protect what little privacy remained to her.[59]

Next, the court discussed the lower court's denial of relief on the suicide issue.[60] Bouvia's physicians and the hospital administration asserted that Bouvia was attempting to commit suicide in their facility.[61] The trial court noted that Bouvia claimed that she did

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of persons under legal disability. *See* West Virginia v. Charles Pfizer & Co., 440 F.2d 1079, 1089 (2nd Cir. 1971). Since the state can generally act to safeguard a child's welfare, the state can act to prevent the ultimate abandonment of a child by the parent's self-destruction. *See also In re* President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1008 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 978 (1964) (court ordered blood transfusions over a patient's religious objections when she had to care for a seven month old child).

53. *Bouvia*, 179 Cal. App. 3d at 1142, 225 Cal. Rptr. at 304. The court noted that the maintenance of ethical standards of the medical profession includes "the right of physicians to effectively render necessary and appropriate medical service and to refuse treatment to an uncooperative and disruptive patient." *Id.*

54. *Id.* at 1141, 225 Cal. Rptr. at 304.

55. The trial court found that Bouvia had "purposefully engaged in a selective rejection of medical treatment and nutritional intake to accomplish her objective and accept only treatment which gives her some degree of comfort pending her demise." *Id.* at 1144, 225 Cal. Rptr. at 305.

56. *Id.* at 1142, 225 Cal. Rptr. at 304.

57. *Id.* at 1136, 225 Cal. Rptr. at 300.

58. *Id.* at 1145, 225 Cal. Rptr. at 306.

59. *Id.*

60. *Id.* at 1144, 225 Cal. Rptr. at 305. Currently, no state, including California, has a statute making a successful suicide a crime, nor does the Model Penal Code recognize suicide as a crime. At common law, attempted suicide was a criminal act. A few American jurisdictions have adopted this view, but most, including California, impose no criminal penalty for a suicide attempt. *In re* Joseph G., 34 Cal. 3d 429, 433, 667 P.2d 1176, 1178, 194 Cal. Rptr. 163, 165 (1983). *See infra* notes 143-83 and accompanying text (discussion of suicide).

61. *Bouvia*, 179 Cal. App. 3d at 1144, 225 Cal. Rptr. at 305.

not wish to commit suicide.[62] Nevertheless, the trial court drew a "reasonable inference" from Bouvia's request to reject nutritional intake and concluded that Bouvia was motivated by a desire to end her life.[63] Agreeing with the position taken by the physicians and hospital administration, the trial court found that the removal of the nasogastric tube would therefore impede the well-recognized state interest in preserving the sanctity of life.[64]

Although the court of appeal noted that suicide is probably the ultimate exercise of one's right to privacy, the court disagreed with the trial court's conclusion for other reasons.[65] In 1983, when Bouvia had the specific intent to commit suicide, she did not do so.[66] The appellate court reasoned that because Bouvia's condition had worsened to the point at which she no longer had the ability to independently consume nutrients, her decision to withdraw from the nasogastric feedings should be construed merely as a choice of an earlier death without force-feeding.[67]

Another question arose as to whether the hospital and its staff would be aiding and abetting suicide by discontinuing treatment as Bouvia requested, if Bouvia was truly attempting to kill herself.[68] The trial court found that Bouvia's desire to terminate her life required the assistance of the hospital staff.[69] The staff would assist Bouvia's suicide by furnishing medical treatment to which she consented, and refraining from administering treatment which she refused.[70] Because Bouvia resided in a state-supported hospital and relied upon public assistance for her maintenance, the hospital

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62. *Id.* The trial court went on to state that Bouvia had voiced her desire to die to a staff member of the hospital. On that evidence, the court found the claim that she did not wish to commit suicide to be merely a semantic distinction. *Id.* at 1144, 225 Cal. Rptr. at 305-06.

63. *Id.* The trial court based its finding that Bouvia had purposefully engaged in a selective rejection of medical treatment and nutritional intake on the fact that she would accept only treatment which gave her some degree of comfort pending her demise. *See supra* note 55.

64. *Bouvia*, 179 Cal. App. 3d at 1145, 225 Cal. Rptr. at 306. *See supra* note 31.

65. *Bouvia*, 179 Cal. App. 3d at 1144, 225 Cal. Rptr. at 306.

66. *Id.* The court pointed out that in 1983, Bouvia apparently had the ability, without artificial aids, to consume enough nutrients to sustain herself. *Id.*

67. *Id.* Furthermore, the appellate court took issue with the trial court's emphasis on the *motives* behind Bouvia's decision to refuse medical treatment. The appellate court stated that: "[i]f a right [to refuse medical treatment] exists, it matters not what 'motivates' its exercise." *Id.*

68. *Id.* California Penal Code § 401 makes aiding and abetting suicide a felony in California. CAL. PENAL CODE § 401 (West 1970). *See infra* note 160 and accompanying text.

69. *Bouvia*, 179 Cal. App. 3d at 1144, 225 Cal. Rptr. at 306.

70. *Id.*

advanced the argument that permitting Bouvia to terminate life-sustaining treatment would effectively make the state a party to her suicide.[71]

The court of appeal disagreed with the trial court's determination that the medical staff would be assisting suicide by adhering to Bouvia's request to stop force-feeding her.[72] The appellate court acknowledged an interest in preserving the sanctity of life, but went on to clarify the distinction between aiding and abetting suicide and merely being present while a patient exercises a constitutional right to privacy.[73] Aiding and abetting suicide presupposes an *affirmative* act on the part of the person charged with the crime.[74] The court offered the example of one who provides the instrumentality or other means by which another could immediately and physically self-inflict a fatal injury.[75] Providing an instrumentality is a far more culpable act than remaining present while a patient exercises a constitutional right to refuse medical treatment.[76] The court of appeal concluded that no criminal or civil liability would attach to a doctor or hospital by honoring the refusal of medical treatment by a competent, informed patient.[77]

The court of appeal finally issued a peremptory writ of mandate, ordering the trial court to immediately grant Bouvia's request for removal of the nasogastric tube from her body.[78] In addition, the trial court was ordered to prohibit the hospital and medical staff from replacing the nasogastric tube, or any other similar device, in or on Bouvia's body without her consent.[79] Although not stated in the order, the court, in dicta, also prohibited the hospital from removing the tube through which Bouvia received morphine injec-

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71. *Id.* at 1142, 225 Cal. Rptr. at 304.
72. *Id.* at 1144, 225 Cal. Rptr. at 306.
73. *Id.* at 1145, 225 Cal. Rptr. at 306. Addressing the same issue, the appellate court in *Bartling I* stated as follows:

> [T]he underlying State interest in this area lies in the prevention of irrational self-destruction. What we consider here is a competent, rational decision to refuse treatment when death is inevitable and the treatment offers no hope of cure or preservation of life. There is no connection between the conduct here in issue and any State concern to prevent suicide.

*Bartling I*, 163 Cal. App. 3d 186, 196, 209 Cal. Rptr. 220, 226.
74. *Bouvia*, 179 Cal. App. 3d at 1145, 225 Cal. Rptr. at 306.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 1146, 225 Cal. Rptr. at 307.
79. *Id.*

tions merely because she chose to reject the nasogastric tube.[80]

## II. Legal Background

The right of individuals to control their own bodies is a basic societal concept, long recognized in the common law.[81] In California, the state supreme court has held that the right to control one's own body includes the right to refuse medical treatment.[82] Initially, the right to refuse medical treatment was provided to comatose and terminal patients,[83] but has more recently been extended to competent patients.[84] Arguably, the ultimate exercise of control over the body is in the deliberate termination of one's life through the act of suicide.[85]

### *A. The Right To Refuse Medical Treatment*

The judiciary has long recognized the right to refuse medical treatment.[86] Courts have affirmed this right even when refusal was life-threatening.[87] The right to refuse medical treatment is encompassed in the fundamental right to privacy protected by both the California and federal constitutions.[88]

The right to refuse medical treatment was first recognized by the California Supreme Court in *Cobbs v. Grant*.[89] During surgery, an

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80. *Id.* at 1145, 225 Cal. Rptr. at 306. The court stated in pertinent part:

> We hold only that her right to refuse medical treatment, even of the life-sustaining variety, entitles her to the immediate removal of the nasogastric tube that has been involuntarily inserted into her body. The hospital and medical staff are still free to perform a substantial if not the greater part of their duty, i.e., that of trying to alleviate Bouvia's pain and suffering.

*Id.*

81. *See supra* note 39 and accompanying text. Probably the most frequently cited statement of the right to control one's body is from *Union Pac. Ry. v. Botsford,* in which the United States Supreme Court stated the following: "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. Ry.*, 141 U.S. 250, 251 (1891) (refusing to compel a personal injury plaintiff to undergo a pretrial medical examination).

82. *See infra* notes 89-94 and accompanying text (discussion of *Cobbs v. Grant*).

83. *See infra* notes 96-118 and accompanying text (discussion of *In re Quinlan* and *Barber v. Superior Court*).

84. *See infra* notes 125-41 and accompanying text (discussion of *Bartling v. Superior Court* and *Superintendent of Belchertown v. Saikewicz*).

85. *See infra* notes 143-83 and accompanying text (discussion of suicide).

86. *See supra* note 39 and accompanying text.

87. *Id.*

88. *See supra* note 37 and accompanying text.

89. 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972).

artery in the plaintiff's spleen was accidently severed.[90] Two additional operations were required to repair the damage.[91] Prior to the initial surgery, the surgeon explained the nature of the operation to Cobbs, but did not discuss any of the inherent risks of the surgery.[92] Cobbs brought medical malpractice actions against the surgeon and the hospital, based on the theory that a physician has a duty to disclose to the patient all facts necessary to allow the patient to intelligently consent to the proposed treatment.[93] The California Supreme Court held that "a person of adult years and in sound mind has the right, in the exercise of control over his own body, to determine whether or not to submit to lawful medical treatment."[94] Although the holding of *Cobbs* related to an actionable battery in the absence of informed consent, the relevance of *Cobbs* to *Bouvia* lies in the affirmation of the patient's right to determine whether to accept or refuse *any* medical treatment. Bouvia sought to enforce her right to limit medical treatment and gain control over her body, pursuant to the holding in *Cobbs*.[95]

### *1. Refusal of Medical Treatment: Comatose and Terminal Patients*

The seminal case concerning a petition to permit the withdrawal of all life-sustaining medical treatment from a comatose patient is *In re Quinlan*.[96] Karen Quinlan suffered from a condition diagnosed as being chronic, persistent, and vegetative.[97] Doctors agreed that no cure existed for Quinland.[98] On the basis of this prognosis, Quinlan's guardian petitioned the court to allow him to authorize the termination of all extraordinary procedures sustaining Quinlan's life.[99] The court stated that because Quinlan was not competent to decide

90. *Id.* at 235, 502 P.2d at 4, 104 Cal. Rptr. at 508.
91. *Id.*
92. *Id.* at 234, 502 P.2d at 4, 104 Cal. Rptr. at 508.
93. *Id.* at 242, 502 P.2d at 9-10, 104 Cal. Rptr. at 513.
94. *Id.* at 242, 502 P.2d at 9, 104 Cal. Rptr. at 513.
95. Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 1137, 225 Cal. Rptr. 297, 300 (1986).
96. 70 N.J. 10, 355 A.2d 647 (N.J. 1976), *cert. denied*, 429 U.S. 922 (1976).
97. *Id.* at 24, 355 A.2d at 654.
98. *Id.* at 26, 355 A.2d at 655.
99. *Id.* at 38-39, 355 A.2d at 662-63. The court noted that the record was somewhat hazy in distinguishing between "ordinary" and "extraordinary" measures, but "one would have to think that the use of the same respirator or like support could be considered 'ordinary' in the context of the possibly curable patient but 'extraordinary' in the context of the forced sustaining by cardio-respiratory processes of an irreversibly doomed patient." *Id.* at 48, 355 A.2d at 667-68.

whether to be maintained on the machines, her guardian could assert Quinlan's right to privacy on the patient's behalf.[100] By applying a balancing test, the court in *Quinlan* determined that the right of the patient to die should be weighed against the societal interest in preserving life and the responsibility of a physician to administer medical treatment in accordance with good judgment.[101] According to the court, the interest of the state weakens and the right of the individual to refuse necessary medical treatment grows as the degree of bodily intrusion increases and the prognosis for life dims.[102] Therefore, the determination of whether to grant a request to withdraw life-sustaining treatment must focus on the reasonable possibility of the patient returning to a cognitive, sapient life, as distinguished from a forced biological vegetative existence.[103]

The California case of *Barber v. Superior Court*[104] dealt with circumstances similar to those in *Quinlan*. Clarence Herbert underwent routine abdominal surgery and subsequently suffered a heart attack.[105] As a result, Herbert entered a deep coma and sustained severe brain damage leaving him in a vegetative state.[106] At the written request of his family, and based upon Herbert's previous statements that he did not want to be kept alive by machines,[107] Herbert was removed from all life-support equipment.[108] Two days after that request, the family ordered the removal of intravenous tubes providing hydration[109] and nourishment.[110] Herbert died and his doctors were charged with murder and conspiracy to commit murder.[111]

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100. *Id.* at 38, 355 A.2d at 662.
101. *Id.* at 40-41, 355 A.2d at 663-64.
102. *Id.* at 41, 355 A.2d at 664.
103. *Id.*
104. 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484 (1983).
105. *Id.* at 1010, 195 Cal. Rptr. at 486.
106. *Id.*
107. *Id.* at 1021, 195 Cal. Rptr. at 493. The court found that Herbert, prior to entering his coma, had expressed to his wife that he would not want to be kept alive by machines or "become another Karen Ann Quinlan." *Id.*
108. *Id.*
109. STEDMAN'S MEDICAL DICTIONARY 662 (5th Unab. Law. ed. 1982) (defining "hydration" as "[c]linically, the taking of water. . . .").
110. *Barber*, 147 Cal. App. 3d at 1011, 195 Cal. Rptr. at 486.
111. *Id.* The *Barber* court noted that historically, death has been defined as the cessation of respiratory and heart function. *Id.* at 1013, 195 Cal. Rptr. at 488. In California, death is defined as the irreversible cessation of all brain function. CAL. HEALTH & SAFETY CODE § 7180(a)(2) (West Supp. 1987). Herbert was not dead by either historical or statutory standards as there was some minimal brain activity at the time medical treatment was terminated. *Barber*, 147 Cal. App. 3d at 1013, 195 Cal. Rptr. at 488.

The court recognized that the Natural Death Act[112] permits a person to execute a directive for the withholding or withdrawal of life-sustaining procedures in the event that the person later suffers from a terminal condition.[113] The court held that the physicians' conduct constituted an omission rather than an act.[114] Because the court did not find that the physicians actively participated in Herbert's death, the doctors were acquitted of all charges.[115] To support the decision that the physicians did not act illegally by acceding to the family's wishes, the *Barber* court relied on the *Quinlan* balancing test to consider whether the proposed treatment for Herbert was proportionate to the advancement of state interests in light of the burdens caused by continued treatment.[116] The court agreed with the *Quinlan* decision that the focal point of the decision should be the prognosis as to the reasonable possibility of return to cognitive and sapient life, as balanced against the forced continuance of a vegetative existence.[117] The court in *Barber* therefore found that the omission to continue treatment under the circumstances was not an unlawful failure to perform a legal duty.[118]

Both *Quinlan* and *Barber* support the conclusion that a patient has a fundamental right to decide whether to accept or refuse medical treatment, even when the patient is not presently competent to make that decision.[119] The *Bouvia* court stated that in cases like *Quinlan* and *Barber*, when the patient is physically incapable of making a decision, the person making the decision in the patient's stead should be guided in the decision by knowledge of the patient's own desires and feelings, to the extent they were expressed before the patient became incompetent.[120] The autonomy of the patient is

112. *See* CAL. HEALTH & SAFETY CODE §§ 7185-7195 (West 1979 & Supp. 1987).
113. *See id.* at § 7188.
114. *Barber*, 147 Cal. App. 3d at 1022, 195 Cal. Rptr. at 493. The court stated as follows: "In summary we conclude that the [physician's] omission to continue treatment under the circumstances, though intentional and with knowledge that the patient would die, was not an unlawful failure to perform a legal duty." *Id.*
115. *Id.*
116. *Id.* at 1019, 195 Cal. Rptr. at 491.
117. *Id.* (quoting *Quinlan*, 70 N.J. at 51, 355 A.2d at 669).
118. *Barber*, 147 Cal. App. 3d at 1022, 195 Cal. Rptr. at 493.
119. The *Quinlan* court stated as follows: "[w]e have no doubt, in these unhappy circumstances, that if Karen were herself miraculously lucid for an interval . . . and perceptive of her irreversible condition, she could effectively decide upon discontinuance of the life-support apparatus, even if it meant the prospect of natural death." *Quinlan*, 70 N.J. at 39, 355 A.2d at 663. The *Barber* court, likewise, recognized Herbert's earlier request not to "become another Karen Ann Quinlan." *Barber*, 147 Cal. App. 3d at 1021, 195 Cal. Rptr. at 493.
120. Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 1138, 225 Cal. Rptr. 297, 301 (1986).

therefore preserved to the greatest extent possible under the circumstances.[121] Like Clarence Herbert, Elizabeth Bouvia expressed her opinion that the benefits of the medical treatment did not outweigh the burden of being kept alive through extraordinary means.[122] The holdings in *Quinlan* and *Barber* permitted the patient's family to withdraw life-sustenance, based on an assumption of a desire, and on the earlier-stated desire of the patient.[123] Denying Bouvia, a competent adult, the right to make the same decision would indeed be ironic.[124]

### 2. *Refusing Life-Sustaining Medical Treatment: Competent Patients*

The recent California case of *Bartling v. Superior Court*[125] is closely analogous to *Bouvia*.[126] At seventy years of age, William Bartling died on the eve of appeal after months of litigation to force doctors to disconnect his respirator.[127] The appellate court agreed to hear the case as if Bartling's treatment was still at issue, due to the lack of guidelines in the state law regulating the conduct of hospitals in so-called "right-to-die" cases.[128] Bartling suffered from a myriad of diseases, including a lung tumor.[129] Although his

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121. *Id.* at 1140, 225 Cal. Rptr. at 303 (citing President's Comm'n. for Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Deciding to Forego Life-Sustaining Treatment, A Report on the Ethical, Medical and Legal Issues in Treatment Decisions* (Mar. 1983)) (any surrogate, making a decision for the patient, ought to be guided by knowledge of the patient's own desires and feelings). *Id.*

122. *See id.* at 1134, 225 Cal. Rptr. at 299.

123. *See supra* note 119 and accompanying text.

124. *Bouvia*, 179 Cal. App. 3d at 1135, 225 Cal. Rptr. at 299. In discussing the availability of immediate relief for Bouvia, the appellate court stated as follows:

> Her mental and emotional feelings are . . . entitled to respect. She has been subjected to the forced intrusion of an artificial mechanism into her body against her will. She has a right to refuse the increased dehumanizing aspects of her condition created by the insertion of a permanent tube through her nose and into her stomach.

*Id.* at 1134, 225 Cal. Rptr. at 299.

125. 163 Cal. App. 3d 186, 209 Cal. Rptr. 220 (1984) (*Bartling I*).

126. The appellate court in *Bouvia* found similarities between *Bartling I* and *Bouvia* on the main issue of whether a competent adult patient, with serious illnesses which are probably incurable, but have not been diagnosed as terminal, has the right, over the objections of his physicians and the hospital, to have life-support equipment disconnected despite the fact that withdrawal of such devices will surely hasten his death. *Bouvia*, 179 Cal. App. 3d at 1138, 225 Cal. Rptr. at 301.

127. *Bartling I*, 163 Cal. App. 3d at 189, 209 Cal. Rptr. at 221.

128. *Id.* The court stated in pertinent part that: "[t]he novel medical, legal and ethical issues presented in this case are no doubt capable of repetition and therefore should not be ignored by relying on the mootness doctrine. This requires us to set forth a framework in which both the medical and legal professions can deal with similar situations." *Id.*

129. *Id.* At the time of his death, Bartling suffered from emphysema, chronic respiratory

condition was considered to be serious, Bartling was not declared to be terminal.[130] While in the hospital, Bartling executed and submitted a living will[131] and a durable power of attorney,[132] both of which expressed his desire to be allowed to die and not be kept alive by medications or artificial means.[133] The hospital questioned Bartling's ability to make a meaningful decision because he had vacillated more than once from his position of wanting the respirator removed.[134]

The appellate court overturned the decision of the trial court which had held that the right to have life-support equipment disconnected was limited to comatose and terminally ill patients, or to their representatives.[135] Using a balancing test broader than that articulated in *Quinlan* and *Barber*, the appellate court asked whether the right of a competent adult to refuse unwanted medical treatment was outweighed by the societal interests in the preservation of life, the prevention of suicide, the protection of third parties, and the maintenance

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failure, arteriosclerosis, abdominal aneurysm (abnormal ballooning of the main artery passing through the abdomen to the legs), and a malignant tumor of the lung. Bartling also had a history of what his physicians termed "chronic acute anxiety/depression" and alcoholism. *Id.* at 189-90, 209 Cal. Rptr. at 221.

130. *Id.* at 193, 209 Cal. Rptr. at 223.

131. A living will is a written directive by an adult patient authorizing the withholding or withdrawal of extraordinary life-sustaining procedures in the situation of terminal illness. CAL. HEALTH & SAFETY CODE § 7188 (West Supp. 1987). Bartling's living will stated in pertinent part as follows: "If at such time the situation should arise in which there is no reasonable expectation of my recovery from extreme physical or mental disability, I direct that I be allowed to die and not be kept alive by medications, artificial means or heroic measures." *Bartling I*, 163 Cal. App. 3d at 190, 209 Cal. Rptr. at 222.

132. The Durable Power of Attorney for Health Care Act enables a designated proxy to terminate health care if the principal is incompetent. *See generally* CAL. CIV. CODE §§ 2430-2443 (West Supp. 1987). In his durable power of attorney, Bartling stated in part as follows:

> I am totally unable to care for myself, and believe that I am dependent on a mechanical ventilator to support and sustain my respiration and life. I continuously suffer agonizing discomfort, pain and the humiliating indignity of having to have my every bodily need and function tended to by others. I do not wish to continue to live under these conditions. It is therefore my intent to refuse to continue on ventilator support and thereby to permit the natural process of dying to occur—peacefully, privately and with dignity.

*Bartling I*, 163 Cal. App. 3d at 191, 209 Cal. Rptr. at 222.

133. *See supra* notes 131-32 and accompanying text.

134. *Bartling I*, 163 Cal. App. 3d at 192, 209 Cal. Rptr. at 223. The appellate court found no question that Bartling was legally competent to decide whether he wanted to have the respirator disconnected. Apparently unconcerned with Bartling's vacillation, the court stated as follows: "The fact that Mr. Bartling periodically wavered from this position because of severe depression or for any other reason does not justify the conclusion of Glendale Adventist and his treating physicians that his capacity to make such a decision was impaired to the point of legal incompetency." *Id.* at 193, 209 Cal. Rptr. at 223-24.

135. *Id.* at 193, 209 Cal. Rptr. at 223.

of medical ethics.[136] The court found these moral and ethical objections were not sufficient to abridge Bartling's constitutionally guaranteed right to privacy.[137] The court relied upon the Massachusetts decision in *Superindendent of Belchertown v. Saikewicz*,[138] which held the individual right to privacy superior to all competing interests.[139] The *Saikewicz* court found that the constitutional right to privacy preserved the sanctity of individual free choice and self-determination as fundamental constituents of life.[140] Under this view, the court noted, the value of life is decreased by the failure to allow a competent human being the right to choose, not by the patient's decision to refuse treatment.[141] The *Bouvia* court used the *Bartling I* balancing test to hold that the decision to forego medical treatment of life-support through mechanical means is a guaranteed right belonging to the patient.[142]

### *B. Suicide*

The trial court in *Bouvia* found that Bouvia's request for relief was motivated by an intent to commit suicide in the hospital.[143] In England, suicide was a crime under common law and generally considered a form of murder.[144] With the sole exception of a Massachusetts statute enacted in 1600,[145] the English attitude has been expressly rejected in the United States and suicide has never been punished in this country.[146] Currently, no state, including California, has a statute making a successful suicide a crime.[147]

Attempted suicide was also a crime at common law.[148] The majority of states, including California, impose no criminal liability

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136. *Id.* at 193, 209 Cal. Rptr. at 224. *Cf. supra* notes 101-03 and accompanying text (*Quinlan* balancing test). *See also supra* notes 50-53 and accompanying text (asserted state interests).

137. *Bartling I*, 163 Cal. App. 3d at 193-94, 209 Cal. Rptr. at 224.

138. 373 Mass. 728, 370 N.E.2d 417 (1977).

139. *Id.* at 759, 370 N.E.2d at 435.

140. *Id.* at 742, 370 N.E.2d at 426.

141. *Id.*

142. Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 1143, 225 Cal. Rptr. 297, 305 (1986).

143. *Id.* at 1144, 225 Cal. Rptr. at 305.

144. *See* Note, *The Punishment of Suicide—A Need for Change*, 14 VILL. L. REV. 463 (1969). The usual punishment for suicide was burial on the public highway with a stake driven through the body and forfeiture of the suicide's property to the crown. *Id.* at 465.

145. *Id.* at 465. This statute provided for burial of the suicide on the highway with a warning to others to beware of such "damnable practices." *Id.*

146. *Id.*

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

148. *Id.*

upon one who attempts to commit suicide.[149] Under current psychiatric views, attempted suicide is considered a symptom of mental illness, requiring medical or psychiatric treatment.[150] In support of these views, the Model Penal Code provides that no form of punishment is acceptable for a successful suicide.[151] The Model Penal Code also states that criminal punishment for attempted suicide, likewise, is ineffective to deter others from attempting to take their own lives.[152]

Although attempted suicide is not a crime in the United States, courts have recognized a state interest in the prevention of irrational self-destruction.[153] Addressing this interest, the court in *Superintendent of Belchertown v. Saikewicz* noted that a competent adult's refusal of medical treatment does not necessarily constitute suicide because the patient may not have the specific intent to die.[154] Even if the intent to die existed, the patient would not be actively setting the death-producing agent in motion when death is the result of natural causes.[155] The *Saikewicz* court therefore concluded no connection existed between the refusal to submit to medical treatment and any state concern to prevent suicide.[156] Despite the trial court's contention in *Bouvia* that Bouvia intended to commit suicide, the appellate court viewed her refusal of medical treatment not as a decision to commit suicide, but as a desire to live out the remainder of her natural life in dignity and peace.[157]

The rationale of the trial court's finding of Bouvia's intent to commit suicide appears not only to assert a state interest in the prevention of suicide,[158] but also to show that Bouvia's refusal of

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149. *Id.*

150. *Id.* at 434, 667 P.2d at 1178, 194 Cal. Rptr. at 165.

151. MODEL PENAL CODE § 210.5 (Official Draft 1980).

152. *Id.* The Model Penal Code also states, in part as follows:

> It seems preposterous to argue that the visitation of criminal sanctions upon one who fails in the effort is likely to inhibit persons from undertaking a serious attempt to take their own lives. Moreover, it is clear that the intrusion of the criminal law into such tragedies is an abuse. There is a certain moral extravagance in imposing criminal punishment on a person who has sought his own self-destruction, who has not attempted direct injury to anyone else, and who more properly requires medical or psychiatric attention.

*Id.* comment 2.

153. *See Saikewicz*, 373 Mass. 728, 741, 370 N.E.2d 417, 425; *Bartling I*, 163 Cal. App. 3d 186, 195, 209 Cal. Rptr. 220, 225.

154. *Saikewicz*, 373 Mass. at 743 n.11, 370 N.E.2d at 426 n.11.

155. *Id.*

156. *Id.*

157. *Bouvia*, 179 Cal. App. 3d at 1144, 225 Cal. Rptr. at 305.

158. *See supra* notes 50-53 and accompanying text (the four state interests asserted by the physicians and hospital administrators in *Bouvia*).

medical treatment placed the hospital and staff in the position of aiding and abetting her suicide.[159] Although suicide is not illegal in California, California Penal Code section 401 expressly makes assisting another to commit suicide a criminal offense.[160] In the 1983 case of *In re Joseph G.*, the California Supreme Court distinguished aiding and abetting suicide from murder.[161] In *Joseph G.*, two high school students became intoxicated and decided to commit suicide together.[162] Joseph would drive his car over a cliff with Jeff as a passenger.[163] There was no evidence of coercion by either boy.[164] The plan was carried out, but only Jeff died.[165] Noting a paucity of decisions on the issue,[166] the court examined in depth whether the survivor who drove the vehicle was guilty of aiding and abetting suicide rather than the murder of his deceased partner.[167]

The court held that murder requires active participation in the final overt act causing the victim's death.[168] Aiding and abetting suicide, on the other hand, presumes assistance short of active participation.[169] Criminal courts have characterized the difference between the crimes of murder and of assisting suicide as the difference between furnishing the means, and active participation.[170] If the defendant merely furnished the means, he is guilty of aiding

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159. *Bouvia*, 179 Cal. App. 3d at 1144, 225 Cal. Rptr. at 305-06.

160. Penal Code § 401 provides as follows: "Every person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony." CAL. PENAL CODE § 401 (West 1970).

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

162. *Id.* at 432, 667 P.2d at 1177, 194 Cal. Rptr. at 164.

163. *Id.*

164. *Id.* at 439, 667 P.2d at 1182, 194 Cal. Rptr. at 169.

165. *Id.* at 432, 667 P.2d at 1178, 194 Cal. Rptr. at 165.

166. *Id.* at 435, 667 P.2d at 1179, 194 Cal. Rptr. at 166.

167. *Id.* at 438, 667 P.2d at 1181, 194 Cal. Rptr. at 168. The court noted that California law provided no options, save first degree murder at one extreme, or aiding and abetting suicide at the other extreme. *Id.*

168. *Id.* at 436, 667 P.2d at 1180, 194 Cal. Rptr. at 167.

169. *Id.* For example, in People v. Bouse, 199 Or. 676, 264 P.2d 800 (1953), defendant's wife drowned in the bathtub. On the evidence, the jury could have found that defendant committed murder by holding his wife's head underwater, despite a struggle, until she died. The jury could also have found that the defendant merely ran the water and assisted his wife into the tub, and was therefore guilty only of manslaughter under the Oregon assisting statute. *Id.* at 687, 264 P.2d at 805.

170. *See* People v. Matlock, 51 Cal. 2d 682, 336 P.2d 505 (1959). Defendant was convicted of murder and robbery. Although he admitted that he strangled the victim and took his money, the defendant claimed he did so solely at the victim's insistence. According to the defendant, the victim sought a way to die but could not commit suicide without forfeiting the benefits of his insurance policy. The victim therefore induced the defendant to kill him and take his property so the death would appear to be a robbery-murder. *Id.* at 687, 336 P.2d at 507.

a suicide.[171] If, however, he actively participated in the death of the suicide victim, he is guilty of murder.[172]

In *Joseph G.*, Joseph had control of the instrumentality (automobile) which proximately killed Jeff.[173] However, the court found that the active-passive distinction between acts did not apply when suicides were undertaken simultaneously by a single instrumentality.[174] Therefore, Joseph could be charged with no more than aiding and abetting in Jeff's suicide.[175] Clearly, the facts of *Joseph G.* did not pertain to a patient's request for the removal of life-sustaining treatment by medical personnel. *Joseph G.* is, however, significant to *Bouvia* by showing that the instances and means of assisting another to commit suicide require an affirmative act on the part of the accused.[176]

The *Bartling I* opinion noted that several of Bartling's doctors had expressed the view that disconnecting the respirator would have been tantamount to aiding his suicide.[177] The court distinguished bringing about Bartling's death by unnatural means and merely hastening his inevitable death by natural means.[178] According to the court, disconnection of the respirator would have allowed Bartling to die a natural death.[179] Using the language from the *Saikewicz* case,[180] the *Bartling I* court assured the physicians that their part in the disconnection of Bartling's respirator would not constitute an assistance of his suicide.[181] The court in *Bouvia* relied on the

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171. *Id.*
172. *Id.*
173. *Joseph G.*, 34 Cal. 3d at 439, 667 P.2d at 1182, 194 Cal. Rptr. at 169.
174. *Id.* at 440, 667 P.2d at 1183, 194 Cal. Rptr. at 170. The court noted that Joseph's fate could have been the same as Jeff's. Yet, had Jeff survived, the most he could have been charged with would have been aiding and abetting suicide, because he did not participate in the final act of driving the automobile. *Id.* at 439, 667 P.2d at 1182-83, 194 Cal. Rptr. at 169.
175. *Id.* at 440, 667 P.2d at 1183, 194 Cal. Rptr. at 170.
176. Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 1145, 225 Cal. Rptr. 297, 306 (1986). Examples of affirmative conduct considered to be aiding and abetting suicide include furnishing a gun, poison, knife, or other instrumentality with which the would-be suicide could physically and immediately inflict some death-producing injury. *Id.*
177. *Bartling I*, 163 Cal. App. 3d 186, 196, 209 Cal. Rptr. 220, 225.
178. *Id.*
179. *Id.*
180. *Saikewicz*, 373 Mass. at 728, 370 N.E.2d at 417. *See supra* notes 154-56 and accompanying text (postulating that a patient's refusal of medical treatment does not necessarily constitute the intent to commit suicide).
181. *Bartling I*, 163 Cal. App. 3d at 196, 209 Cal. Rptr. at 226. The court also quelled the hospital and physicians' fear that their compliance with Bartling's wishes might subject them to criminal and civil liability, noting that the holding of *Barber* effectively precludes any criminal liability in these circumstances. Without further explanation, the *Bartling I*

opinions in *Joseph G.* and *Bartling I* to conclude that Elizabeth Bouvia made a conscious decision to simply let nature take its course.[182] The mere presence of her physicians did not constitute the requisite affirmative, assertive, proximate, and direct conduct of aiding and abetting suicide.[183]

## III. Legal Ramifications

The recent decisions of the California Courts of Appeal have evidenced a progression in the attitude of the California courts toward granting wider latitude to patients seeking to refuse life-sustaining medical treatment. The 1972 California Supreme Court case of *Cobbs v. Grant* laid the foundation for the exercise of the right of refusal by stating that an adult of sound mind had the right to determine whether to *submit* to medical treatment.[184] The California Court of Appeal for the Second District, in *Barber v. Superior Court*, found the obvious corollary to the *Cobbs* principle, that a person could determine whether to accept medical treatment, was that a competent adult had a legal right to *refuse* medical treatment.[185] In *Barber*, prosecution of physicians arose after life-support measures were withdrawn from a deeply comatose patient.[186] In view of the patient's dismal prognosis for recovery[187] and his family's request that life-sustaining treatment be withdrawn,[188] the court concluded that the physicians did not act improperly by withdrawing essential medical treatment.[189] One year after the *Barber* decision, the Court of Appeal for the Second District was presented with the case of *Bartling v. Superior Court*.[190] Seventy year old Bartling was alert and competent, but required a life-support device to remain alive.[191] Although Bartling had not been diagnosed as

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court went on to state, "we are now satisfied the law as outlined is clear and if Mr. Bartling had lived, real parties could not have been criminally or civilly liable for carrying out his instructions." *Id.* at 197, 209 Cal. Rptr. at 226.

182. *Bouvia*, 179 Cal. App. 3d at 1144, 225 Cal. Rptr. at 306.

183. *Id.* at 1145, 225 Cal. Rptr. at 306.

184. Cobbs v. Grant, 8 Cal. 3d 229, 242, 502 P.2d 1, 9, 104 Cal. Rptr. 505, 513 (1972). *See supra* notes 89-94 and accompanying text (discussion of the *Cobbs* case).

185. Barber v. Superior Court, 147 Cal. App. 3d 1006, 1015, 195 Cal. Rptr. 484, 489 (1983). *See supra* notes 104-18 and accompanying text (discussion of the *Barber* case).

186. *Barber*, 147 Cal. App. 3d at 1010, 195 Cal. Rptr. at 486.

187. *Id.* at 1020, 195 Cal. Rptr. at 492.

188. *Id.* at 1010, 195 Cal. Rptr. at 486.

189. *Id.* at 1022, 195 Cal. Rptr. at 493.

190. 163 Cal. App. 3d 186, 209 Cal. Rptr. 220 (1984). *See supra* notes 125-37 and accompanying text (discussion of the *Bartling I* case).

191. *Bartling I*, 163 Cal. App. 3d at 193, 209 Cal. Rptr. at 223.

terminal, he had a prognosis of less than one year to live at the time he sought removal of the life-support device.[192] The court held that Bartling had the right to refuse life-sustaining medical treatment under his constitutional right of privacy.[193]

Claiming a factual similarity between the cases, the Court of Appeal for the Second District used the *Bartling I* rationale to grant an injunction for the withdrawal of life-sustaining medical treatment based on the patient's constitutional right to privacy in *Bouvia v. Superior Court.*[194] Unlike Bartling, however, Bouvia was twenty-eight years old at the time of the ruling[195] and had a potential of living an additional fifteen to twenty years.[196] Although both Bartling and Bouvia appeared cognizant, functional, and self-determined, Bartling wished to live, but under his own power,[197] while Bouvia wished to deprive her body of its life-sustaining capabilities through starvation.[198]

The trend developed by California courts has effectively sanctioned the commission of suicide by the refusal of life-sustaining medical treatment in cases where the patient is comatose,[199] near death,[200] and, as a result of *Bouvia*, in a condition where the quality of life has been diminished to the point of "meaningless existence."[201] Reflecting on the trend, from *Barber* to *Bouvia*, a question arises as to how far California courts will be willing to extend the right to refuse medical treatment. Will the courts, for example, grant an injunction against the force-feeding of a physically healthy individual who has determined that the quality of life has diminished to the point of "hopelessness, uselessness, unenjoyability, and frus-

192. *Id.* Bartling was not considered to be terminal because his physicians had determined that Bartling could live for at least one year if he was *weaned* from the respirator. The physicians were of the opinion, however, that successful weaning was unlikely due to Bartling's mental and physical problems. *Id.* at 192, 209 Cal. Rptr. at 223.

193. *Id.* at 195, 209 Cal. Rptr. at 225. *See supra* note 37 and accompanying text.

194. *Bouvia*, 179 Cal. App. 3d at 1137-38, 225 Cal. Rptr. at 301.

195. *Id.* at 1135, 225 Cal. Rptr. at 299.

196. *Id.* at 1142, 225 Cal. Rptr. at 304.

197. *Bartling I*, 163 Cal. App. 3d at 193, 209 Cal. Rptr. at 223.

198. *Bouvia*, 179 Cal. App. 3d at 1144, 225 Cal. Rptr. at 305-06. The court noted that Bouvia's request connoted a decision on her part to "allow nature to take its course." *Id.* at 1144, 225 Cal. Rptr. at 306. A question remains, however, as to whether deliberate starvation can be equated with a natural death which ensues when the lungs can no longer function absent mechanical means, and breathing terminates.

199. *See Barber*, 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484.

200. *See Bartling I*, 163 Cal. App. 3d 186, 209 Cal. Rptr. 220.

201. *Bouvia*, 179 Cal. App. 3d at 1142-43, 225 Cal. Rptr. at 304. Advancing Bouvia's view, the court stated that, "the quality of her life has been diminished to the point of helplessness, uselessness, unenjoyability and frustration." *Id.*

tration?"[202] Further, will the California courts extend the right to control one's own body so far as to sanction euthanasia, as suggested by the concurrence?[203]

In 1982, the New York Supreme Court, Appellate Division,[204] was presented with a case which had the potential of extending the constitutional right of privacy to include the right of a physically healthy individual to intentionally die of starvation. Declining to broaden this right, the New York Supreme Court, in *Von Holden v. Chapman*,[205] authorized the force-feeding of an in-mate at the Attica Correctional Facility.[206] Mark David Chapman, while serving a sentence of twenty years to life for the murder of former Beatle John Lennon, expressed an intention to take his life by starvation.[207] Like Bouvia, Chapman was declared to be competent and fully informed of the fatal consequences of his refusal to eat.[208] Also, like Bouvia, Chapman claimed a constitutional right to privacy and argued that state intervention was an unwarranted denial of his constitutional rights.[209] However, the *Von Holden* court found that the right to privacy did not include the right to commit suicide, since only personal rights that can be deemed to be "fundamental" or "implicit in the concept of ordered liberty" fall under the constitutional guarantee of privacy.[210] The court found an obligation of the state to protect the health and welfare of persons in its care and custody, including Chapman who resided in a state facility.[211] The court, therefore, found that societal interest outweighed the constitutional privacy rights of Chapman.[212]

Pursuant to the ruling in *Bouvia*, a California court might have found Chapman's right to privacy in refusing medical treatment to

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202. *Id. See also* Von Holden v. Chapman, 87 A.D.2d 66, 450 N.Y.S.2d 623 (1982).
203. *Bouvia*, 179 Cal. App. 3d at 1147, 225 Cal. Rptr. at 307.
204. The New York Supreme Court, Appellate Divison operates at the same jurisdictional level as the court of appeal in California.
205. 87 A.D.2d 66, 450 N.Y.S.2d 623 (1982).
206. *Id.* at 66-67, 450 N.Y.S.2d at 624-25. At the time of the court's decision, Chapman had been temporarily transferred to the Psychiatric Center upon the certification of two examining physicians that he was suffering from a mental condition likely to result in serious harm to himself. *Id.* at 67, 450 N.Y.S.2d at 625.
207. *Id.* at 67, 450 N.Y.S.2d at 625.
208. *Id.*
209. *Id.* at 66-67, 450 N.Y.S.2d at 624-25.
210. *Id.* at 68, 450 N.Y.S.2d at 625.
211. *Id.* at 66-67, 450 N.Y.S.2d at 624-25.
212. *Id.* at 68, 450 N.Y.S.2d at 625. The court upheld an order at Special Term which authorized the Director of the New York Psychiatric Center to "take all steps necessary to force-feed Chapman in order to sustain his life." *Id.* at 66-67, 450 N.Y.S.2d at 624-25.

outweigh the societal interests, and therefore grant an injunction against any force-feeding. Although, unlike Bouvia, Chapman is relatively healthy,[213] the prospects of spending twenty years to life in prison is likely to be considered, at least by Chapman, an ordeal[214] from which death would be a welcome relief. *Von Holden*, therefore, seems a plausible extension of *Bouvia*. As in *Bouvia*, Chapman's refusal of medical treatment (force-feeding) allows nature to simply take its course.[215]

The concurrence in *Bouvia* would appear to extend the trend toward granting wider latitude of self-termination by permitting an individual to actively aid and abet another's suicide. The concurring opinion of Justice Compton asserted that the penal sanctions imposed on persons who aid and abet suicide[216] are archaic and inhumane.[217] The concurrence found unequivocally that Bouvia wanted to die, and if she had had the physical ability to do so, she would have taken her own life.[218] Justice Compton observed that an integral part of the right to control one's destiny includes the right to die.[219] This right should include, according to the concurrence, the ability of the patient to enlist assistance from others, including the medical profession, in making death as painless and quick as possible.[220] The assistance request should not be thwarted by the threat of penal sanctions against those who would help.[221]

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213. There is at least a question of Chapman's mental health. *See supra* note 206 and accompanying text.

214. The *Bouvia* court described Bouvia's plight, in part, as follows:

> Her mind and spirit may be free to take great flights but she herself is imprisoned and must lie physically helpless subject to the ignominy, embarrassment, humiliation and dehumanizing aspects created by her helplessness. We do not believe it is the policy of this State that all and every life must be preserved against the will of the sufferer. It is incongruous, if not monstrous, for medical practitioners to assert their right to preserve a life that someone else must live, or more accurately, endure, for "15 to 20 years." We cannot conceive it to be the policy of this State to inflict such an ordeal upon anyone.

Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 1143-44, 225 Cal. Rptr. 297, 305 (1986).

215. *See id.* at 1144, 225 Cal. Rptr. at 306.

216. CAL. PENAL CODE § 401 (West 1970). *See supra* note 160 and accompanying text.

217. *Bouvia*, 179 Cal. App. 3d at 1146, 225 Cal. Rptr. at 307.

218. *Id.* at 1146-47, 225 Cal. Rptr. at 307. The concurring opinion postulated that Bouvia has to "stultify her position before this court by disavowing her desire to end her life in such a fashion and proclaiming that she will eat all that she can physically tolerate" to obtain assistance in ending her life. Moreover, the concurrence notes that "[e]ven the majority opinion here must necessarily 'dance' around the issue." *Id.* at 1147, 225 Cal. Rptr. at 307 (Compton, J., concurring).

219. *Id.*

220. *Id.*

221. *Id.* The concurrence stated in part, as follows:

The concurring opinion further recognized that the Hippocratic Oath[222] speaks directly against a physician assisting another's suicide.[223] The concurrence points out that the Hippocratic Oath also proscribes the performance of abortion, yet the medical profession has already accomodated a deviation from that part of the oath.[224] Under this rationale, the concurrence asserts that the medical profession should, therefore, be permitted to provide the same accomodation to a patient who wishes to die.[225]

A definite trend of granting wider latitude toward self-termination has been evidenced in recent rulings of the California Courts of

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> Elizabeth apparently has made a conscious and informed choice that she prefers death to continued existence in her helpless and, to her, intolerable condition. I believe she has an absolute right to effectuate that decision. This state and the medical profession, instead of frustrating her desire, should be attempting to relieve her suffering by permitting and in fact assisting her to die with ease and dignity.

*Id.*

222. STEDMAN'S MEDICAL DICTIONARY 650 (5th Unab. Law. ed. 1982) (defining "Hippocratic Oath" as "[a]n oath demanded of the physician about to enter upon the practice of his profession").

223. The Hippocratic Oath reads in pertinent part as follows: "I will prescribe regimen for the good of my patients according to my ability and my judgment and never do harm to anyone. To please no one will I prescribe a deadly drug, nor give advice which may cause his death." *Id.*

224. *Bouvia*, 179 Cal. App. 3d at 1147, 225 Cal. Rptr. at 308. A woman's right to choose to terminate her pregnancy (under Roe v. Wade, 410 U.S. 113 (1973), and its progeny), does not, however, compel a doctor to perform an abortion. The Health and Safety Code states in part that "[n]o such employee or person with staff privileges in a hospital, facility, or clinic shall be subject to any penalty or discipline by reason of his refusal to participate in an abortion." CAL. HEALTH & SAFETY CODE § 25955 (West Supp. 1986). If, therefore, a woman does not have the right to compel a doctor to perform an abortion, a patient's right to die should likewise not compel a doctor to assist the effectuation of a decision to commit suicide.

225. The concurrence does not suggest limiting the right to provide affirmative assistance to another's suicide solely to members of the medical profession. Rather, the concurrence states as follows: "That right should, in my opinion, include the ability to enlist assistance from others, including the medical profession, in making death as painless and quick as possible." *Bouvia*, 179 Cal. App. 3d at 1147, 225 Cal. Rptr. at 307 (Compton, J., concurring). Although Justice Compton did not specify who was contemplated as *others*, the discussion invokes strong implications on the issue of euthanasia. One could envisage a number of scenarios in which assistance may be elicited to make death "as painless and quick as possible;" for example, an elderly husband who can no longer bear to see his cancer-stricken wife suffer the intolerable symptoms which accompany the disease. At her urging, he determines that relief is the greatest gift of love he can give his wife and smothers the life from her with a bed pillow. This kind of act, though one done out of love and not malice, was recently held to be premeditated murder by a court in Florida. *See* Gilbert v. State of Florida, 487 So. 2d 1185 (Fla. Dist. Ct. App. 1986) (affirming the first-degree murder conviction of a 75 year old man who shot and killed his wife of 51 years to end her suffering from osteoporosis and Alzheimer's Disease). To accept the tenets of the concurrence, the husband's act would be a permissible assistance to one who "prefers death to continued existence in her helpless and, to her, intolerable condition." *Bouvia*, 179 Cal. App. 3d at 1147, 225 Cal. Rptr. at 307 (Compton, J., concurring).

Appeal. Under the principle that a competent adult has the fundamental right to refuse even life-sustaining medical treatment, California appellate courts have ordered the removal of life-sustaining medical treatment in *Barber*, when the patient was comatose and terminal; in *Bartling I*, when the patient required the use of a respirator to remain alive; and in *Bouvia*, when the patient's physical condition had severely reduced the quality of life. An argument has been made that California courts may extend the trend of wider latitude of self-termination to permit healthy, but unhappy individuals a comfortable environment in which to commit suicide. The trend may even be extended to cases in which courts permit others to assist another to die with ease and dignity without fear of criminal reprisals, as suggested by the concurring opinion in *Bouvia*.

## Conclusion

In *Bouvia v. Superior Court*, the California Court of Appeal for the Second District permitted a patient to legally compel the hospital staff to remove a nasogastric tube which was supplying her with food and water. The court found that a nonterminal, competent patient has a right to refuse medical treatment because of the constitutional right to privacy, even when doing so creates a life-threatening condition. Previously, California courts had permitted the refusal of life-sustaining medical treatment in cases in which the patient was comatose or close to death. Bouvia, however, was twenty-eight years old, with the potential for living another fifteen to twenty years. Despite the trial court's determination that Bouvia was attempting to commit suicide with the assistance of the hosptial staff, the court of appeal found the lower court rationale to be unfounded. According to the appellate court, Bouvia's exercise of her fundamental right to refuse medical treatment permitted her to die of natural means. The appellate court further found that the mere presence of Bouvia's physicians while she refused medical treatment did not constitute the act of aiding and abetting another's suicide. An examination of California opinions concerning a patient's refusal to submit to life-sustaining medical treatment reveals a trend toward providing greater latitude to courts concerning the kinds of cases to which the right to refuse essential medical treatment may be applied. An argument was posed that a individual may invoke the constitutional right of privacy to commit suicide by starvation while incarcerated in a state penal facility. Extending the trend of permitting self-termination to an extreme, the concurring

opinion makes the suggestion that the courts should permit a person to affirmatively assist another to die with ease and dignity.

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