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CALIFORNIA'S LIMITS ON THE RIGHT TO REFUSE
LIFE SAVING TREATMENT —
“NO HOLDS BARRED?”
Thor v. Superior Court,
855 P.2d 375 (Cal. 1993) (en banc)

The Fourteenth Amendment to the United States Constitution provides that individuals cannot be deprived of their liberty without due process of law.¹ The common law underscores the import of individual liberty² by recognizing that competent individuals have a fundamental right to refuse to consent to medical treatment.³ A competent person, therefore, has a protected liberty interest⁴ in refusing medical treatment even if doing so will cause or hasten death.⁵ The U.S. Supreme Court, however, has authorized states to determine the parameters of an individual's liberty interest vis-à-vis countervailing state interests.⁶ In *Thor v. Superior Court*,⁷ the California Supreme Court

1. “No State shall . . . deprive any person of life, *liberty*, or property, without due process of law.” U.S. CONST. amend. XIV, § 1 (emphasis added).

2. The common law right of self-determination is best defined in terms of the right to control one's own person. *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891). In *Botsford*, the Supreme Court stated: “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 . . .” *Id.* at 251.

3. The doctrine of informed consent grew out of the common law tort of battery, which prohibits the nonconsensual touching of another. *See* RESTATEMENT (SECOND) OF TORTS § 18(1) (1965). The doctrine of informed consent requires a doctor to disclose all of the risks involved in undergoing medical treatment to the patient. *See ZeBarth v. Swedish Hosp. Medical Ctr.*, 499 P.2d 1, 8 (Wash. 1972) (en banc). This provides the patient with the opportunity to reasonably balance the probable risks against the probable benefits in deciding whether to undergo or to forego treatment. *Id.* Thus, courts generally recognize the doctrine as a corollary to the notion of personal autonomy. *See, e.g., Cruzan v. Director, Mo. Dep't. of Health*, 497 U.S. 261, 270 (1990) (explaining that the principle of personal autonomy is incorporated in the doctrine of informed consent); *Barber v. Superior Court*, 195 Cal. Rptr. 484, 489 (Cal. Ct. App. 1983) (stating that the competent patient's right to refuse medical treatment is “the obvious corollary” to the principle of actionable battery resulting from a doctor's treatment of a patient absent informed consent).

4. *Cruzan*, 497 U.S. at 279 n.7 (5-4 decision) (declining to hold that individuals have a privacy interest in refusing life-sustaining treatment).

5. The Supreme Court acknowledged the existence of a competent person's liberty interest in refusing life-sustaining medical treatment. *Id.* at 279.

6. An individual's “liberty interest” under the Due Process Clause is not

held that the liberty interest of a competent quadriplegic state prisoner in refusing life-sustaining medical treatment outweighs any countervailing state or prison interests in administering such treatment.⁸

The petitioner in *Thor* worked as a staff physician in a California prison medical facility.⁹ A quadriplegic prisoner under Dr. Thor's care¹⁰ refused to be fed or medicated.¹¹ The doctor sought a court order¹² permitting him to artificially feed and medicate the prisoner.¹³ The superior court denied the petition, holding that the prisoner had a right to refuse medical treatment.¹⁴ Refusing to grant the petitioner a writ of mandate, the California Court of Appeals affirmed the prisoner's right to refuse treatment, including sustenance.¹⁵ Sitting en banc, the California Supreme Court upheld both of the lower courts'

absolute. *Cruzan*, 497 U.S. at 279-81. The Supreme Court found that Missouri could constitutionally require proof by clear and convincing evidence of an incompetent patient's desire for withdrawal of treatment. *Id.* at 281.

7. 855 P.2d 375 (Cal. 1993) (en banc).

8. *Id.* at 384.

9. *Id.* at 379. The doctor had standing to seek a court order against the prisoner because the state is ultimately subject to liability for the physician's acts. *Id.* at 380 n.4.

10. The real party in interest, Howard Andrews, was serving a life term in prison when he suffered injuries rendering him a quadriplegic. *Id.* at 379.

11. Andrews intermittently refused to eat and receive his medication during the months following his injury. *Id.* As a result, he suffered severe weight loss. *Id.*

12. The doctor instituted an *ex parte* proceeding in the Superior Court of Solano County. *Thor*, 855 P.2d at 379. When the doctor sought a writ of mandate from the California Court of Appeals, the court appointed special counsel to represent the prisoner. *Id.* On appeal, Dr. Thor asserted that he had a duty, under both California regulatory authority and the federal constitution, to administer any procedure he deemed necessary to maintain the health of prisoners in his care. *Id.* at 379-80.

Specifically, California law permits state prison officials to force medical treatment over the objection of mentally competent inmates only when immediate action is necessary to save the life of, or avoid serious damage to, an inmate. CAL. CODE REGS. tit. 15, § 3351 (1992).

Additionally, the Eighth Amendment to the U.S. Constitution prohibits "cruel and unusual punishment" to prisoners. U.S. CONST. amend. VIII. The U.S. Supreme Court has held that a prison's "deliberate indifference" to a prisoner's serious medical treatment constitutes "cruel and unusual punishment" in violation of the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

13. Thor sought an order allowing him to perform a surgical procedure that involved the insertion of a feeding tube, or other instrument, to expedite artificial feeding. *Thor*, 855 P.2d at 379.

14. *Id.*

15. *Id.* The court of appeals relied on *Bouvia v. Superior Court*, 225 Cal. Rptr. 297 (Cal. Ct. App. 1986) and *Bartling v. Superior Court*, 209 Cal. Rptr. 220 (Cal. Ct. App. 1984). *Id.*

dismissals of the petition, declaring that absent an actual threat to prison security, a prisoner has a right to refuse life-sustaining medical treatment.¹⁶

In *Cruzan v. Director, Missouri Department of Health*,¹⁷ the Supreme Court lodged the responsibility of determining the parameters of an individual's right to refuse life-sustaining medical treatment in the "laboratory" of the states.¹⁸ *Cruzan* was the Court's first opportunity to address the question of an incompetent individual's right to withdraw life-sustaining treatment.¹⁹ Declining to address every aspect of an individual's "right to die,"²⁰ the Court narrowly held that it was not unconstitutional for Missouri to require guardians of an incompetent person to provide clear and convincing proof that the incompetent person would consent to withdrawal of life-sustaining treatment.²¹ Presuming that competent individuals have a constitutionally protected liberty interest in refusing life saving treatment,²² the Court concluded that states are better equipped

16. The court, however, did not extend its holding to otherwise healthy prisoners who bring about their own demise. *Thor*, 855 P.2d at 385-86, 389 n.16. For example, the court's holding does not extend to healthy prisoners who engage in a hunger strike or voluntarily starve themselves and later need artificial feeding to stay alive. *Id.* at 389 n.16.

17. 497 U.S. 261 (1990).

18. *Id.* at 292 (O'Connor, J., concurring) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

19. *Cruzan*, 497 U.S. at 277.

20. The Court referred to the right to refuse life-saving medical treatment as the right to die. *Id.* At least one commentator, however, has distinguished the right to die from the right to refuse life-saving medical treatment. John L. Capone, Note, *Bartling v. Superior Court: The Final Transgression of a Patient's Right to Die?*, 35 CASE W. RES. L. REV. 764, 764 n.4 (1985) (arguing that such a distinction may be relevant to determine a patient's intent).

21. *Cruzan*, 497 U.S. at 280. The Court concluded that because Missouri has adopted an unqualified policy of preserving life, it may impose a more stringent standard of proof in furtherance of its policy. *Id.*

22. It is important to note that the *Cruzan* Court assumed but did not hold that competent individuals have a liberty interest in refusing life-sustaining treatment. *Id.* at 279. See also Thomas A. Eaton & Edward J. Larson, *Experimenting with the "Right To Die" in the Laboratory of the States*, 25 GA. L. REV. 1253, 1263-64 (1991) (noting that the *Cruzan* majority opinion did not explicitly decide whether an individual has a constitutionally protected right to die); Cathaleen A. Roach, *Paradox and Pandora's Box: The Tragedy of Current Right-To-Die Jurisprudence*, 25 U. MICH. J.L. REF. 133, 140 (1991) (observing that the majority holding in *Cruzan* is notable for what it did not say); John N. Suhr, Jr., Note, *Cruzan v. Director, Missouri Department of Health: A Clear and Convincing Call for Comprehensive Legislation to Protect Incompetent Patients' Rights*, 40 AM. U. L. REV. 1477, 1504 n.140 (1991) (coming to the conclusion that the Court created this right by reading *Cruzan* with other decisions).

to determine the proper limits of this liberty interest.²³

Courts acknowledged early on that countervailing state interests temper an individual's right to refuse life-sustaining treatment.²⁴ The majority of courts, however, have held that in certain circumstances individuals may exercise this right irrespective of state interests.²⁵ For example, in *Superintendent of Belchertown State School v. Saikewicz*,²⁶ the Massachusetts Supreme Court held that the right of a terminally ill patient to freedom from bodily intrusion outweighed countervailing state interests.²⁷ The court balanced the patient's right to privacy²⁸ and self-determination against countervailing state interests in preserving life, preventing suicide, maintaining the ethical integrity of the medical profession, and protecting innocent third parties.²⁹ The court distinguished between a terminally ill person,

23. The Court observed that "[s]tate courts have available to them a number of sources — state constitutions, statutes and common law — that the [Supreme Court] does not have" at its disposal to determine what rules to apply in these situations. The Supreme Court's only source is the U.S. Constitution. *Cruzan*, 497 U.S. at 277.

24. Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417 (Mass. 1977), was the first major decision to delineate state interests vis-à-vis those of an individual. The seminal case, *In re Quinlan*, 355 A.2d 647 (N.J. 1976), however, was the first to declare that an incompetent person has a constitutional right to refuse life-sustaining medical treatment. The *Saikewicz* court adopted much of its analysis from *Quinlan*. See Eaton & Larson, *supra* note 22, at 1257-62 (discussing the significance of *Quinlan* and *Saikewicz* and characterizing the opinions as the "basic analytic building blocks" of the right to die).

25. Almost every decision since 1976 has upheld a patient's right to refuse treatment. Eaton & Larson, *supra* note 22, at 1262 (discussing the role of state constitutional law in right to die cases). See also Suhr, *supra* note 22, at 1479 n.3 (citing several cases upholding a competent individual's right to refuse life-sustaining treatment).

26. 370 N.E.2d 417 (Mass. 1977).

27. *Id.* at 435.

28. Prior to *Cruzan*, numerous courts held that patients had a privacy interest in refusing life-sustaining medical treatment. See, e.g., Bouvia v. Superior Court, 225 Cal. Rptr. 297, 301 (Cal. Ct. App. 1986); Bartling v. Superior Court, 209 Cal. Rptr. 220, 225 (Cal. Ct. App. 1984); *In re Barry*, 445 So. 2d 365, 370 (Fla. Dist. Ct. App. 1984); *In re Colyer*, 660 P.2d 738, 742 (Wash. 1983) (en banc); *In re Quinlan*, 355 A.2d at 663. But see *In re Estate of Longeway*, 549 N.E.2d 292, 297 (Ill. 1989) (questioning the bounds of a federal constitutional right of privacy); *In re Conroy*, 486 A.2d 1209, 1223 (N.J. 1985) (recognizing the possible applicability of a privacy right, but basing its decision on a right of self-determination); *In re Storar*, 420 N.E.2d 64, 70 (N.Y. 1981) (declining to base a right to refuse treatment on a constitutional right of privacy).

29. *Saikewicz*, 370 N.E.2d at 425. The court surveyed various state decisions and concluded that states articulate four major interests: "(1) the preservation of life; (2) the protection of the interests of innocent third parties;

whose death the state cannot prevent, and an individual whose illness is curable.³⁰ Accordingly, the court concluded that because the state can only prolong a terminally ill patient's dying process, countervailing state interests are severely diminished.³¹

California's Natural Death Act³² implicitly supports the *Saikewicz* principle that state countervailing interests play a minimal role in a terminally ill patient's decisions regarding death. The Natural Death Act permits a competent, terminally ill individual to execute an advance directive³³ for the withholding or withdrawing of life-sustaining procedures. In *Barber v.*

(3) the prevention of suicide; and (4) maintaining the ethical integrity of the medical profession." *Id.* at 424-25. The countervailing state interests the *Saikewicz* court identified do not constitute a comprehensive list of state interests. *See Eaton & Larson, supra* note 22, at 1259 n.43. Of the four interests, the court identified preservation of life as a state's paramount interest. 370 N.E.2d at 425. At least one court has added to the list of state interests an interest in "encouraging the charitable and humane care of those whose lives may be artificially extended under conditions which have the prospect of providing at least a modicum of quality living." *McKay v. Bergstedt*, 801 P.2d 617, 621 (Nev. 1990).

30. *Saikewicz*, 370 N.E.2d at 425-26.

31. *Id.* at 426.

32. CAL. HEALTH & SAFETY CODE §§ 7185-7194.5 (West Supp. 1993). Relevant portions of the Natural Death Act provide:

(a) The Legislature finds that an adult person has the fundamental right to control the decisions [regarding] his or her own medical care, including the decision to have life-sustaining medical treatment withheld or withdrawn in instances of a terminal condition or permanent unconscious condition.

...
 (c) The Legislature further finds that, in the interests of protecting individual autonomy, such prolongation of the process of dying for a person with a terminal condition or permanent unconscious condition for whom medical treatment does not improve the prognosis for recovery may violate patient dignity and cause unnecessary pain and suffering, while providing nothing medically necessary or beneficial to the person.

(d) In recognition of the dignity and privacy that a person has a right to expect, the Legislature hereby declares that the laws of the State of California recognize the right of an adult person to make a written declaration instructing his or her physician to withhold or withdraw life-sustaining treatment in the event of a terminal condition or permanent unconscious condition, in the event that the person is unable to make those decisions for himself or herself.

CAL. HEALTH & SAFETY CODE § 7185.5 (West Supp. 1993).

33. California courts, however, have discredited the Act's advance directive provisions as cumbersome. *See, e.g., Bartling*, 209 Cal. Rptr. at 224 n.5; *Barber*, 195 Cal. Rptr. at 489. Specifically, these courts have focused on one Code provision that requires the patient to wait 14 days after diagnosis of a terminal illness before executing an advance directive. *Bartling*, 209 Cal. Rptr.

Superior Court,³⁴ however, the California Court of Appeals allowed the family members of a comatose patient who failed to execute an advance directive to order the termination of life-sustaining treatment.³⁵ The court reasoned that legislative declarations and state common law make it clear that doctors do not have a duty to prolong the moment of death merely because they have the technology to do so.³⁶ The court concluded that patients may remain the ultimate decision-makers even if they fail to execute advance directives as the Act requires.³⁷

After *Barber*, California courts continued to defer to patients' decisions to forego or withdraw from life-sustaining treatment. In *Bartling v. Superior Court*,³⁸ the California Court of Appeals deferred to the decision of a competent, non-terminally ill patient to withdraw from life-sustaining procedures.³⁹ The court held⁴⁰ that California law did not prohibit it from extending the right to refuse treatment to non-terminal patients with a poor prognosis.⁴¹ The court reasoned that neither the Natural Death Act

34. 195 Cal. Rptr. 484 (Cal. Ct. App. 1983).

35. *Id.* at 489-90. The petitioners in the case were doctors accused of murder and conspiracy to commit murder for removing an incompetent person's life support system at his family's request. *Id.* at 486. The court held that although the patient did not execute an advance directive, the patient, through his family, had a right to withdraw life-sustaining treatment. *Id.* at 492-93. Thus, the court concluded that the doctors were not guilty of murder or conspiracy to commit murder. *Id.* at 493.

36. The court stressed that the focal point of the inquiry regarding the permissibility of state intervention in the case of an incompetent person should be the patient's prognosis. *Barber*, 195 Cal. Rptr. at 492. Under this analysis, the permissibility of state intervention turns on the "reasonable possibility of [the patient's] return to cognitive and sapient life . . ." *Id.* Absent this "reasonable possibility," a state's interest in intervening is severely discounted. *Id.*

37. *Id.* at 489.

38. 209 Cal. Rptr. 220 (Cal. Ct. App. 1984).

39. *Id.* at 224. The patient, William Bartling, was seriously ill but had not yet been diagnosed as terminal. *Id.* at 220. Bartling died before the court of appeals heard the case. *Id.* at 221. The court nevertheless addressed the case to prevent a recurrence of the dilemma both the patient and attending physicians faced. *Id.*

40. The court stated that if Bartling had lived, it would have ordered that he was free to either remain in the hospital or go home. *Bartling*, 209 Cal. Rptr. at 226 n.8. The court further stated that it would restrain any person from interfering with his decision. *Id.*

Underscoring this point, the California Natural Death Act requires physicians opposed to the withdrawal of life support systems to transfer the patient to another physician or health care provider. CAL. HEALTH & SAFETY CODE § 7190 (West Supp. 1993).

41. *Bartling*, 209 Cal. Rptr. at 225.

nor common law prohibits competent persons from foregoing medical treatment.⁴² The court applied the same reasoning⁴³ to a non-terminal, competent patient that *Barber* and *Saikewicz* previously applied to comatose and terminally ill patients.⁴⁴

*Bouvia v. Superior Court*⁴⁵ further advanced the principle that a competent, non-terminal patient may refuse life-sustaining medical treatment. In *Bouvia*, the California Court of Appeals held that a competent quadriplegic⁴⁶ had the right to require removal of a nasogastric feeding tube that provided her with hydration and nutrition.⁴⁷ The court reasoned that the quality of Bouvia's life while connected to a life support system was as important as the length of time the treatment could keep her alive.⁴⁸ Emphasizing that Bouvia's condition was irreversible and

42. *Id.* at 225-26. The court went further by stating that: "[I]n the absence of legislative guidance, we find no legal requirement that prior judicial approval is necessary before any decision to withdraw treatment can be made." *Id.* at 226 (quoting *Barber v. Superior Court*, 195 Cal. Rptr. 484 (Cal Ct. App. 1983)). *Contra McKay v. Bergstedt*, 801 P.2d 617, 630-31 (Nev. 1990) (requiring non-terminal patients to secure judicial approval before life-sustaining treatment can be withheld or withdrawn).

43. The *Bartling* opinion paved the way for California's "quality of life" policy by failing to distinguish between the state's interest in preserving the life of a terminal or comatose patient and preserving the life of a non-terminal, competent patient. See *Bartling*, 209 Cal. Rptr. at 193 (concluding that the trial court had incorrectly limited the right to refuse life-sustaining treatment to comatose, terminally ill patients).

44. *Id.* at 226 (citing *Barber* and *Saikewicz*).

45. 225 Cal. Rptr. 297 (Cal. Ct. App. 1986).

46. Elizabeth Bouvia was a 28 year old quadriplegic suffering from severe cerebral palsy. Bouvia had previously expressed the desire to die, and on one occasion attempted to starve herself to death. *Id.* at 299-300.

47. *Id.* at 305. The court, by merging the state interest of preventing suicide into its interest in preserving life, dodged the difficult question of whether refusing to continue life-sustaining treatment constitutes suicide. For thoughtful commentary addressing moral and ethical difficulties involved in competent patients' end-of-life decisions, see Martha A. Matthews, Comment, *Suicidal Competence and the Patients's Right to Refuse Lifesaving Treatment*, 75 CAL. L. REV. 707 (1987) (discussing the consequences of allowing competent yet suicidal patients to withdraw from life-sustaining treatment); Bruce C. Morris, *Compelling A Competent Adult To Submit To Medical Treatment: An Argument Against Antidysthanasia*, 16 FORUM 911 (1981) (arguing that because no person facing death is truly "competent" to request the right to die, courts and hospitals should err on the side of life); Alan A. Stone M.D., *The Right To Die: New Problems For Law and Medicine and Psychiatry*, 37 EMORY L.J. 627 (1988) (commenting on the complex issues that the right to die cases give rise to and the often compelling interests of the medical and legal professions).

48. *Bouvia*, 225 Cal. Rptr. at 304. One argument is that it is a mistake for courts to attach importance to the amount of time available to the patient. *Id.* Under this analysis, the dispositive question is whether, given the irrevers-

that the state's proposed treatment was painful and demeaning,⁴⁹ the court concluded that Bouvia's individual interest outweighed countervailing state interests.⁵⁰ The court found that permitting the state to intervene⁵¹ in Bouvia's decision to withdraw from life-sustaining treatment impermissibly intruded on her fundamental rights of privacy and self-determination.⁵²

In the prison context, an additional layer of state interest further limits an individual's ability to control bodily integrity. In *Commissioner of Correction v. Myers*,⁵³ the Massachusetts Supreme Court held that state prison officials could force a prisoner to continue hemodialysis⁵⁴ to prevent the prisoner's death.⁵⁵ The court reasoned that unique prison interests in maintaining institutional security, rehabilitating prisoners, and preserving prison order⁵⁶ warranted state intervention in the prisoner's decision to forego treatment.⁵⁷ The court authorized

ibility of the patient's condition, she considers her life meaningless. *Id.*

This argument, however, fails to take into account the possibility of advancements in technology which could provide a cure or a better life support system. See generally Michael R. Flick, Comment, *The Due Process of Dying*, 79 CAL. L. REV. 1121, 1157 (1991) (commenting that it is difficult to make the "right" decision because such decisions are final, leaving no room to prove the decision wrong).

49. If force fed, Bouvia would live for an additional 15 to 20 years. *Bouvia*, 225 Cal. Rptr. at 304. Her condition is such, however, that medical staff would have to constantly administer morphine to ease the pain related to feeding. *Id.* at 305. As a result, Bouvia would have to endure 15 to 20 years of immobility while others fed, cleaned, and turned her. *Id.*

50. *Id.*

51. California, therefore, discounts the paramount state interest developed in *Saikewicz* — preserving the life of a non-terminal, competent individual — when the individual's condition is irreversible and treatment is painful and intrusive. *Bouvia*, 225 Cal. Rptr. at 305. See *Saikewicz*, 370 N.E.2d at 425.

52. The court stated that "we cannot conceive it to be the policy of [California] to inflict such an ordeal upon anyone." 225 Cal. Rptr. at 305. Ironically, after the decision was handed down, Bouvia decided to continue the life-sustaining treatments. For a thoughtful discussion about the implications of *Bouvia* and the medical profession, see Flick, *supra* note 48, at 1127-28 (arguing that if Elizabeth Bouvia had died, she would not have had any choice to make at all and that she "did not want to die, she wanted to be wanted").

53. 399 N.E.2d 452 (Mass. 1979).

54. Hemodialysis is a process by which a machine acts in place of a person's kidney, pumping blood out of the body to a mechanical filter and then returning it to the body. *Id.* at 454.

55. The physician attending the prisoner estimated that without hemodialysis, the prisoner would live no longer than 15 days with prescribed medication. If he refused both the hemodialysis and the medication, he could survive only three to five days. *Id.*

56. *Myers*, 399 N.E.2d at 457.

57. To determine if the prisoner's refusal to undergo hemodialysis consti-

prison officials to administer life-saving medical treatment that the state would be prohibited from administering to non-prisoners.⁵⁸

The California Penal Code,⁵⁹ however, guarantees that prisoners shall retain their constitutional rights except to the extent that restrictions are necessary to protect public safety or institutional security.⁶⁰ In *Keyhea v. Rushen*,⁶¹ the California Court of Appeals held that the Penal Code prohibits the state from subjecting state prisoners to long-term involuntary psychotropic medication⁶² without a judicial determination of competency.⁶³ The court implemented a two prong test to determine whether the state had violated the Code.⁶⁴ First, the court determined whether non-prisoners would have a right to a competency

tuted a threat to prison integrity, the court considered the prisoner's motive in refusing treatment. *Id.* at 457-58. *Contra Bouvia*, 225 Cal. Rptr. at 306 (stating that the trial court seriously erred by considering the patient's motives in refusing life-sustaining treatment). In this instance, the court determined that the prisoner refused treatment to improperly gain a transfer to a prison with lower security. *Myers*, 399 N.E.2d at 454.

58. *Myers*, 399 N.E.2d at 458. Given the nature of hemodialysis treatment, it is as intrusive a life-sustaining procedure as artificial feeding. *See id.* at 457. However, countervailing prison interests still tipped the balance in favor of state-mandated medical intervention. *Id.*

Later courts have applied *Myers* to cases in which the prisoner did not have an underlying disease or condition. *See, e.g., In re Caulk*, 125 N.H. 226, 231 (N.H. 1984) (permitting prison to force feed prisoner who was starving himself); *Von Holden v. Chapman*, 450 N.Y.S.2d 623 (N.Y. App. Div. 1982) (same); *Department of Pub. Welfare v. Kallinger*, 580 A.2d 887, 891 (Pa. Commw. Ct. 1990) (permitting prison officials to force feed a suicidal prisoner); *White v. Narick*, 292 S.E.2d 54, 57 (W. Va. 1982) (permitting prison officials to force feed a prisoner on a hunger strike). *But see Zant v. Prevatte*, 286 S.E.2d 715, 717 (Ga. 1982) (using right of privacy principles to prohibit prison officials from force feeding starving prisoner, absent a threat to prison security).

59. CAL. PENAL CODE § 2600 (West 1982).

60. By instituting section 2600 of the Penal Code, the California Legislature embraced the principle that prisoners no longer suffer "civil death." *See In re Harrell*, 470 P.2d 640, 655, 658 (Cal. 1970) (en banc) (interpreting section 2600 as prisoners' bill of rights).

61. 223 Cal. Rptr. 746 (Cal. Ct. App. 1986).

62. Psychotropic or antipsychotic drugs such as thiorazine, prolixin, stelazine, serentil, quide, tindal, compazine, trilafon, tractan, navane, hadol, moban, and vesprin are used for treating serious mental disorders. *Id.* at 747. *See Sheldon Gelman, Mental Hospital Drugs, Professionalism, and the Constitution*, 72 GEO. L.J. 1725 (1984) (discussing modern medicine for mental disorders). These drugs have taken the place of earlier measures such as lobotomy, insulin shock, and electroshock. *Keyhea*, 223 Cal. Rptr. at 747.

63. *Keyhea*, 223 Cal. Rptr. at 747.

64. The court rejected the state's argument that section 2600 of the Penal Code protects constitutional rights and does not extend to statutory rights. *Id.* at 749. The court concluded that section 2600 provides protection to

hearing.⁶⁵ Second, the court balanced prisoners' interests against countervailing state interests to determine whether competency hearings for prisoners threatened prison security.⁶⁶ The court found that a judicial competency hearing posed no threat to prison security.⁶⁷ Because *Keyhea* equated the Penal Code to a prisoner's "bill of rights," prisoners have the same rights as non-prisoners when exercise of these rights does not threaten prison security.⁶⁸

*Thor v. Superior Court*⁶⁹ provided the California Supreme Court an opportunity to underscore California's commitment to protecting the personal autonomy of individuals in making end-of-life decisions, irrespective of an individual's status as a prisoner. Prison officials must now prove that it is both reasonable and necessary to administer life-sustaining medical treatment to competent, unconsenting prisoners.⁷⁰ In the absence of mitigating circumstances that render involuntary treatment reasonable and necessary, prison interests are severely discounted.⁷¹ Accordingly, the *Thor* court discounted prison interests in mandating treatment because the doctor failed to show that the prisoner's refusal to submit to treatment constituted a threat to prison security.⁷² The court declared that the prisoner was entitled to the same right-of-refusal as a non-prisoner in his condition.⁷³

The *Thor* court relied primarily on *Bouvia* and its progeny to determine the scope of the prisoner's right-of-refusal as a com-

prisoner's rights to the extent that those rights do not undermine prison integrity. *Id.*

65. *Id.* at 750-55. The court determined that non-prisoners had the right to a competency hearing under the Lanterman-Petris-Short Act, which provides certain procedural requirements for institutions administering long-term psychotropic medication. *Id.* at 751. See CAL. WELF. & INST. CODE § 5000 (West Supp. 1993).

66. *Keyhea*, 223 Cal. Rptr. at 755.

67. *Id.*

68. *Id.* at 750.

69. 855 P.2d 375 (Cal. 1993) (en banc).

70. *Thor*, 855 P.2d at 388.

71. *Id.* The existence of mitigating circumstances will cause a court to defer to the experience and expertise of prison administrators. *Id.* See *supra* notes 57-58 and accompanying text for a discussion of circumstances warranting state intervention in prisoner's refusal of life-sustaining treatment.

72. *Thor*, 855 P.2d at 388. The court further determined that a prison physician's statutory duty to care for prisoners is discharged once a competent prisoner refuses medical treatment. *Id.* at 386. See also *supra* note 12 for a discussion of *Thor*'s posited duty under California law and under the federal constitution. Thus, once a prisoner discharges a physician from his duty to care for the prisoner, the physician cannot be liable for "deliberate indifference." *Id.*

73. *Thor*, 855 P.2d at 388.

petent quadriplegic.⁷⁴ Focusing on the irreversible nature of the prisoner's condition,⁷⁵ the court determined that unlike the state of Missouri,⁷⁶ California has not adopted a policy "of preserving life at the expense of personal autonomy."⁷⁷ Thus, the court considered the quality of the prisoner's life without considering the limitations his status as a prisoner had already placed on his personal autonomy.⁷⁸

The *Thor* court's denial of the doctor's request to artificially feed and medicate the prisoner without his consent comports with California common law, statutory law, and state policy.⁷⁹ As such, *Thor* is a natural progression in California's trend toward greater personal autonomy for competent individuals making end-of-life decisions.⁸⁰ Furthermore, *Thor* illustrates California's retreat from the near-extinct principle of "civil death" for prisoners⁸¹ by including prisoners in its progression towards greater personal autonomy in end-of-life decisions.⁸²

In advancing California's goals of greater personal autonomy for all, however, *Thor* leaves troubling questions in its wake.

74. See *id.* at 380-83.

75. The prisoner, like Elizabeth Bouvia, would have to spend the rest of his days being "fed, bathed and turned by others." *Id.* at 379. Several commentators argue, however, that the dispositive question is not whether the prisoner has an underlying affliction. Rather, these commentators propose that the inquiry should be the same irrespective of the underlying events which caused the prisoner to need life-sustaining medical treatment in the first instance. See, e.g., Joel K. Greenberg, Note, *Hunger Striking Prisoners: The Constitutionality Of Force-Feeding*, 51 *FORDHAM L. REV.* 747, 763 (1983) (arguing that a prison should not use its duty to care for prisoners as a "sword to intrude on a prisoner's privacy"); Kathleen L. Johnson, Note, *The Death Row Right To Die: Suicide or Intimate Decision?*, 54 *S. CAL. L. REV.* 575, 604 (1981) (drawing a comparison between a death row inmate's assertion of a right to die by refusing to appeal and a terminal patient's right to refuse treatment); Stephanie C. Powell, Comment, *Constitutional Law — Forced Feeding of a Prisoner on a Hunger Strike: A Violation of an Inmate's Right To Privacy*, 61 *N.C. L. REV.* 714, 732 (1983) (arguing that absent threat to prison security, prisoners are entitled to same right of privacy as non-prisoners).

76. See *supra* note 21 and accompanying text for a discussion of the *Cruzan* case and Missouri's articulated policy of preserving life.

77. *Thor*, 855 P.2d at 384.

78. *But cf.* *Commissioner of Correction v. Myers*, 399 N.E.2d 452 (Mass. 1979) (emphasizing the limitations on the prisoner's autonomy rather than the quality of his life on dialysis).

79. See *supra* notes 48-52 and accompanying text for a discussion of California's quality of life policy.

80. California has stopped short of permitting a competent person to seek out the help of another to commit suicide. See *Donaldson v. Lundgren*, 4 Cal. Rptr. 2d 59, 63-64 (Cal. Ct. App. 1992) (holding that petitioner's right to die did not encompass a right to state-assisted suicide).

81. See *supra* note 60 for a discussion of section 2600 of California's Penal Code.

82. See *supra* notes 48-52 and accompanying text for a discussion of state policy.

Specifically, *Thor* provides no framework for determining the point that a competent, viable individual's refusal to continue life support constitutes suicide.⁸³ Moreover, *Thor* sets a dangerous precedent by conferring the right to refuse treatment on prisoners with an "underlying affliction," while denying the right-of-refusal to non-afflicted prisoners.⁸⁴ In granting protected class status to afflicted prisoners, *Thor* provides an incentive for unafflicted prisoners to thwart prison objectives by maiming themselves as a means of joining the protected class. Although *Thor* purports to ensure equal protection to prisoners exercising their right to die, the case will ultimately result in excessive weight given to prisoners' interests compared to the interests of the state.

The U.S. Supreme Court recognizes that because medical technology allows doctors to suspend the moment of death, states must play an increased role in the end-of-life decisions of their citizens.⁸⁵ In the prison context, the state's role in an individual's end-of-life decision is further increased by the additional state interest in maintaining prison security. Although prisoners have a liberty interest in refusing medical treatment, the state has greater latitude to intervene in prisoners' end-of-life decisions. In *Thor*, however, the California Supreme Court diminished the ability of California prisons to intervene in prisoners' end-of-life decisions by creating an exception in the case of afflicted prisoners. Accordingly, *Thor* opens the door to erosion of prison interests vis-à-vis the interests of prisoners.

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83. *But see* McKay v. Bergstedt, 801 P.2d 617 (Nev. 1990) (providing a comprehensive procedural mechanism for right to die cases involving competent patients). For further discussion of the *Bergstedt* mechanism, see Eaton & Larson, *supra* note 22, at 1273-75.

84. See *supra* note 16 for a discussion of the court's reluctance to extend the holding to voluntary starvation and hunger-striking prisoners.

85. See *supra* note 23 for a discussion of the Supreme Court's reason for turning the issue over to the "laboratory" of the states.

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