

1995

Assisted Suicide, the Due Process Clause and "Fidelity in Translation"

Willard C. Shih

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Willard C. Shih, *Assisted Suicide, the Due Process Clause and "Fidelity in Translation"*, 63 Fordham L. Rev. 1245 (1995).

Available at: <https://ir.lawnet.fordham.edu/flr/vol63/iss4/11>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

ASSISTED SUICIDE, THE DUE PROCESS CLAUSE AND "FIDELITY IN TRANSLATION"

WILLARD C. SHIH

INTRODUCTION

[T]he prospect of impossibility should not dissuade any scientist or doctor who is sincerely dedicated to the pursuit of empirical truth.

A prerequisite for that noble aim is the ideal of unfettered experimentation on human death under impeccably ethical conditions. [Physician-assisted suicide], as I have outlined it, comes closest to that ideal, now and for the foreseeable future. The practice should be legitimized and implemented as soon as possible; but that calls for the strident advocacy of influential personalities who, unfortunately, choose to remain silent or disinterested—or simply antithetical.¹

Dr. Kevorkian authored this passage hoping that other physicians would read it and join his crusade supporting physician-assisted suicide. The mere mention of his name stirs up different images in people's minds. Some call him "Dr. Death," the man who provides the means for people to kill themselves. Others think of him as a good doctor, aiding those who believe that life has become too burdensome to live. But in a court of law, those who decide Dr. Kevorkian's ultimate fate must lay aside whatever moral predispositions they have towards this man or any of the many other physicians who practice assisted suicide.²

Dr. Kevorkian's acts have attracted attention to the assisted suicide debate and have elevated the issue to the forefront of the public forum. Three courts have recently heard arguments regarding an individual's right to seek such help. The Michigan Supreme Court³ and a federal district court in New York⁴ ruled that there is no constitutional right to seek assisted suicide, whereas a federal district court in Washington⁵ found that the right exists under the Fourteenth Amendment's Due Process Clause.

This Note examines whether a constitutional right to seek assisted suicide exists under the Due Process Clause of the Fourteenth

1. Dr. Jack Kevorkian, *Prescription: Medicine, The Goodness of Planned Death* 244 (1991).

2. Physicians often act upon requests to hasten death. See Richard A. Knox, *One in Five Doctors Say They Assisted a Patient's Death, Survey Finds*, Boston Globe, Feb. 28, 1992, at 5 ("one in five U.S. physicians say they have deliberately taken action to cause a patient's death.").

3. *People v. Kevorkian*, No. 99591, 1994 WL 700448 (Mich. Dec. 13, 1994).

4. *Quill v. Koppell*, No. 94 CIV.5321(TPG), 1994 WL 702800 (S.D.N.Y. Dec. 15, 1994).

5. *Compassion in Dying v. Washington*, 850 F. Supp. 1454 (W.D. Wash. 1994).

Amendment.⁶ Part I defines the relevant terminology in assisted suicide cases and examines the most recent decisions on the issue, *Quill v. Koppell*,⁷ *People v. Kevorkian*⁸ and *Compassion in Dying v. Washington*.⁹ This part also analyzes relevant Supreme Court rulings concerning the liberty interest protected in the Fourteenth Amendment¹⁰ and distinguishes them from the assisted suicide cases. Because this part concludes that the liberty interest does not extend to allow assisted suicide, part II suggests three different models of constitutional interpretation that a court may use to establish this right. This part first discusses two extreme approaches of interpreting the Constitution: originalism and the theory of fundamental rights. This part then suggests that Lawrence Lessig's intermediate method of interpretation is a preferable approach.¹¹ Lessig argues that constitutional rights exist only if the ratifiers would have protected them in the context of present society.¹² Not only does this approach take into account the intent of those who wrote the relevant provisions of the Constitution, but it also recognizes that legal and social changes may influence how a judge analyzes certain issues. Part III applies Lessig's model to the context of assisted suicide and considers whether such a right exists independent from other privacy or due process rights. Using Lessig's analytical framework, this part reasons that there is no constitutional basis for the right to assisted suicide. This Note concludes that because both suicide and assisted suicide were proscribed when the ratifiers adopted the Fourteenth Amendment, there is no constitutional right to seek assisted suicide.

6. While most of the patient plaintiffs challenging assisted suicide regulations are terminally ill, this Note does not focus on the narrow issue of whether the terminally ill have a right to seek help in killing themselves. Instead, this Note explores the more general topic of whether there is a constitutional right to seek assisted suicide. Even though the state may have a greater interest in preventing those who are not terminally ill from committing suicide, this inquiry is irrelevant to this Note. The courts must first rule whether a person, regardless of his or her condition, possesses a right to commit suicide before considering what interests the state may have in preventing the act from occurring.

7. No. 94 CIV.5321(TPG), 1994 WL 702800 (S.D.N.Y. Dec. 15, 1994).

8. No. 99591, 1994 WL 700448 (Mich. Dec. 13, 1994).

9. 850 F. Supp. 1454 (W.D. Wash. 1994).

10. If assisted suicide is a constitutional right, one place it may be located is in the Fourteenth Amendment's guarantee of the right to liberty.

The Supreme Court has heard several cases challenging the scope of this liberty interest. *See, e.g., Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2804-08 (1992) (discussing whether a mother has a liberty interest in procuring an abortion); *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990) (examining whether the state could require a person to remain on life support); *Roe v. Wade*, 410 U.S. 113 (1973) (same).

11. *See* Lawrence Lessig, *Fidelity in Translation*, 71 *Tex. L. Rev.* 1165 (1993) (arguing that when interpreting the Constitution, a court must comprehend that both the meaning and the context of the text may have changed).

12. *Id.* at 1196.

I. DEFINITIONS AND JURISPRUDENCE

Some of the controversy surrounding assisted suicide, whether the act is legally or even morally proper, is based on confusion over what the practice of assisted suicide entails. Therefore, before undergoing an analysis of whether a constitutional right exists, this part clarifies the definitions of suicide and assisted suicide and distinguishes them from the different forms of euthanasia.

A. *Relevant Terminology*

There are four different ways individuals may take their lives: suicide, passive euthanasia, assisted suicide and active euthanasia.

Suicide involves the voluntary termination of one's own life without the assistance of another.¹³ Passive euthanasia involves a physician who, upon the request of a terminally ill patient or his or her guardian, removes a life support system.¹⁴ Though suicide is a crime under common law, it is no longer punishable as a felony in most states.¹⁵ In addition, the Supreme Court in *Cruzan v. Director, Missouri Department of Health* assumed that a right to passive euthanasia exists.¹⁶

To date, most states prohibit assisted suicide and active euthanasia.¹⁷ When individuals assist in a suicide, they intentionally provide the means, such as a poison pill, for others to end their lives. In contrast, physicians engaging in active euthanasia take some sort of affirmative action that directly results in death.¹⁸ For example, the doctor may inject poison to end the life of the patient, whereas in assisted suicide, the ultimate act remains in the patient's own hands. The Supreme Court has yet to consider the constitutional implications of assisted suicide and active euthanasia. Lower courts today are focusing on assisted suicide. For example, in *People v. Kevorkian*,¹⁹ Dr. Kevorkian challenged a Michigan statute that proscribed precisely this

13. A legal definition of suicide is "self-destruction; the deliberate termination of one's own life." Black's Law Dictionary 1434 (6th ed. 1990).

14. Eugenie A. Gifford, *Artes Moriendi: Active Euthanasia and the Art of Dying*, 40 UCLA L. Rev. 1545, 1546 n.3 (1993) (defining passive euthanasia as "allowing a patient to die by removing her from artificial life support systems such as respirators and feeding tubes or simply discontinuing medical treatments necessary to sustain life").

15. See *infra* notes 285-90 and accompanying text.

16. 497 U.S. 261, 279 (1989).

17. See discussion *infra* part III.B.

18. See Catherine L. Bjorck, *Physician-Assisted Suicide: Whose Life Is It Anyway?*, 47 SMU L. Rev. 371, 373 (1994) (defining active euthanasia as when "a physician performs the action which ends the patient's life."); Gifford, *supra* note 14, at 1546 n.3 (calling active euthanasia taking "positive steps to end the life of a patient, typically by lethal injection"); Jim Persels, *Forcing the Issue of Physician-Assisted Suicide: Impact of the Kevorkian Case on the Euthanasia Debate*, 14 J. Legal Med. 93, 94 (1993) (indicating that in active euthanasia, an individual engages in an "affirmative action to purposefully induce death before nature can take its course").

19. No. 99591, 1994 WL 700448 (Mich. Dec. 13, 1994).

course of action.²⁰ If the Supreme Court recognizes a right to assisted suicide, the next battle might be fought over the legality of active euthanasia.

B. *Relevant Case Law*

Only three courts have rendered decisions specifically addressing the constitutionality of assisted suicide under the Fourteenth Amendment. All are on appeal.²¹

1. *Quill v. Koppell*

In *Quill v. Koppell*,²² a federal district court in New York ruled that there was no right to seek assisted suicide.²³ The original group of plaintiffs included three physicians, one of whom was Dr. Timothy E. Quill.²⁴ They sought to enjoin the state from prosecuting them under two New York statutes that criminalized assisted suicide.²⁵ Dr. Quill was involved in a well-known incident in which a patient told him she would kill herself with or without his assistance.²⁶ Choosing the former course of action, he provided her with enough barbiturates to cause an overdose.²⁷ Subsequently, Dr. Quill wrote an article in the

20. *Id.* at *2. The statute prohibited physicians from providing the physical means for a patient to commit suicide. Mich. Comp. Laws § 752.1027(1) (West Supp. 1994).

Most definitions for assisted suicide similarly focus on the physician providing only the means to death, thus leaving the patient with the final choice of whether to follow through with the act. See Bjorck, *supra* note 18, at 373 (defining assisted suicide as "when a physician provides the means and information necessary for the patient to perform the life-ending action, such as giving a prescription for sleeping pills and information about the lethal dose"); Michael J. Roth, Note, *A Failed Statute, Geoffrey Feiger, and the Phrenetic Physician: Physician-Assisted Suicide in Michigan and a Patient-Oriented Alternative*, 28 Val. U. L. Rev. 1415, 1426 (1994) (noting that in assisted suicide, a second party encourages or provides the means to suicide).

21. See Thomas Maier, *A Fight to the Death; Assisted-Suicide Bans Face More Court Tests*, Newsday, Dec. 17, 1994, at A11 (*Quill* will be appealed in New York); Jessie Mangaliman, *Lawyers Battle Over Legal Suicide*, Newsday, Oct. 20, 1994, at A29 (*Compassion in Dying* is being appealed in Washington); Michael Betzold & Matt Davis, *Kevorkian Cases May Reopen, Prosecutor Calls Court's Finding a "Total Victory"*, Detroit Free Press, Dec. 15, 1994, at 1B (*Kevorkian* will seek certiorari from the Supreme Court).

22. No. 94 CIV.5321(TPG), 1994 WL 702800 (S.D.N.Y. Dec. 15, 1994).

23. *Id.* at *7.

24. *Id.* at *1.

25. The statute provided: "A person is guilty of manslaughter in the second degree when . . . [h]e intentionally . . . aids another person to commit suicide." N.Y. Penal Law § 125.15(3) (McKinney 1987).

In addition, "A person is guilty of promoting a suicide attempt when he intentionally . . . aids another person to attempt suicide." N.Y. Penal Law § 120.30 (McKinney 1987).

26. *Quill v. Koppell*, No. 94 CIV.5321(TPG), 1994 WL 702800, *2 (S.D.N.Y. Dec. 15, 1994).

27. *Id.*

New England Journal of Medicine describing these events.²⁸ The other two doctors were also willing to assist in suicide.²⁹ The assisted suicide statutes, however, deterred them from rendering help.³⁰ Three patients, all of whom were mentally competent adults with terminal illnesses, also joined the original complaint.³¹

The plaintiffs framed the issue narrowly, requesting the court to rule only that terminally ill patients have a constitutional right to engage their physicians to aid them in suicide.³² Toward this end, they sought an injunction to enjoin the enforcement of the New York statutes in question.³³

The court first addressed two relevant Supreme Court cases. Although the court acknowledged that plaintiffs relied upon *Planned Parenthood v. Casey*,³⁴ it only indicated that the *Casey* Court did not intend its decision to lead automatically to a recognition of other fundamental rights.³⁵ The court, however, considered *Cruzan v. Director, Missouri Department of Health*³⁶ in more detail.³⁷ It reasoned that the *Cruzan* Court only assumed a right to passive euthanasia exists, but stopped short of deciding that it is a constitutional right.³⁸ Even if this right is fundamental, the *Quill* court nevertheless ruled that there is a significant legal difference between passive euthanasia and assisted suicide.³⁹ Unfortunately, it did not articulate what it considered the difference to be. The court concluded that neither *Casey* nor *Cruzan* applied to assisted suicide.⁴⁰

The *Quill* court then proceeded to apply two other tests to determine whether the right to assisted suicide is fundamental. A right that the Constitution does not specifically enumerate must be either: (1) "implicit in the concept of ordered liberty so that neither liberty nor justice would exist if they were sacrificed," or (2) "deeply rooted in the nation's history and traditions."⁴¹ The court determined that assisted suicide did not satisfy either test.⁴² In fact, the plaintiffs did not

28. *Id.* After a meeting between doctor and patient to explore all possible alternatives, the patient chose to take an excessive amount of the drug and thus passed away. *Id.* Dr. Quill was subsequently the subject of a criminal investigation, but the grand jury did not indict him for his actions. *Id.*

29. *Id.* at *3.

30. *Id.*

31. *Id.* at *1. All three have since passed away. *Id.*

32. *Id.* at *1-2.

33. *Id.* at *1.

34. 112 S. Ct. 2791 (1992).

35. *Quill v. Koppell*, No. 94 CIV.5321(TPG), 1994 WL 702800, at *6 (S.D.N.Y. Dec. 15, 1994).

36. 497 U.S. 261 (1990).

37. *Quill*, No. 94 CIV.5321(TPG), 1994 WL 702800 at *6-7.

38. *Id.* at *6.

39. *Id.*

40. *See id.*

41. *Id.* (citing *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986)).

42. *See id.* at *7.

even attempt to base their arguments on the historical treatment of assisted suicide, a necessary requirement to satisfy both tests.⁴³ After tracing the history of suicide, the court indicated that states no longer treat the act as a crime because such treatment tends to punish the innocent family of the deceased.⁴⁴ Regarding assisted suicide, the court stated that most states have always punished the act.⁴⁵ Therefore, the court in *Quill* ruled that, because legal history did not sanction any form of either suicide or assisted suicide, assisted suicide is not a constitutional right.⁴⁶

2. *People v. Kevorkian*

Using an approach similar to that of the New York court, the Michigan Supreme Court, in *People v. Kevorkian*,⁴⁷ also declined to find a constitutional right to assisted suicide. This decision consolidated two cases from the Michigan Court of Appeals.⁴⁸ The more relevant lower court case considered whether the Michigan statute prohibiting assisted suicide was constitutional.⁴⁹ The plaintiffs included Teresa Hobbins, a terminally ill patient, and Dr. Jack Kevorkian, the notorious physician charged with assisting others in suicide.⁵⁰ Although the court of appeals ruled that the statute violated the Michigan constitution,⁵¹ in dicta, it determined that the United States Constitution does not grant a right to assisted suicide.⁵² In the Michigan Supreme Court, Dr. Kevorkian and Hobbins sought a preliminary injunction

43. *Id.* at *6.

44. *Id.* at *7.

45. *Id.*

46. *Id.*

47. No. 99591, 1994 WL 700448 (Mich. Dec. 13, 1994).

48. *Id.* at *1.

49. *Hobbins v. Att'y Gen.*, 518 N.W.2d 487 (Mich. Ct. App. 1994).

The Michigan statute provided:

"(1) A person who has knowledge that another person intends to commit or attempt to commit suicide and who intentionally does either of the following is guilty of criminal assistance to suicide . . . (a) Provides the physical means by which the other person attempts or commits suicide. (b) Participates in a physical act by which the other person attempts to commit suicide."

People v. Kevorkian, No. 99591, 1994 WL 700448, at *4 n.14 (Mich. Dec. 13, 1994) (quoting Mich. Comp. Laws § 752.1027 (1993); Mich. Stat. Ann. § 28.547(127) (Callaghan 1993)).

50. *Hobbins*, 518 N.W.2d at 489.

51. In *Hobbins*, the court of appeals held that the assisted suicide statute violated the Michigan Constitution. *Id.* at 491. This section states that "[n]o law shall embrace more than one object, which shall be expressed in its title." *Id.* at 489 (quoting Mich. Const. art. 4, § 24). The court determined that the statute had two objects. *Id.* at 490. The first was to create a commission to study assisted suicide and the second was to specifically criminalize the act. *Id.*

52. *Id.* at 493. The second court of appeals case that the Michigan Supreme Court considered, *People v. Kevorkian*, 517 N.W.2d 293 (Mich. Ct. App. 1994), also involved the physician from Michigan. *People v. Kevorkian*, No. 99591, 1994 WL 700448, at *3 (Mich. Dec. 13, 1994). Before the legislature enacted the assisted suicide statute, Dr. Kevorkian aided in the suicide of several patients. *Kevorkian*, 517

against enforcement of the statute, arguing that it was unconstitutional under both state and federal law.⁵³

The Michigan Supreme Court ruled against Kevorkian and Hobbins, reversing the court of appeals on the state constitution issue.⁵⁴ After deciding that the statute was constitutional under Michigan law,⁵⁵ the court addressed the issue of whether the right to seek assisted suicide exists under the United States Constitution.⁵⁶ On this issue, the court agreed with the court of appeals and concluded that the Constitution does not protect the right to seek assisted suicide.⁵⁷

In its analysis, the court reasoned that for it to protect the right to assisted suicide, the right must be fundamental.⁵⁸ The plaintiffs argued that this right, like the right to passive euthanasia and the right to procure an abortion, is protected under the Due Process Clause of the Fourteenth Amendment as a substantive liberty interest.⁵⁹ The court disagreed⁶⁰ and first focused its attention on distinguishing *Cruzan v. Director, Missouri Department of Health*⁶¹ and *Planned Parenthood v. Casey*.⁶² It stated: "In *Cruzan*, the Court was able to 'assume' a protected liberty interest in the withdrawal of life-sustaining medical treatment because it was able to distinguish between

N.W.2d at 294. The grand jury indicted him on two counts of murder, and the court of appeals held that he must face these charges. *Id.* at 298.

53. *Kevorkian*, No. 99591, 1994 WL 700448 at *2 n.14.

54. *Id.* at *2.

55. The court of appeals suggested that had the legislature chosen a more general title, the statute would have been constitutional. *Id.* at *5-6. The supreme court, however, reasoned that the lower court mistakenly focused on the title of the statute. *Id.* at *6. "It cannot be said that a statute has two objects if its title specifically describes its content, but only one if the title is general." *Id.* The more appropriate inquiry is into the body of the act, and the court held that the statute dealt only with assisted suicide and no other object. *Id.*

The title of the statute is "AN ACT to create the Michigan commission on death and dying; to prescribe its membership, powers and duties; to provide for the development of legislative recommendations concerning certain issues related to death and dying; to prohibit certain acts pertaining to the assistance of suicide; to prescribe penalties; and to repeal certain parts of this act on a specific date." *Hobbins v. Attorney General*, 518 N.W.2d 487, 490 (Mich. Ct. App. 1994) (quoting 1992 P.A. 270).

56. *Kevorkian*, No. 99591, 1994 WL 700448 at *8-14.

57. *Id.* at *14.

58. *Id.* at *8.

59. *Id.*

60. *Id.* at *10. The Michigan Court of Appeals also had declined to extend the Supreme Court's reasoning in *Roe v. Wade*, 410 U.S. 113 (1973). See *Hobbins v. Attorney General*, 518 N.W.2d 487, 492-93 (Mich. Ct. App. 1994) (ruling that assisted suicide is significantly different from abortion). It recognized that in *Roe*, the guarantee of personal privacy only concerned "marriage, procreation, contraception, family relationships, and child rearing and education." *Id.* at 492 (quoting *Roe*, 410 U.S. at 152-53). No logical connection existed between these areas and terminating one's own life. *Id.* The court also ascertained that it should not create rights not enumerated within the Constitution, as this task belongs to the legislature. *Id.* at 493-94 (citing *Moore v. East Cleveland Ohio*, 431 U.S. 494, 544 (1977) (White, J., dissenting)).

61. 497 U.S. 261 (1990).

62. 112 S. Ct. 2791 (1992).

acts that artificially sustain life and acts that artificially curtail life.”⁶³ The court reasoned that the right to withdraw treatment is passive inaction resulting in a natural death, whereas assisted suicide is “active misconduct” producing an artificial death.⁶⁴ Thus, it did not consider *Cruzan* as controlling precedent.

The court also ruled that the decision in *Casey* did not dictate the outcome of the case. The plaintiffs argued that the right to assisted suicide, like the choice to terminate a pregnancy, is a deeply personal decision.⁶⁵ They also contended that *Casey* established a broader view of what constitutes a fundamental right.⁶⁶ The court, however, disagreed.⁶⁷ It stated that the abortion cases were “unique” and not subject to extension into other areas.⁶⁸ In addition, the test the Supreme Court established in *Casey* “does not fall so far outside” the traditional tests for whether a right is fundamental.⁶⁹ The court, like the New York court did in *Quill v. Koppell*,⁷⁰ found that the right to assisted suicide must be either “implicit in the concept of ordered liberty” or “deeply rooted in the nation’s history and traditions.”⁷¹ It questioned “whether the asserted right . . . arises from a rational evolution of tradition, or whether recognition of such a right would be a radical departure from historical precepts.”⁷² The court concluded that because both the courts and the states treat assisted suicide with disapproval, the right is not grounded in tradition.⁷³ Furthermore, the court reasoned that it should not decide the issue based on competing moral philosophies, as this task belongs to the legislature.⁷⁴

3. *Compassion in Dying v. Washington*

In the same year that Michigan debated assisted suicide in the state courts, a federal district court in Washington also considered the issue. Unlike the other cases, however, this court determined that there is a constitutional right to assisted suicide. In *Compassion in Dying v. Washington*,⁷⁵ several groups banded together to challenge their

63. *People v. Kevorkian*, No. 99591, 1994 WL 700448, at *11 (Mich. Dec. 13, 1994).

64. *Id.*

65. *Id.* at *10.

66. *Id.* at *12.

67. *Id.*

68. *Id.*

69. *Id.* at *13. In *Casey*, the Supreme Court advocated using a “reasoned judgment” standard to determine whether a right is fundamental. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2806 (1992).

70. No. 94 CIV.5321(TPG), 1994 WL 702800 (S.D.N.Y. Dec. 15, 1994); see *supra* part I.A.1.

71. *People v. Kevorkian*, No. 99591, 1994 WL 700448, at *13 (Mich. Dec. 13, 1994).

72. *Id.*

73. *Id.* at *13-14.

74. *Id.* at *14.

75. 850 F. Supp. 1454 (W.D. Wash. 1994).

state's restriction on assisted suicide.⁷⁶ One of the plaintiffs was an organization that periodically aided others in committing suicide.⁷⁷ Several patients who were terminally ill and mentally competent⁷⁸ and doctors who had received requests to hasten death⁷⁹ joined the organization as plaintiffs in the suit.

The court held that the right to assisted suicide is a fundamental right for the terminally ill found in the Due Process Clause of the Fourteenth Amendment.⁸⁰ This clause declares that the state may not "deprive any person of life, liberty, or property, without due process of law."⁸¹ The plaintiffs contended that the liberty interest within this clause gave them a "right to be free from undue governmental intrusion on their decision to hasten death and avoid prolonged suffering."⁸²

The Washington court extended the reasoning of *Planned Parenthood v. Casey*⁸³ and *Cruzan v. Director, Missouri Department of Health*⁸⁴ to arrive at this conclusion.⁸⁵ As the Supreme Court explained in *Casey*, decisions regarding deeply personal matters are usually afforded constitutional protection as liberty interests.⁸⁶ The court deduced that, similar to the abortion decision, choosing whether to

76. *Id.* at 1456-58. The Washington statute made assisted suicide a felony. It provided: "A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide. Promoting a suicide attempt is a class C felony." Wash. Rev. Code Ann. § 9A.36.060 (West 1988).

77. Compassion in Dying will not assist anyone in committing suicide unless several criteria are met. *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1458 (W.D. Wash. 1994). First, the primary care physician must consider the patient terminally ill. *Id.* Another consulting physician then must examine the patient's medical records to verify the terminal progress of the illness and to ascertain that inadequate pain management is not a factor in the decision to commit suicide. *Id.* A mental health professional also may certify that the patient is mentally competent and not depressed or emotionally distressed. *Id.* Finally, the patient must request death at least three times, either written or on videotape, with an interval of at least 48 hours between the second and third requests. *Id.*

78. *Id.* at 1456-57. Jane Roe suffered from cancer that had metastasized throughout her skeleton. *Id.* at 1456. Doctors had given her less than six months to live. *Id.* John Doe was diagnosed with AIDS. *Id.* Since his infection with the virus, he had battled pneumonia, skin and sinus infections, seizures and fatigue. *Id.* The last patient, James Poe, was afflicted with emphysema, a disease that causes a constant suffocating sensation. *Id.* at 1457.

79. *Id.* at 1457-58. In their declarations to the court, several doctors wrote that because the statute deterred them from acting on requests to aid in suicide, their patients often proceeded on their own. *Id.* In fact, two doctors described personal experiences where their patients, after being refused a prescription for drugs, used violent means to kill themselves. *Id.* at 1458 n.3.

80. *Id.* at 1461, 1467.

81. U.S. Const. amend. XIV, § 1.

82. *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1459 (W.D. Wash. 1994).

83. 112 S. Ct. 2791 (1992).

84. 497 U.S. 261 (1990).

85. *Compassion in Dying*, 850 F. Supp. at 1459-62.

86. *Casey*, 112 S. Ct. at 2807.

kill oneself "involv[es] the most intimate and personal choice[] a person may make in a lifetime."⁸⁷ According to the court, the arguments that might distinguish abortion from assisted suicide "hardly amount to a distinction that warrants a different constitutional result."⁸⁸ Because a personal right is involved, the court declined to leave it to the legislature to decide the issue.⁸⁹

The court also refused to distinguish *Cruzan*, arguing that there was no relevant distinction between passive euthanasia and assisted suicide.⁹⁰ Chief Judge Rothstein cited Justice O'Connor's concurring opinion in *Cruzan*, in which she noted that the Due Process Clause must protect an individual's deeply personal decision to have life sustaining equipment removed.⁹¹ Because assisted suicide is also a personal decision that results in death, the court, from a constitutional perspective, refused to recognize a difference between the two situations.⁹²

After determining that the liberty interest encompasses the right to seek assisted suicide, the court then considered the state's interests in prohibiting the act.⁹³ These interests include preventing suicide and protecting those who choose suicide from undue influence and abuse.⁹⁴ The court determined that a total ban on assisted suicide did not support these interests.⁹⁵ Therefore, by strictly prohibiting the act, the state had unconstitutionally placed an undue burden⁹⁶ on those who attempted to exercise their Fourteenth Amendment right.⁹⁷

87. *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1460 (W.D. Wash. 1994) (citations omitted).

88. *Id.* The alleged distinctions include the level of personal autonomy traditionally given to the decision, the presence of competing interests in the abortion decision, the potential for undue influence and the difference in the level of medical knowledge obtained in the two cases. *Id.* at 1460-61.

89. *Id.* at 1460. The court only granted those adults that are competent and terminally ill the right to seek assisted suicide. *Id.* at 1462.

90. *Id.* at 1461-62.

91. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 289 (1990) (O'Connor, J., concurring).

92. *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1460 (W.D. Wash. 1994).

93. *Id.* at 1464.

94. *Id.* at 1464-65.

95. *Id.* at 1465-66. The court reasoned that the state's interest in preventing suicide is not absolute, as it could have no interest in prolonging the pain and suffering of a dying person. *Id.* at 1464. Regarding the second state interest of preventing undue influence, the court assumed that mentally competent people can make "knowing and voluntary choices" to commit assisted suicide. *Id.* at 1465. Furthermore, the potential for abuse in this instance is no greater than in cases of passive euthanasia, where a surrogate might choose death for the patient. *Id.*

96. In the context of abortion, a regulation poses an undue burden on a person's rights if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2820 (1992).

97. *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1467 (W.D. Wash. 1994). Furthermore, the court held that the Washington statute violated the Equal

C. Supreme Court Cases

In *Quill*, *Hobbins* and *Compassion in Dying*, the courts adopted different approaches to substantive due process under the Fourteenth Amendment. Because these decisions rely heavily on prior Supreme Court liberty interest cases, this section examines the following decisions in more detail: *Cruzan v. Director, Missouri Department of Health*,⁹⁸ *Roe v. Wade*⁹⁹ and *Planned Parenthood v. Casey*.¹⁰⁰ This section then considers to what extent courts should rely upon these and other cases. It concludes that these decisions concerning passive euthanasia and abortion are not binding upon the courts when they consider whether there is a constitutional basis for the right to assisted suicide.

1. *Cruzan v. Director, Missouri Department of Health* and the "Right to Die"

The most relevant Supreme Court case on the question of assisted suicide is *Cruzan v. Director, Missouri Department of Health*,¹⁰¹ in which the Court considered whether the liberty interest protected in the Fourteenth Amendment encompassed the right to refuse life-sustaining treatment.¹⁰² The plaintiff, Nancy Cruzan, was in a persistent vegetative state and thus incompetent.¹⁰³ Her parents sought authorization from the court to remove her artificial nutrition and hydration equipment.¹⁰⁴ Even though the Court declined their request, it did so not because their daughter lacked the right to refuse treatment. Rather, her parents had failed to produce clear and convincing evidence to indicate that she would have desired the procedure.¹⁰⁵ To reach this conclusion, the Court assumed that the Fourteenth Amendment granted a competent person a right to refuse lifesaving hydration and nutrition.¹⁰⁶ The Court grounded this supposition in its prior decisions that recognized the continued viability of the doctrine of informed consent:¹⁰⁷ "The logical corollary [of this doctrine] is that the

Protection Clause. Because the court could not find a difference between natural and artificial death, it held that the statute burdened the fundamental rights of those not on life support while leaving intact the rights of those on life support. *Id.* at 1466-67. Those on life support, by removing their artificial hydration and nutrition equipment, still possessed the right to commit suicide under the statute.

98. 497 U.S. 261 (1990).

99. 410 U.S. 113 (1973).

100. 112 S. Ct. 2791 (1992).

101. 497 U.S. 261 (1990).

102. *Id.* at 279.

103. *Id.* at 266.

104. *Id.* at 267-68.

105. *Id.* at 285.

106. *Id.* at 279.

107. *Id.* at 277-79; see *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (recognizing a prisoner's interest in refusing antipsychotic drugs); *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30 (1905) (holding that an individual has the right to decline smallpox

patient generally possesses the right not to consent, that is, to refuse treatment."¹⁰⁸ The Supreme Court, however, has never specifically recognized the right to die.¹⁰⁹

Some lower courts have found a right to passive euthanasia, or the so-called "right to die," in different provisions of the Constitution. A few have labeled it a right of privacy,¹¹⁰ while others have termed it the right to autonomy.¹¹¹ Several have relied exclusively on the doctrine of informed consent without giving the right a specific name.¹¹² But no matter how a court arrives at finding the "right to die," the analyses nonetheless tend to be the same.¹¹³

In almost all of the cases concerning passive euthanasia, the courts were careful not to extend the right to die to cover assisted suicide.¹¹⁴ These decisions have routinely drawn a distinction between the withholding of care and assisted suicide.¹¹⁵ For example, most cases care-

vaccinations). The doctrine of informed consent states that, in most cases, physicians may not apply treatment unless they first obtain the patient's permission. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 269 (1990).

108. *Cruzan*, 497 U.S. at 270.

109. Nevertheless, some commentators attempt to stretch the very specific holding in *Cruzan* into a general "right to die" that encompasses all forms of euthanasia. They have used the right to die to include everything from withdrawing useless treatments to taking affirmative actions to control the time and manner of death. Robert A. Destro, *The Scope of the Fourteenth Amendment Liberty Interest: Does the Constitution Encompass a Right to Define Oneself Out of Existence? An Exchange of Views with John A. Powell*, *Legal Director, ACLU*, 10 *Issues in L. & Med.* 183, 200 (1994).

110. See *Bouvia v. Superior Court*, 225 Cal. Rptr. 297, 301 (Ct. App. 1986); *Bartling v. Superior Court*, 209 Cal. Rptr. 220, 225 (Ct. App. 1984); *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417, 424 (Mass. 1977); *McKay v. Bergstedt*, 801 P.2d 617, 622 (Nev. 1990); *In re Farrell*, 529 A.2d 404, 410 (N.J. 1987); *In re Quinlan*, 355 A.2d 647, 662-64 (N.J. 1976). The Supreme Court reasoned that it could derive the right to privacy from the penumbras of the Bill of Rights and from the language of the First, Third, Fourth, Fifth and Ninth Amendments of the Constitution. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

111. Those who favor the "right to autonomy" label argue that one should have the ultimate freedom to control his or her life, including the manner in which one chooses to die. Antonios P. Tsarouhas, Comment, *The Case Against Legal Assisted Suicide*, 20 *Ohio N.U. L. Rev.* 793, 800-01 (1994).

112. See *In re Peter*, 529 A.2d 419, 423 (N.J. 1987); *Brophy v. New England Sinai Hosp., Inc.*, 497 N.E.2d 626, 633 (Mass. 1986); *In re Storar*, 420 N.E.2d 64, 71 (N.Y. 1981). The doctrine of informed consent is the common law doctrine most often invoked in right to die cases. Note, *Physician-Assisted Suicide and the Right to Die with Assistance*, 105 *Harv. L. Rev.* 2021, 2025 (1992).

113. In all cases, the court must decide whether the right, no matter what it is labeled, is fundamental and to what extent the court should protect the right in light of opposing state interests. See Rebecca C. Morgan et al., *The Issue of Personal Choice: The Competent Incurable Patient and the Right to Commit Suicide?*, 57 *Mo. L. Rev.* 1, 25 (1992) (arguing that the analysis would have been the same whether the right is described as "privacy" or "liberty").

114. See, e.g., *Storar*, 420 N.E.2d at 71 (holding that the State's interest in preventing suicide is inapplicable if the patient desires to have a respirator removed).

115. See *Bartling v. Superior Court*, 209 Cal. Rptr. 220, 226 (Ct. App. 1984) (determining that there is no need to consider suicide when patient chooses to refuse medical treatment); *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d

fully distinguish death that occurs naturally when medical equipment is withdrawn from death that results because of affirmative human efforts.¹¹⁶ The difference between acts and omissions may appear inconsequential, thus suggesting that assisted suicide does fall within the sphere of euthanasia. The law, however, does recognize such a distinction. As one court has stated, "There is a wide difference . . . between causing and preventing an injury The duty to protect against [a] wrong is . . . a moral obligation only, not recognized or enforced by law."¹¹⁷

417, 426 n.11 (Mass. 1977) (reasoning that in a case concerning the withholding of medical care, "[t]he [state's] interest in protecting against suicide seems to require little if any discussion"); *In re Quinlan*, 355 A.2d 647, 670 n.9 (N.J. 1976) (stating that the New Jersey statute that makes aiding suicide an offense does not apply to third parties assisting in passive euthanasia).

Even if the legal differences seem minimal, moral arguments may distinguish assisted suicide from the "right to die."

Some theorists argue that disease does not cause a suicidal tendency. Burke J. Balch & Randall K. O'Bannon, *Why We Shouldn't Legalize Assisted Suicide, Part III: What About the Terminally Ill?* (May 1994) (unpublished manuscript on file with the *Fordham Law Review*). Instead, those who choose suicide do so because of clinical depression. According to a survey, 93-94% of those who commit suicide have mental disorders. Burke J. Balch & Randall K. O'Bannon, *Why We Shouldn't Legalize Assisted Suicide, Part I: Suicide and Mental Illness* (May 1994) (unpublished manuscript on file with the *Fordham Law Review*). The state should not allow those with a psychological disorder to take their lives. Rather, proper treatment of the disease is necessary. Just alleviating physical pain, however, is not enough; total care includes treating for social and mental pain, two factors often disregarded by those who care for the terminally ill. Burke J. Balch & Randall K. O'Bannon, *Why We Shouldn't Legalize Assisted Suicide, Part II: Pain Control* (May 1994) (unpublished manuscript on file with the *Fordham Law Review*).

Others fear that, should assisted suicide become legal, the terminally ill will see it as an obligation to die because of the financial and emotional burden they place on their families and close friends. Burke J. Balch & Randall K. O'Bannon, *Why We Shouldn't Legalize Assisted Suicide, Part III: What About the Terminally Ill?* (unpublished manuscript on file with the *Fordham Law Review*).

116. See *Brophy v. New England Sinai Hosp., Inc.*, 497 N.E.2d 626, 637-38 (Mass. 1986) (discontinuing G-tube causes a natural death); *Saikewicz*, 370 N.E.2d at 426 n.11 (noting that "[T]he cause of death was from natural causes [and] the patient did not set the death producing agent in motion with the intent of causing his own death"); *Quinlan*, 355 A.2d at 670 (removing a respirator causes death naturally); *In re Colyer*, 660 P.2d 738, 743 (Wash. 1983) (finding that a patient in a vegetative state dies naturally when life support is removed).

117. *Buch v. Amory Mfg. Co.*, 44 A. 809, 811 (N.H. 1898). Noted scholars also have recognized the legal distinction between acting and omitting to act:

In the determination of the existence of a duty, there runs through much of the law a distinction between action and inaction. . . . [T]here arose very early a difference, still deeply rooted in the law of negligence, between "misfeasance" and "nonfeasance" – that is to say, between active misconduct working positive injury to others and passive inaction or a failure to take steps to protect them from harm. The reason for the distinction may be said to lie in the fact that by "misfeasance" the defendant has created a new risk of harm to the plaintiff, while by "nonfeasance" he has at least made his situation no worse, and has merely failed to benefit him by interfering in his affairs.

Some decisions have described other important differences between passive euthanasia and assisted suicide. For instance, the right to passive euthanasia is well-grounded in the historical notion of informed consent.¹¹⁸ The Court has routinely protected patients from an undesired touching by their doctors, even though this battery may have been necessary to save their lives.¹¹⁹ Therefore, in passive euthanasia, the doctor who leaves a patient, against his or her will, on life-sustaining equipment has also committed a battery.¹²⁰ The same rationale does not exist for allowing assisted suicide. The patient is not seeking to have medical equipment withdrawn or refusing an unwanted touching. Instead, the patient is endeavoring to have medical treatment applied.

Because of the historical tie between legal theories substantiating informed consent and passive euthanasia, states traditionally did not proscribe passive euthanasia.¹²¹ Likewise, because there is no logical relation between informed consent and the request for assisted suicide, this act has historically been banned. Thus, while passive euthanasia and assisted suicide both result in the death of a patient, history has treated the two very differently. No laws permitted physicians to assist in suicide under common law, at the time of the original framing or when the ratifiers adopted the Fourteenth Amendment.¹²² This is in stark contrast with how the courts and legislatures of the time viewed the right to refuse treatment.¹²³

Because of these distinctions between assisted suicide and passive euthanasia, a court cannot justifiably rely on *Cruzan* as controlling precedent. The two situations, even though analogous in their ends, deserve different legal treatment.

2. *Roe v. Wade*, *Planned Parenthood v. Casey* and the Right to Choose Abortion

In addition to discussing the relevance of passive euthanasia, the *Compassion in Dying* and *Kevorkian* courts went to great lengths to analyze the applicability of the abortion decisions.¹²⁴ When these two courts decided the issue, they relied on *Planned Parenthood v.*

W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 56, at 373 (5th ed. 1984) (citation omitted).

118. The right is derived from the common law notion that a touching without legal justification is a battery. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 269-70 (1990).

119. *Id.* at 270-77.

120. *Id.* at 269.

121. *Id.*; see, e.g., N.J. Stat. Ann. § 26:2H-53 to 2H-78 (West Supp. 1994) (New Jersey Advance Directives for Health Care Act); *In re Quinlan*, 355 A.2d 647, 662-64 (N.J. 1976) (holding that plaintiff had a right to choose death).

122. See discussion *infra* part III.A (detailing history of assisted suicide laws).

123. See *supra* notes 106 and 121.

124. See *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1459-61 (W.D. Wash. 1994); *People v. Kevorkian*, No. 99591, 1994 WL 700448, at *8-13 (Mich. Dec

Casey,¹²⁵ the most recent case on abortion and the liberty interest in the Fourteenth Amendment. Before examining *Casey*, however, it is necessary first to discuss *Roe v. Wade*,¹²⁶ the Supreme Court's prior decision on abortion, which *Casey* reconsidered.

In *Roe*, the Supreme Court struck down a Texas statute that forbade abortion under most circumstances.¹²⁷ It held that before viability of a fetus, a woman has a fundamental right to obtain an abortion.¹²⁸ The Court underwent an exhaustive analysis of the history of abortion, tracing attitudes toward the practice from ancient times all the way through the current ideological positions of organizations such as the American Medical Association and the American Public Health Association.¹²⁹ In concluding its historical analysis, the Court stated: "It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect."¹³⁰ In fact, restrictive criminal abortion laws are "not of ancient or even common-law origin."¹³¹

The Court next recognized that the right of privacy, though not explicitly enumerated, exists within the Constitution.¹³² In the past, the Court had found this right in cases relating to marriage,¹³³ procreation,¹³⁴ contraception¹³⁵ and child rearing,¹³⁶ and now it extended privacy to cover abortion.¹³⁷ According to the Court in *Roe*, the right of privacy is broad enough to encompass choosing to have an abortion.¹³⁸

Despite the privacy arguments, the Supreme Court appeared to focus primarily on the history of abortion. The Court chose to spend over fourteen pages of its decision solely to show that abortion was

13, 1994). *But see* *Quill v. Koppell*, No. 94 CIV.5321(TPG), 1994 WL 702800, at *5-6 (S.D.N.Y. Dec. 15, 1994).

125. 112 S. Ct. 2791 (1992).

126. 410 U.S. 113 (1973).

127. *Id.* at 164.

128. *Id.* at 163-64.

129. *Id.* at 129-47.

130. *Id.* at 140.

131. *Id.* at 129. At English common law, obtaining an abortion before a woman was "quick with child" was not a criminal act. *Id.* at 138.

132. *Id.* at 152.

133. *Loving v. Virginia*, 388 U.S. 1 (1967).

134. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

135. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

136. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

137. *Roe v. Wade*, 410 U.S. 113, 152-54 (1973). The Court nevertheless cautioned that an unlimited right to do with one's body as one pleases does not exist. *Id.* at 154.

In addition, the Court has extended privacy to cover acts in the home, such as viewing pornography. *Stanley v. Georgia*, 394 U.S. 557 (1969).

138. *Roe*, 410 U.S. at 153. According to the Court, if it did not grant the mother this right, great harm would result. *Id.* For example, she might be exposed to physical or psychological harm, and the unwanted baby might suffer from neglect. *Id.*

not historically treated with disfavor.¹³⁹ With this analysis, the *Roe* opinion effectively grounded the right to choose an abortion in historical tradition.¹⁴⁰

Under *Roe's* analysis, therefore, it does not necessarily follow that a court can extend the justification for the right to choose abortion into the area of assisted suicide.¹⁴¹ First, in *Roe*, the Court ascertained that history did not strictly forbid the right to choose an abortion. As pointed out previously in comparison to the right to passive euthanasia,¹⁴² the history of assisted suicide is different.¹⁴³ Second, the Court held that privacy rights only exist in certain areas such as marriage and contraception.¹⁴⁴ Assisted suicide does not fall within these categories. Moreover, the Court went to great lengths to indicate that choosing an abortion may not involve terminating the life of a person.¹⁴⁵ Assisted suicide, on the other hand, involves precisely the opposite situation, where a human being chooses to die.

Compassion in Dying v. Washington,¹⁴⁶ the only case to find a right to assisted suicide, interprets *Roe* differently. The court in *Compassion in Dying* explained that the right to die is easier to justify than the

139. *Id.* at 129-43.

140. This analysis was necessary because a fundamental right must be " 'deeply rooted in this Nation's history and tradition.' " *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)). Several scholars have suggested that the Court analyzed historical tradition to derive a right of privacy, rather than ruling in favor of an all-encompassing right to personal autonomy. Thomas J. Marzen et al., *Suicide: A Constitutional Right?*, 24 *Duq. L. Rev.* 1, 13-17 (1985).

In a later case, Justice Scalia stated that the reason for the historical analysis in *Roe* was to negate the proposition that abortion was commonly proscribed throughout history. Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989). This emphasis on history, rather than on current social attitudes, is generally necessary to base a substantive right in tradition. *Id.* But see *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2805 (1992) ("It is also tempting . . . to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. But such a view would be inconsistent with our law." (citation omitted)).

141. See *Hobbins v. Attorney General*, 518 N.W.2d 487, 492 (Mich. Ct. App. 1994) ("Judicial discovery of a right to terminate one's life is not a logical extension of . . . [abortion] rights.").

142. See *supra* notes 121-23 and accompanying text.

143. See *infra* part III.A.

144. See, e.g., *Roe v. Wade*, 410 U.S. 113, 153 (1973) (finding a right to choose to have an abortion); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (recognizing the freedom to marry); see generally Julie Inness, *Privacy, Intimacy and Isolation* (1992) (describing privacy as the control over decisions arising out of love, liking and care).

145. The Court found that a person, as used in the Fourteenth Amendment, does not include the unborn. *Roe*, 410 U.S. at 158. Nevertheless, the Court did recognize that the fetus had some rights. For example, once viability occurred, the state could not proscribe abortion unless the mother's life was in jeopardy. *Id.* at 164-65. See generally Ronald Dworkin, *Life's Dominion* 21 (1993) (discussing difference between constitutional definition of "person" and moral definition of "person").

146. 850 F. Supp. 1454 (W.D. Wash. 1994).

right to choose to have an abortion.¹⁴⁷ The former involves one's own life, whereas in the latter, the interests of the unborn fetus are also at stake.¹⁴⁸ This view of the *Compassion in Dying* court does not take into consideration that in *Roe* the Court was not only concerned with protecting the mother's privacy but also with preserving life in general. The Court's preoccupation with protecting life is evident in its proscription of abortion after the viability of the fetus except when necessary to protect another life—the mother's.¹⁴⁹ On the other hand, the Court emphasized that abortion in the first trimester does not kill an infant, the act only ends a "potentiality of life."¹⁵⁰

The right to assisted suicide also cannot be justified under the more recent abortion decision, *Planned Parenthood v. Casey*.¹⁵¹ Although the court in *Compassion in Dying* cited *Casey* as precedent,¹⁵² its reliance is misplaced.

The *Casey* Court gave two justifications for affirming the right to choose abortion, and it is not clear which, if either, it thought was more important.¹⁵³ One reason was grounded in *stare decisis*.¹⁵⁴ According to this analysis, the Justices could not justify overruling *Roe* simply because they believed it was wrongly decided.¹⁵⁵ To do so would be to compromise the Court's legitimacy, both politically and socially.¹⁵⁶ Another reason the Court affirmed *Roe* was that it considered the right to have an abortion as a fundamental right.¹⁵⁷ It held that the Due Process Clause encompasses more rights than those that

147. *Id.* at 1460.

148. *Id.*

149. *Roe v. Wade*, 410 U.S. 113, 163-64 (1973).

150. *Id.* at 162.

151. 112 S. Ct. 2791 (1992).

152. *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1460 (W.D. Wash. 1994).

153. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2807-09 (1992). If length of analysis is any indication of which was the more important issue, the Court devoted only five pages to the consideration of whether abortion is a liberty interest and fourteen pages to the issue of *stare decisis* and whether the specific framework of *Roe* was still constitutional. *Id.* at 2804-21.

154. The Court reasoned:

So in this case we may inquire whether *Roe's* central rule has been found unworkable; whether the rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by the rule in question; whether the law's growth in the intervening years has left *Roe's* central rule a doctrinal anachronism discounted by society; and whether *Roe's* premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed.

Id. at 2809.

155. *Id.* at 2814.

156. *Id.* at 2815.

157. *Id.* at 2807-08.

were protected when the Fourteenth Amendment was ratified;¹⁵⁸ the additional rights include those that are deeply personal.¹⁵⁹

Attempting to justify a right to assisted suicide through *Casey* is problematic, even though the decision is as "personal" as abortion. As mentioned earlier, abortion significantly differs from assisted suicide.¹⁶⁰ In addition, *Casey* does not actually articulate a broader inquiry for determining whether a right is fundamental, as some scholars have suggested. To suggest that *Casey* expanded fundamental rights analysis is inconsistent with the Court's long established tests for interpreting the Fourteenth Amendment.¹⁶¹ Those tests focus squarely on history and tradition rather than on the independent reasoning of the justices.¹⁶²

The conceptual differences between the right to assisted suicide and existing fundamental rights, as earlier discussed in this section,¹⁶³ are not the only barriers to the Court recognizing a constitutional right to assisted suicide. On a practical level, the recognition of such a right within the Due Process Clause seems unlikely. This is due to the Court's recent hostility toward expanding the substantive due process right.¹⁶⁴ In *Michael H. v. Gerald D.*,¹⁶⁵ the Court stated that "the present construction of the Due Process Clause represents a major

158. *Id.* at 2805. The Court noted that it was engaging in "reasoned judgment," a method of analysis with limitations "not susceptible of expression as a simple rule." *Id.* at 2806.

159. The Court stated:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.

Id. at 2807.

Thus, abortion is one of these choices "central to personal dignity and autonomy" as well as central to the Fourteenth Amendment liberty interest. *Id.* The Court stated that it was using a method of "reasoned judgment" to determine that abortion was a deeply personal decision that deserved protection. *Id.* at 2806-07. The court in *People v. Kevorkian*, No. 99591, 1994 WL 700448 (Mich. Dec. 13, 1994), however, indicated that this method does not differ from the traditional tests the Supreme Court has applied in determining whether a certain right is fundamental. *Id.* at *13.

The tests that the Court has enunciated are that a fundamental right must be either "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed," or "deeply rooted in this Nation's history and tradition." *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937), and *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).

160. See *supra* text accompanying notes 141-50.

161. See *supra* note 159.

162. See *supra* note 140.

163. See *supra* part II.C.1. and text accompanying notes 141-50.

164. See Gifford, *supra* note 14, at 1577 (stating that though the Court will not contract the right of privacy, it also will not expand it to encompass assisted suicide).

165. 491 U.S. 110 (1989).

judicial gloss on [the terms of the Constitution], as well as on the anticipation of the Framers.' ”¹⁶⁶ The Court further expressed its unwillingness to “breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare.”¹⁶⁷ Additionally, in *Bowers v. Hardwick*,¹⁶⁸ the Court refused “to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause.”¹⁶⁹

A right to assisted suicide, therefore, is not established within Supreme Court jurisprudence. Accordingly, as the court in *People v. Kevorkian*¹⁷⁰ recognized, “we must determine whether the asserted right to commit suicide arises from a rational evolution of tradition, or whether recognition of such a right would be a radical departure from historical precepts.”¹⁷¹ Therefore, any argument supporting assisted suicide must exist because of independent constitutional grounds.

II. CONSTITUTIONAL INTERPRETATION

To determine whether there is a fundamental right to assisted suicide, a court must choose a tenable method of constitutional interpretation. The case law on substantive liberties reveals that the courts have used various methods of constitutional interpretation to ascertain which rights are fundamental.¹⁷² Even the Supreme Court has not universally accepted one framework as the proper method.¹⁷³ This part discusses the two primary analytical frameworks, originalism and fundamental rights theory, and explores their weaknesses. This part then focuses on Lawrence Lessig’s intermediate model of constitutional interpretation and suggests that it offers the most viable analytic approach to assessing assisted suicide.

166. *Id.* at 122 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting)) (denying visitation rights to a man not definitely the father of a child).

167. *Id.*

168. 478 U.S. 186 (1986).

169. *Id.* at 194 (holding that there is no right to homosexual consensual sodomy).

“The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.” *Id.*

170. No. 99591, 1994 WL 700448 (Mich. Dec. 13, 1994).

171. *Id.* at *13.

172. Compare *Quill v. Koppell*, No. 94 CIV.5321(TPG), 1994 WL 702800 (S.D.N.Y. Dec. 15, 1994) (ruling that a fundamental right must be historically recognized at law) with *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1459-60 (W.D. Wash. 1994) (determining that a fundamental right must be personal).

173. For example, in *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court looked at the original intent of the framers and determined that because the right to consensual sodomy did not exist at the time of the framers, it should not exist today. *Id.* at 192-94. Whereas in *Casey*, the Court engaged in “reasoned judgment” to find a right to abortion. *Casey*, 112 S. Ct. 2791, 2806 (1992).

A. Originalism

Originalist theory seeks above all else to respect the intent of those who ratified the Constitution.¹⁷⁴ Some have labeled this as "original understanding"¹⁷⁵ or the interpretation of a "constitution of detail."¹⁷⁶ Noted supporters of this theory include former Judge Robert Bork and Supreme Court Justices Antonin Scalia and Clarence Thomas.¹⁷⁷ According to this method, a court should only consider the text, structure and history of the Constitution to interpret its effect.¹⁷⁸ Those who ratified the Constitution intended it to have a certain meaning, and the courts should protect this meaning when the legislature passes a statute or the executive takes an action that threatens the original understanding of the ratifiers.¹⁷⁹ Thus, the judges should not search for subjective intention; instead, they must conduct an investigation into what the public understood the specific law to mean at the time the text was adopted.¹⁸⁰

Judges who adhere to this theory review history to determine how the ratifiers would have decided the issue at hand.¹⁸¹ Judge Bork indicated that this process involves the application of three axioms.¹⁸² First, a court must accept that the ratifiers' definition of the constitutional right in question is the proper one.¹⁸³ Second, it must conduct a search for what the public, at the time the document was adopted, interpreted the clause to mean.¹⁸⁴ This intention is manifest in secondary materials such as debates at conventions or newspaper articles.¹⁸⁵ Implicit in this exercise is the need to ascertain how far the ratifiers would have stretched a certain principle (in Judge Bork's terms, the principle's "degree of generality").¹⁸⁶ Finally, a court must apply the principle in all cases before it, regardless of where current public sympathies may lie.¹⁸⁷

174. Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 143 (1990).

175. *Id.*

176. Dworkin, *supra* note 145, at 119.

177. *Id.* at 126, 141.

178. Bork, *supra* note 174, at 150.

179. *Id.*

180. *Id.* at 144.

181. *See id.* at 143-46.

182. *Id.* at 146-53.

183. *Id.* at 146-47.

184. *Id.* at 144. Those who purport to follow this method, however, are willing to go beyond the text to adapt to advancing technology. They do not view this process as being unfaithful to the text. As Bork stated about the originalist position, "[i]t is no different to refine and evolve doctrine [to encompass changes in the legal environment], so long as one is faithful to the basic meaning of the amendment, than it is to adapt the fourth amendment to take account of electronic means of surveillance." *Id.* at 168.

185. *Id.*

186. *Id.* at 149.

187. *Id.* at 151.

Originalists primarily justify their position by invoking the doctrine of separation of powers¹⁸⁸ and arguing that judges are not given the power to legislate.¹⁸⁹ Rather, originalists believe that judges are assigned the responsibility of interpreting what the law is, not what it should be in their or someone else's eyes.¹⁹⁰ Judge Bork noted that, under an originalist view, "the judge has no authority to impose upon society even a correct moral hierarchy."¹⁹¹ For example, according to Judge Bork, the Fourteenth Amendment was passed to protect African Americans from the enforcement of discriminatory laws.¹⁹² It was not meant as a mandate to hand ultimate governance over to the courts and to permit them to create law.¹⁹³ Only by looking beyond the text, Judge Bork claimed, have the courts found various liberty interests that are unrelated to the amendment's original meaning,¹⁹⁴ for example, abortion rights.

Originalism, however, suffers from two significant shortcomings. First, critics argue that the Constitution is a flexible framework, not a rigid, specific document. For example, legal philosopher Ronald Dworkin contends that the Constitution is an abstract document.¹⁹⁵ To support his proposition, Dworkin points out that the text does not contain any references to legal, economic or other social science terms that possess precise definitions.¹⁹⁶ Instead, the Constitution uses words such as "freedom," "cruel" and "equal"—words that he has called "breathhtakingly abstract."¹⁹⁷ Thus, even originalists must

188. *Id.* at 153-55.

189. *Id.* at 183.

190. Originalists consider their technique as the only acceptable method because the judiciary should only shoulder powers the Constitution grants it. Those who ratified the Constitution viewed the judiciary as holding an apolitical role, not assuming powers that alter the design of the American Republic. *Id.* at 154-55. Therefore, if a section of the Constitution has become outdated, the proper remedy is to amend it, not through the courts, but through procedures outlined in Article V. *Id.* at 143. Otherwise, judges would have supremacy over the people, invalidating statutes and executive actions and thereby creating something akin to a judicial oligarchy. *Id.* at 160.

191. *Id.* at 258. The originalists, as evidenced by Justice Scalia's concurring opinion in *Cruzan*, would not find a right to suicide, much less assisted suicide. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 292-95 (1989) (Scalia, J., concurring). For a fundamental right to be rooted in tradition or implicit in the concept of ordered liberty, the state must historically and traditionally protect it. *Id.* at 294. Scalia indicated that the states have always possessed the power to prevent suicide, including passive euthanasia. *Id.* at 293. He argued that at the time of the ratification of the Fourteenth Amendment, case law generally treated assisted suicide as a criminal offense. *Id.* at 294.

192. Bork, *supra* note 174, at 180.

193. *Id.* at 180-83.

194. *Id.* at 182-83.

195. Dworkin, *supra* note 145, at 127-28.

196. *Id.* at 127.

197. *Id.* at 128.

somehow decode these general messages.¹⁹⁸ In describing this weakness in the originalist theory, Dworkin suggests that the framers intended to write these phrases abstractly and that there is no reason to interpret them otherwise.¹⁹⁹

Another major problem with originalism is that it is unworkable in certain situations. For originalism or any other theory of constitutional interpretation to be logical, courts must strictly apply it in all cases, not merely whenever it appears convenient. At one point or another, however, most originalists have abandoned their interpretative framework and embarked on some level of moral abstraction.²⁰⁰ For example, Dworkin points to decisions regarding racial segregation in schools.²⁰¹ He indicates that those who passed the Fourteenth Amendment probably did not envision an integrated school system.²⁰² Therefore, if originalists adhered to their theory, *Brown v. Board of Education*²⁰³ would not have overturned *Plessy v. Ferguson*,²⁰⁴ and schools would still be racially "separate but equal."²⁰⁵ The choice for originalists is either to accept the "separate but equal" doctrine or to concede that their theory fails in this circumstance. Once an originalist rejects the idea of a segregated school system and therefore chooses against strictly interpreting the Constitution in this specific instance, nothing prevents him or her from abandoning originalism in other situations as well.²⁰⁶ Therefore, not only does originalism fail to serve as a plausible method of interpretation, but all intermediate

198. Dworkin argues that one of the original framers, James Madison, did not consider his own views on the Constitution important. As proof of this assertion, Dworkin points to the fact that the framers burned all their notes from the constitutional convention. *Id.* at 136.

On the other hand, Judge Bork emphasizes that the subjective intent of the ratifiers is indeed unimportant. Bork, *supra* note 174, at 144. According to Bork, however, this is because how the public viewed the statute at that time, and not the intent of the ratifiers, is truly consequential. Bork argues that James Madison, one of the original framers of the Constitution, knew that his notes of the discussions at Philadelphia were "merely evidence of what informed public men of the time thought the words of the Constitution meant." *Id.* Thus, to prevent courts from placing too great an emphasis on them, he burned his notes.

199. Dworkin, *supra* note 145, at 136. He reasons that "those who made the Constitution had abstract intentions and more detailed convictions. . . . Originalism argues that judges should attend to the authors' more concrete convictions rather than to their more abstract ideals. It offers no serious argument for that choice." *Id.* at 137-38.

200. *Id.* at 141-43.

201. *Id.* at 140-41.

202. See *id.* at 140 (postulating that the ratifiers of the Fourteenth Amendment did not believe that they had outlawed racial segregation in public schools).

203. 347 U.S. 483 (1954).

204. 163 U.S. 537 (1896).

205. *Id.* at 552 (Harlan, J., dissenting).

206. Dworkin, *supra* note 145, at 141-43.

levels of interpretation are also arbitrary and unprincipled without some further justification.²⁰⁷

*Quill v. Koppell*²⁰⁸ and *People v. Kevorkian*²⁰⁹ both recognized this flaw in originalism. Both courts, with their emphasis on history,²¹⁰ observed the originalist method of constitutional interpretation. They acknowledged, however, that the contemporary treatment of assisted suicide is important.²¹¹ This line of reasoning is significant because the legal standards regarding assisted suicide or any other issue may have changed since the time of the ratifiers. Under originalist theory, this is not an important factor for the judiciary to consider.²¹²

B. Fundamental Rights

Unlike originalism, the theory of fundamental rights, sometimes called moral abstraction, recognizes that the only constraint on constitutional interpretation is that legitimate arguments be made.²¹³ According to this view, the Constitution lays down a general scheme of moral ideals, leaving it to judges to apply these principles to concrete circumstances.²¹⁴ Those supporting this method, including Ronald Dworkin, argue that because the framers wrote the text in the abstract, they intended to commit the nation only to a general framework of morality for judges to elaborate upon.²¹⁵ Judges who adhere to this method justify their decisions through their own principles and integrity, not by turning to the concrete visions a framer may have had in mind.²¹⁶ These principles must be consistent only with Supreme Court precedent and the "main structures of our constitutional arrangement."²¹⁷ Finally, to have integrity, a judge who "adopts a principle in one case must give full weight to it in other cases . . . even in

207. Ronald M. Dworkin, "Life's Dominion": An Exchange, *The New Republic*, Sept. 6, 1993, at 43 (colloquy with Jeffrey Rosen).

208. No. 94 CIV.5321(TPG), 1994 WL 702800 (S.D.N.Y. Dec. 15, 1994).

209. No. 99591, 1994 WL 700448 (Mich. Dec. 13, 1994).

210. *Quill*, No. 94 CIV.5321(TPG), 1994 WL 702800, at *6-7; *Kevorkian*, No. 99591, 1994 WL 700448, at *13-14.

211. In *Quill*, the court weighed how the Model Penal Code treated assisted suicide. *Quill*, No. 94 CIV.5321(TPG), 1994 WL 702800, at *7. This Code was adopted in 1962. See *infra* note 297.

In the same vein, the *Kevorkian* court also considered more recent handlings of assisted suicide and suicide, including how the Model Penal Code, "living will" statutes and state legislatures have dealt with those who engage in these actions. *Kevorkian*, No. 99591, 1994 WL 700448, at *13.

212. Rather, originalists believe that if the judiciary valued this factor, it would take on a political role. Bork, *supra* note 174, at 154-55. To do so would compromise the very structure of democracy. *Id.* at 153-54.

213. Dworkin, *supra* note 145, at 145.

214. Dworkin labels this view as interpreting a "constitution of principle." *Id.* at 119.

215. *Id.* at 137.

216. *Id.* at 124.

217. *Id.* at 146.

apparently unrelated fields of law.”²¹⁸ Generally, the theory of fundamental rights gives the court the power to propose its own theory of morality, even though it may conflict with some of the ratifiers’ more concrete perceptions.²¹⁹

The strengths of moral abstraction lie in its ability to account for the weaknesses of originalism.²²⁰ As previously stated, if a court adopts a theory of fundamental rights, it does not need to discover a concrete set of rules that may lie behind the abstract terminology of the Constitution. It is not bound by the particular ideas of the ratifiers when those ideas are clearly outdated.²²¹ In addition, fundamental rights theorists, unlike originalists, have no reason to worry about departing from their interpretive framework. A court can always justify its decisions by citing to a general moral principle that it is seeking to uphold.

Some supporters of the theory of fundamental rights concede that it supplies the judiciary with a “frightening power” to prescribe morality for the entire nation.²²² As Judge Bork has argued, “every theory not based on the original understanding . . . requires the judge to make a major moral decision. . . . There is no satisfactory explanation of why the judge has the authority to impose his morality upon us.”²²³ If judges are given this power, originalists and other critics argue that clauses of the Constitution will lose their distinctiveness and become muddled together.²²⁴ All phrases will begin to look like a general mandate to act fairly.²²⁵ According to one extreme, judges will no longer have to adhere to the specific meanings of the amendments, as they will be free to add and subtract from the list of protected freedoms.²²⁶ For example, in the interest of “fairness,” a court may order

218. *Id.*

219. *Id.* at 138. Applying this method to the issue of assisted suicide, it is hard to say which position a judge who engages in moral abstraction would take. How judges personally feel or what position public opinion favors may determine which side of the fence the judge comes down upon. In essence, the answer lies in the position that advocates the best moral arguments. For example, Dworkin believes that proscribing assisted suicide altogether might damage the integrity of those who wish their death to parallel how they lived their life. *Id.* at 216. On the other hand, those who fear that the bedridden may choose assisted suicide because they feel they are too burdensome to their loved ones, either economically or emotionally, may support prohibiting the act. According to this view, legalizing assisted suicide would create an obligation to die. See *infra* note 115; *supra* notes 304 and 324.

220. See *supra* notes 195-207 and accompanying text.

221. For example, the Supreme Court overruled a prior decision that approved of a segregated school system, even though the ratifiers did not find any faults with such an educational system. See *supra* notes 201-06 and accompanying text.

222. Dworkin, *supra* note 145, at 143.

223. Bork, *supra* note 174, at 251-52.

224. Jeffrey Rosen, *Life's Dominion: An Exchange*, *The New Republic*, Sept. 6, 1993, at 43 (colloquy with Ronald Dworkin).

225. *Id.*

226. Andrew J. Morris, *The Morality and Constitutionality of Abortion and Euthanasia*, *The Conn. Law Tribune*, July 18, 1994, at 39 (arguing that in Dworkin's model, because he discounts any intermediate level of interpretation, rights do not have to be

the incarceration of a prisoner even though the arresting officers may have violated one of his constitutional rights.

The assisted suicide cases addressed the theory of fundamental rights in their discussions of Supreme Court precedent. All three decisions²²⁷ considered the passive euthanasia²²⁸ and abortion cases.²²⁹ For example, the court in *Compassion in Dying v. Washington*,²³⁰ referring to the Supreme Court's willingness to protect personal decisions, concluded that electing to commit suicide is also a choice of a profound nature.²³¹ It engaged in what the Supreme Court has called "reasoned judgment,"²³² a method that seems to use moral considerations.

The weakness of the fundamental rights theory, however, is also evident when the courts consider the approach in the context of assisted suicide. As Judge Bork reasoned, the courts do not have the power to base decisions solely on moral arguments.²³³ As a result, it is necessary to find a model that limits the judiciary to its traditional role of applying, rather than creating, the law, yet is flexible enough to accommodate changing public values.

C. "Fidelity in Translation"

Lawrence Lessig's model, called "Fidelity in Translation," advocates for an intermediate level of interpretation.²³⁴ Lessig's framework is capable of respecting the ratifiers' intent while also adapting the law to the present day context.

grounded); Rosen, *supra* note 224, at 43 (stating that in Dworkin's model, judges will be free to ignore the constraints of the Constitution).

227. See *supra* part I.B.

228. The federal court in Washington could not find a significant distinction between the right assumed in *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 269-72 (1990) (the withdrawal of life-sustaining equipment), and assisted suicide. See *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1461-62 (W.D. Wash. 1994) (finding that both are "profoundly personal decision[s]").

In contrast, the other two assisted suicide cases determined that *Cruzan* was not controlling precedent. See *Quill v. Koppell*, No. 94 CIV.5321(TPG), 1994 WL 702800, at *5-6 (S.D.N.Y. Dec. 15, 1994) (considering only the legal disparities); *People v. Kevorkian*, No. 99591, 1994 WL 700448, at *11 (Mich. Dec. 13, 1994) (recognizing both legal and moral differences).

229. The two abortion cases are *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), and *Roe v. Wade*, 410 U.S. 113 (1973). The assisted suicide courts all considered whether the choice to have an abortion was similar to the choice to seek assisted suicide. Compare *Quill v. Koppell*, No. 94 CIV.5321(TPG), 1994 WL 702800, at *6 (S.D.N.Y. Dec. 15, 1994) (stating it was not comparable) and *People v. Kevorkian*, No. 99591, 1994 WL 700448, at *12-13 (Mich. Dec. 13, 1994) (same) with *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1461-62 (W.D. Wash. 1994) (stating it was comparable).

230. 850 F. Supp. 1454 (W.D. Wash. 1994).

231. See *id.* at 1461-62 (relying on the reasoning set forth in *Casey* and *Cruzan*).

232. *Casey*, 112 S. Ct. at 2806.

233. See Bork, *supra* note 174, at 251-54.

234. See Lessig, *supra* note 11, at 1173.

The first step in Lessig's process, which he calls finding the "context of [the] writing," is to determine the meaning of the relevant clause at the time the ratifiers adopted it.²³⁵ This is essentially what the originalists advocate as the beginning and end of constitutional interpretation.²³⁶ For Lessig, however, the analysis does not end here because the task of a judge is not only to read the text according to its original context, but also to adjust this meaning, if necessary, as society changes.²³⁷ Lessig termed this next step as recognizing the "context of [the] application."²³⁸ This process entails asking judges to determine how society treats the issue at the time the case is pending before them.²³⁹

Using a process called translation, the court must then note any changes in the context since the ratifiers' time, whether legal or non-legal.²⁴⁰ Judges may address only those changes that would have induced the framers to reword the text.²⁴¹ As Lessig himself admits, this is a complicated matter.²⁴² First, the court must become familiar with the two contexts²⁴³ to "know[] from where and to where the text must be carried."²⁴⁴ This means that a court must understand the interrelationship of ideas that give the text its meaning.²⁴⁵

Second, the court must engage in finding an "*equivalence* in meaning between the two contexts."²⁴⁶ This requires it to construct in today's language what the framers would have written if they were alive today.²⁴⁷ In its search for "equivalence," a court must deviate as little as possible from the original intention of the ratifiers.²⁴⁸ Therefore, it should only engage in translation if a presupposition completely changes.²⁴⁹ Otherwise, the court should leave the text alone. For example, politically motivated translations would exceed a court's constitutionally granted institutional authority; the court would become the law-making branch rather than its interpreter.²⁵⁰

235. *Id.* at 1183, 1263.

236. *Id.* at 1182-83.

237. *Id.* at 1183-84.

238. *Id.* at 1184-85, 1263.

239. *See id.* at 1184.

240. *Id.* at 1214.

241. *Id.* at 1263.

242. *See id.* at 1195.

243. *See id.* at 1194-95.

244. *Id.* at 1196.

245. *Id.* at 1195. Lessig explained that this process is possible when one is familiar with the context of the text, "how that text interrelates with others near it, and the context within which it sits—when one knows, for example, its purpose, the assumptions that underlie it, the scope of its reach, and theories it embraces." *Id.* at 1195-96.

246. *Id.* at 1196 (emphasis in original).

247. *Id.*

248. *Id.* at 1206, 1263.

249. *Id.* at 1257, 1263.

250. *Id.*

The following are brief descriptions of how to apply Lessig's model.

“Fidelity in Translation” is preferable to originalism and moral abstraction because it contains the advantages of both extremes²⁵¹ while eliminating most of the disadvantages. In the spirit of originalism, “Fidelity in Translation” incorporates the ratifiers’ intent into the method of interpretation. This process is faithful to the stated purpose of the judiciary²⁵²—the court’s only purpose is to interpret the law. Unlike the originalists, whom Lessig claims are “[b]lind to the effect of context on meaning,”²⁵³ “Fidelity in Translation” recognizes that “meaning is a function of both text and context.”²⁵⁴ Therefore, this model requires the court to uphold constitutional meaning even if this requires deviation from the strict wording of the text.²⁵⁵ Original-

First, Lessig’s model provides a plausible explanation of why *Brown v. Board of Education*, 347 U.S. 483 (1954), overruled *Plessy v. Ferguson*, 163 U.S. 537 (1896). In *Plessy*, the plaintiff argued that the state contributed to the inferiority of the black man with its support of segregation. See Lessig, *supra* note 11, at 1243-44. Justice Brown, writing for the *Plessy* court, ruled against the plaintiff, reasoning that the state does not affect the social status of a black man, but rather, the stigma was self-created and fully within the individual’s power to remove. *Plessy*, 163 U.S. at 551; Lessig, *supra* note 14, at 1244. However, when *Brown* was decided, Chief Justice Warren recognized that a presupposition had changed, namely that the government could stamp a race with a badge of inferiority, and that social meaning was no longer only self-created. *Id.* at 1245. Thus, he overruled *Plessy*.

Lessig’s model also resolves the cases regarding a person’s right to be free from unreasonable searches and seizures. The Fourth Amendment originally only applied to cases where there was a physical invasion of property. *Id.* at 1238. Later, in *Olmstead v. United States*, 277 U.S. 438 (1928), the now famous dissent of Justice Brandeis translated the Fourth Amendment and argued that it also encompassed cases such as eavesdropping where no physical invasion occurred:

Legislation . . . is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth.

Id. at 472-73 (Brandeis, J., dissenting) (citing *Weems v. United States*, 217 U.S. 349, 373 (1910)). Brandeis then applied this general principle to the case at hand. “When the Fourth and Fifth Amendments were adopted, ‘the form that evil had theretofore taken,’ had been necessarily simple. . . . Subtler and more far-reaching means of invading privacy have become available to the Government [now].” *Id.* at 473 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). Thus, the Court expanded the Fourth Amendment to cover eavesdropping and other cases where there state officials did not physically invade a person’s property.

As one final example, federal courts originally did not apply the Fourth Amendment to state officials who seized evidence on private property without a warrant. *Weeks v. United States*, 232 U.S. 383 (1914). Once the Supreme Court incorporated the Fourth Amendment and applied it to the states, it became a simple task for state courts to recognize this change in a legal presupposition and apply the same rule as the federal courts. Lessig, *supra* note 11, at 1216.

251. This model “accommodate[s] vast changes between the framers’ world and our own, while respecting some of the limitations, as well as the ideals, of the original text.” Rosen, *supra* note 223, at 45.

252. See U.S. Const. art. III.

253. See Lessig, *supra* note 11, at 1264.

254. *Id.* at 1166.

255. *Id.* at 1183-84, 1264.

ists acknowledge this necessity only in conjunction with the advance of technology.²⁵⁶ They do not attempt to preserve the ratifiers' meaning when change has occurred for other reasons.²⁵⁷ In "Fidelity in Translation," however, the court must ask itself whether the framers, if writing the text today, would have written it differently; if so, the court must apply the new standard to the situation before it.²⁵⁸

In addition, as proponents of fundamental rights theory argue, "Fidelity in Translation" also recognizes that the original application of the text may no longer be proper.²⁵⁹ Instead, it appreciates that society continues to evolve. Lessig's model effectively responds to Dworkin's allegation that any intermediate level of constitutional interpretation is unprincipled.²⁶⁰ Dworkin claims that at a certain point, all interpreters must engage in some level of moral abstraction.²⁶¹ Once this occurs, Dworkin argues that no set of principles exist that would keep the interpreter from engaging in moral abstraction altogether.²⁶² "Fidelity in Translation," however, is based upon a discrete set of rules. As previously indicated, each step involves a mechanical application minimizing judicial discretion. Because "Fidelity in Translation" exploits the strengths of both originalism and moral abstraction while ameliorating their weaknesses, it is a preferable method of constitutional interpretation. Consequently, applying Lessig's model to assisted suicide provides a sound interpretive approach into whether such a right exists.

III. THE LIBERTY INTEREST AND ASSISTED SUICIDE

Lessig's model suggests that there is no constitutional right to assisted suicide. First, in its historical context, the states generally looked with disfavor on suicide and strictly prohibited assisted suicide at the time of the ratifiers. Second, even though suicide is no longer a crime, assisted suicide remains a felony in the present day. Therefore, because this legal and other non-legal factors have not changed, the courts must respect the intent of the ratifiers. As the interpreters of the law, the courts accomplish this feat only through ruling that assisted suicide is not a fundamental constitutional right.

A. *Historical Context of Suicide and Assisted Suicide*

"Fidelity in Translation" requires a judge to ascertain the context of the writing—in this case, to examine the historical context of assisted

256. See *supra* note 184.

257. See Lessig, *supra* note 11, at 1264. For examples of how other forms of change affect meaning, see *supra* note 250.

258. *Id.* at 1196.

259. *Id.* at 1266.

260. Dworkin, *supra* note 145, at 142-43.

261. *Id.*

262. See *supra* text accompanying notes 200-07.

suicide. This part traces the social mores surrounding suicide, emphasizing the law at the time of the passage of the Constitution and the Fourteenth Amendment. These time periods are especially relevant, as the right to assisted suicide is most likely grounded in the Bill of Rights and the Fourteenth Amendment's Due Process Clause.²⁶³

Since ancient times, most societies have condemned suicide and, correspondingly, assisted suicide.²⁶⁴ Perhaps the best testament of this attitude is the Hypocratic oath: "If any shall ask of me a drug to produce death I will not give it, nor will I suggest such counsel."²⁶⁵ Despite this predominant belief, several cultures supported suicide when a person suffered from intolerable pain²⁶⁶ or when he or she found it necessary to maintain honor.²⁶⁷

A dispute exists among historians as to whether the American colonies observed English common law.²⁶⁸ If they did, the views of William Blackstone, the principal source of English common law for American lawyers, becomes important.²⁶⁹ He despised the act, calling it "[s]elf murder . . . the pretended heroism, . . . [the] real cowardice, of the Stoic philosophers; who thus avoided ills, which they had not the fortitude to endure."²⁷⁰ In England, suicide was considered a fel-

263. See, e.g., *People v. Kevorkian*, No. 99591, 1994 WL 700448, at *8, 14 (Mich. Dec. 13, 1994) (discussing whether the Due Process Clause encompasses the fundamental right to commit suicide).

264. From ancient Judaic times through the Age of Reason, societies have frowned at the practice of suicide. George Rosen, *History, in A Handbook for the Study of Suicide* 3, 3-29 (Seymour Perlin ed., 1975); Marzen et al., *supra* note 140, at 17-55. Some cultures, including the Roman, Germanic and Celtic tribes, however, supported those who chose suicide. Glanville Williams, *The Sanctity of Life and the Criminal Law* 252-54 (1966). The ancient Celts even believed that those who die of old age and disease go to hell, while those who commit suicide go to heaven. Raanan Gillon, *Suicide and Voluntary Euthanasia: Historical Perspective, in Euthanasia and the Right to Death* 182 (A.B. Downing ed., 1969).

265. Tsarouhas, *supra* note 111, at 795 (citation omitted).

A contemporary version of the Hypocratic Oath exists that seems to suggest a change in attitude towards suicide among some members of the medical profession. It states, "I tread with care in matters of life and death. . . . But it may also be within my power to take a life; this awesome responsibility must be faced with great humbleness and awareness of my own frailty." Roth, *supra* note 20, at 1454 (citation omitted).

266. Patricia A. Unz, *Euthanasia: A Constitutionally Protected Peaceful Death*, 37 N.Y.L. Sch. L. Rev. 439, 441 (1992) (discussing Plato's and Aristotle's support for those who decided to commit suicide to avoid pain and suffering).

267. The ancient Jews did not look at suicide with disfavor if committed to avoid enemy capture. Rosen, *supra* note 264, at 4-5. The Greeks and Romans also supported suicide when necessary to maintain one's honor and to avoid capture, humiliation or death in conflicts. *Id.* at 5.

268. Marzen et al., *supra* note 140, at 63-64.

269. *Id.* at 62.

270. 4 William Blackstone, *Commentaries on the Laws of England* 648 (1897).

ony²⁷¹ and punishable by forfeiture of property²⁷² and a dishonorable and ignominious burial.²⁷³ As evidence that the colonies did follow English common law, in Massachusetts in 1660, a person who committed suicide was buried along a common highway with stones laid upon his or her grave as a brand of infamy.²⁷⁴ Some time later, however, as the English would also do, the courts began to reject the common law penalties for suicide because they punished innocent families.²⁷⁵

Even though the legal attitudes towards suicide are well-documented, very little early case law on assisted suicide is available.²⁷⁶ A court may assume, however, that if the state punished suicide as a felony, those who aided in this act were also committing a crime. To support this assertion, a court could cite either Blackstone or later rulings as evidence of the prevailing attitude. Both sources support the conclusion that assisted suicide was considered criminal. As previously mentioned, not only did Blackstone view suicide as a felony,²⁷⁷ he also described those who assist in suicide as guilty of murder.²⁷⁸ The later holdings of some courts also support this proposition. In Connecticut²⁷⁹ and New York,²⁸⁰ for example, a person who advised another to kill himself or herself was guilty of murder. Maryland, Massachusetts and North and South Carolina also considered assisted suicide criminal.²⁸¹ Thus, at least six out of the original thirteen colonies prohibited assisted suicide.²⁸²

By the time the Fourteenth Amendment was ratified in 1868, most states had either statutes or case law indicating that they prohibited

271. Donald W. Cox, *Hemlock's Cup: The Struggle for Death with Dignity* 62 (1993); Morgan et al., *supra* note 113, at 8; Tsarouhas, *supra* note 111, at 795.

272. Morgan et al., *supra* note 113, at 8 (discussing English law distinction between those who committed suicide to avoid pain, in which case only movable goods were forfeited, and those who feared punishment, in which case all goods were forfeited). The courts waived this punishment in the eighteenth century as long as one did not commit suicide to avoid a felony charge. The Forfeiture Act of 1870 cemented this tendency towards leniency. Williams, *supra* note 264, at 262.

273. Tsarouhas, *supra* note 111, at 795. These penalties were repealed in 1823. Williams, *supra* note 264, at 260-61.

274. Williams, *supra* note 264, at 260-61.

275. Marzen et al., *supra* note 140, at 69.

276. *Id.* at 71. *Contra* Cox, *supra* note 271, at 62 (noting that a majority of the 13 colonies had case law indicating that assisting in suicide was a crime).

277. *See supra* text accompanying note 270.

278. Blackstone, *supra* note 270, at 648.

279. *See* Marzen et al., *supra* note 140, at 73 (citing 2 Z. Swift, *A Digest of the Laws of the State of Connecticut* 270 (2d ed. 1823)).

280. 1 John Colby, *Practical Treatise Upon the Criminal Law and Practice of the State of New York* 612 (1868).

281. *See* Marzen et al., *supra* note 140, at 73.

282. *Id.*

assisted suicide.²⁸³ Of the remaining states, only a few clearly permitted the act.²⁸⁴

Thus, in defining the context of the writing of suicide and assisted suicide, a judge may conclude that the predominant view towards suicide and assisted suicide at the time of the ratification of the Fourteenth Amendment was that it was a crime, even though the public may not have viewed individual suicide to avoid pain or humiliation as morally wrong.

B. *Present-Day Context of Suicide and Assisted Suicide*

The next step in Lessig's model is to interpret the context of the currently desired application. For assisted suicide, this includes determining how both law and society treat the act today.

At first glance, it appears as if the context of the application may have changed since the Fourteenth Amendment was passed, because states no longer consider suicide a felony.²⁸⁵ But just because suicide is not a crime, it does not necessarily follow that the states see nothing harmful about committing the act. Rather, the primary reason for the repeal of suicide statutes was that states viewed it as futile to punish those who kill themselves, because time in jail would not deter another future attempt.²⁸⁶ Indeed, the threat of punishment most likely strengthened a person's resolve to succeed the first time around.²⁸⁷ According to a California court, "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 . . ."²⁸⁸ States therefore view criminal laws against suicide attempts as useless cruelty and an immense obstacle to the possibility of treatment.²⁸⁹ Thus, suicide is currently seen as a sign of despondency or other mental disorder, not as a crime where criminal penalties are the solution.²⁹⁰

283. Of the 37 states that existed when the Fourteenth Amendment was ratified, 21 (including the 18 that ratified the amendment) had case law or statutes designating assisted suicide as a crime. *See id.* at 75.

284. Illinois, Indiana, Iowa, Louisiana, Maine, Nebraska and Texas, which voted to ratify the Fourteenth Amendment, and Ohio, which voted not to ratify it, were the only states that had no case law or statutes prohibiting assisted suicide. *Id.*

285. Tsarouhas, *supra* note 111, at 795 (citing Wayne R. LaFave & Austin W. Scott, *Handbook on Criminal Law* § 74, at 568-69 (1972)).

286. The court in *In re Joseph G.*, 667 P.2d 1176 (Cal. 1983), stated: "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." *Id.* at 1178 (citations omitted).

287. *See Williams, supra* note 264, at 305.

288. *In re Joseph G.*, 667 P.2d at 1178 (citations omitted).

289. *Williams, supra* note 264, at 305.

290. *See Marzen et al., supra* note 140, at 99. "That suicide itself has been decriminalized . . . demonstrates only that pity has replaced retribution as a socially proper response to suicide and that a punitive model was replaced by a therapeutic one in the law. Suicide is still a harm to be avoided, not a right to be encouraged."

The law, however, still seeks to deter suicide. For example, attempts are routinely treated in mental hospitals.²⁹¹ In addition, Justice Scalia, in his concurring opinion in *Cruzan v. Director, Missouri Department of Health*,²⁹² indicated that others may use force to prevent a person from committing suicide. "The state-run hospital . . . is not liable . . . if, in a State where suicide is unlawful, it pumps out the stomach of a person who has intentionally taken an overdose of barbiturates, despite that person's wishes to the contrary."²⁹³

Because states no longer treat suicide as a felony, its context of application may have changed. The effect of this on the lawfulness of assisted suicide, however, is not discernible without delving into assisted suicide in particular. Most states still have a law against aiding or abetting another to commit suicide, with some treating such an action as murder or manslaughter²⁹⁴ and others treating it as an in-

Thomas J. Marzen, "Out, Out Brief Candle": *Constitutionally Prescribed Suicide for the Terminally Ill*, 21 Hastings Const. L.Q. 799, 804 (1994). A therapeutic model replaced the punitive model.

291. As a court in California has noted, "The current psychiatric view is that attempted suicide is a symptom of mental illness." *In re Joseph G.*, 667 P.2d at 1179 (quoting Note, *The Punishment of Suicide—A Need for Change*, 14 Vill. L. Rev. 463, 465 (1969)). The same holds true in New Jersey. N.J. Stat. Ann. § 30:4-26.3a (West 1981) (calling for temporary hospitalization).

In Pennsylvania, a judge wrote that suicide "may be a sin, but it is not a crime; it is the result of disease. [A person who attempts suicide] should be taken to a hospital and not sent to a prison." Marzen et al., *supra* note 140, at 99 (citing *Commonwealth v. Wright*, 11 Pa. D. 144, 146 (1902)).

Several states have statutes providing for the hospitalization of those who attempt suicide. For example, in Florida, "[a] person may be taken to a receiving facility for involuntary examinations if there is reason to believe that he is mentally ill and because of his mental illness . . . [t]here is a substantial likelihood that without care or treatment he will cause serious bodily harm to himself." Fla. Stat. Ann. § 394.463(1) (West 1993). A person may be involuntarily placed for treatment if "[h]e is mentally ill . . . [and t]here is substantial likelihood that in the near future he will inflict serious bodily harm on himself or another person." Fla. Stat. Ann. § 394.467(1) (West 1993).

In Missouri, the state can take into custody and put in a mental health facility anyone who is a threat to harm himself. Mo. Ann. Stat. § 632.300 (Vernon 1988).

292. 497 U.S. 261 (1990).

293. *Id.* at 298 (Scalia, J., concurring). Justice Scalia has also indicated that the state and even private citizens may use force to interfere with bodily integrity to prevent a felony. *Id.* This rule applies to suicide, because under the common law, it was considered a felony. *Id.*

294. Alaska Stat. § 11.41.100(a)(1)(B) (1994); Ariz. Rev. Stat. Ann. § 13-1103(3) (1989); Ark. Code Ann. § 5-10-104(a)(2) (Michie 1993); Colo. Rev. Stat. Ann. § 18-3-104(1)(b) (West 1986); Conn. Gen. Stat. Ann. § 53a-56(a)(2) (West 1994); Haw. Rev. Stat. § 707-702(1)(b) (1993); Mo. Rev. Stat. § 565.023.1(2) (1992); 18 Pa. Cons. Stat. Ann. § 2505(a) (1991).

Several cases exist that apply these statutes. In one case, a prisoner had helped a fellow convict, who had talked about committing suicide for some time, kill himself. The court sentenced the defendant to life imprisonment for first degree murder. *State v. Fuller*, 278 N.W.2d 756, 757 (Neb. 1979). In another case, a husband killed his wife after she repeatedly requested aid in dying. The court upheld a conviction of first degree murder. *Gilbert v. State*, 487 So. 2d 1185, 1191 (Fla. 1986). As a final example, a husband who placed a mixture of poison within reach of his wife, upon her request,

dependent crime.²⁹⁵ In 1993, thirty-two states had criminalized assisted suicide.²⁹⁶ The Model Penal Code also currently regards assisted suicide as a felony.²⁹⁷ Furthermore, euthanasia is not available as a defense for a person who assists a suicide.²⁹⁸ Only rarely, however, are any of these so-called "mercy killers" sentenced to time in jail.²⁹⁹

The lack of prosecutions³⁰⁰ may reflect changing social views of assisted suicide. Thus there may be few prosecutions because the juries believe that those who assisted in a suicide did not act immorally.³⁰¹ Therefore, in the abstract, the act is considered wrong, but in concrete situations, assisting a suicide may appear to be the proper action to take. The way the juries have interpreted it, assisted suicide laws seek

was also guilty of first degree murder. *People v. Roberts*, 178 N.W. 690, 692-93 (Mich. 1920).

295. Cal. Penal Code § 401 (West 1993); Del. Code Ann. tit. 11, § 645 (1994); Ind. Code Ann. § 35-42-1-2 (Burns 1994); Kan. Stat. Ann. § 21-3406 (1992); Me. Rev. Stat. Ann. tit. 17-A, § 204.1 (West 1993); Minn. Stat. Ann. § 609.215(1) (West 1994); Miss. Code Ann. § 97-3-49 (1994); Mont. Code Ann. § 45-5-105(1) (1993); N.H. Rev. Stat. Ann. § 630:4(I) (1994); N.J. Stat. Ann. § 2C:11-6 (West 1994); N.M. Stat. Ann. § 30-2-4 (Michie 1978 & Supp. 1993); N.Y. Penal Law § 120.30 (McKinney 1987); N.D. Cent. Code § 12.1-16-04 (1993); Okla. Stat. Ann. tit. 21, § 813 (West 1983); 18 Pa. Cons. Stat. § 2505(B) (1993); S.D. Codified Laws Ann. § 22-16-37 (1993); Wash. Rev. Code Ann. § 9A.36.060 (West 1988); Wis. Stat. Ann. § 940.12 (West 1982).

296. Jennifer L. Hoehne, Note, *Physician Responsibility and the Right to "Death Care": The Call for Physician-Assisted Suicide*, 42 Drake L. Rev. 225, 238-39 (1993).

297. The Model Penal Code provides: "(2) *Aiding or Soliciting Suicide as an Independent Offense*. A person who purposely aids or solicits another to commit suicide is guilty of a felony of the second degree if his conduct causes such suicide or an attempted suicide, and otherwise of a misdemeanor." Model Penal Code § 210.5 (1962).

298. See, e.g., *Gilbert v. State*, 487 So. 2d 1185, 1190 (Fla. Dist. Ct. App. 1986) (concluding that euthanasia is not a defense to murder).

299. One of the rare examples is *Gilbert. Id.* In *Gilbert*, a husband received the minimum sentence of 25 years in prison for shooting his wife who was suffering from Alzheimer's and osteoporosis. *Id.* at 1187; see also Hoehne, *supra* note 296, at 246-47 (commenting on the *Gilbert* case). The governor, however, citing Gilbert's poor health as the reason, released him after he had served only five years of his sentence. *Id.* at 247.

Another case of lenient sentencing for a mercy killer was *People v. Edwards*, CR 7853 (Cal. Crim. Sup. Ct., Napa County 1991) (cited in Hoehne, *supra* note 296, at 247). In that case, the defendant suffocated his wife, who was paralyzed with a stroke and unable to care for herself, and was found guilty of voluntary manslaughter. Hoehne, *supra* note 296, at 247-48. He served only three years of probation and community service. *Id.* at 248.

300. A total of 11 doctors have been charged with killing their terminally ill patients, yet not one has been incarcerated. Cox, *supra* note 271, at 234-37; Tsarouhas, *supra* note 111, at 798-99. Even in the case of Dr. Kevorkian, the courts have dismissed all but one charge, and that charge is still pending in the courts. *People v. Kevorkian*, No. 99591, 1994 WL 700448, at *1-2 (Mich. Dec. 13, 1994).

301. Even if these physicians did the "right thing," it is up to the legislatures and not the courts to repeal laws that seem morally incorrect. See *supra* parts II.A. and II.C.

to deter the act from occurring and not to punish the actors after the fact.³⁰²

While assisted suicide remains against the law, popular opinion is somewhat more sympathetic toward those who engage in this action. Recent polls indicate that a majority of people support physician-assisted suicide and the idea that, at times, choosing death is honorable.³⁰³ Despite these polls, voters in both Washington and California have defeated initiatives seeking to legalize the act.³⁰⁴

302. Nevertheless, it is better to have the law on the books and ignore it than to have no law at all. David N. O'Steen & Burke J. Balch, *Why We Shouldn't Legalize Assisting Suicide, Part IV: The Need for Civil Remedies to Prevent Assisting Suicide* (May 1994) (unpublished manuscript on file with the *Fordham Law Review*). In this way, at least the prosecutor has the discretion to bring a charge in cases that appear suspicious.

On the other hand, perhaps criminal penalties are not the proper response to juries who refuse to punish physicians with a harsh penalty of jail time. At least two authors have indicated that a civil cause of action is preferable. *Id.* These authors have proposed giving private individuals standing to sue a doctor even if they had previously consented to the suicide. *Id.* Possible remedies for such a suit could include either an injunction or civil damages, with both likely to deter physicians from performing the action. *Id.*

303. See Henry R. Glick, *The Right to Die: Policy Innovation and Its Consequences* 84 (1992) (showing increasing support for active euthanasia, from 37% in 1947 to 69% in 1990); Julia Pugliese, *Don't Ask—Don't Tell: The Secret Practice of Physician-Assisted Suicide*, 44 *Hastings L.J.* 1291, 1318 (1993) (indicating that in the 1990 Roper Poll, 64% answered affirmatively, compared to 24% supporting the other side, to the question, "When a person has a painful and distressing terminal disease, do you think doctors should or should not be allowed by law to end the patient's life if there is no hope of recovery and the patient requests it?" (quoting The Roper Organization, Roper Report 90-5, in *Hemlock Q.*, July 1990, at 5)); *Across the USA: News From Every State*, *USA Today*, July 12, 1994, at 8A (stating that 52% approved of doctor-assisted suicide while 31% disapproved in a *Detroit News* poll); Peter Steinfelds, *Beliefs*, *N.Y. Times*, Nov. 9, 1991, at 11A (noting that 64% support assisted suicide in a *Boston Globe* poll); Evan Moore, *Taking Life in Their Hands; Should We Be Free to Choose Suicide—and to Ask for Help?*, *Hous. Chron.*, Oct. 2, 1994, at 1A (finding that 53% believe that assisted suicide is an acceptable act in a *New England Journal of Medicine* poll).

304. In November of 1991, Initiative 119 of Washington state read: "Shall adult patients who are in a medically terminal condition be permitted to request and receive from a physician aid-in-dying?" Bjorck, *supra* note 18, at 384 (quoting William McCord, *Dignity, Choice and Care*, *Society*, July/Aug. 1992, at 20). The proposed bill required two physicians to certify that the patient was mentally competent and terminally ill, had less than six months to live and had executed a medical directive requesting assisted suicide in the presence of two unrelated witnesses. Persels, *supra* note 18, at 103. To get the initiative on the ballot, 223,000 signatures were collected, 70,000 more than required. *Id.* Even so, the initiative failed 54% to 46%. *Id.* Voters interviewed on the way to and leaving from the polls said they were concerned about who would be considered terminally ill and that the elderly might choose suicide to spare their families and friends from economic and emotional hardship. *Id.* at 103-04.

In 1992, Proposition 161, commonly known as the California Death with Dignity Act, contained provisions that called for (1) two physicians to certify the patient as terminally ill, (2) the patient to be certified as mentally competent, (3) the patient to have executed a revocable, written statement in the presence of two disinterested witnesses, (4) the patient to have made the request more than once and (5) a licensed physician to perform the procedure. Mary M. Penrose, Comment, *Assisted Suicide:*

In November, 1994, however, an initiative finally passed in Oregon.³⁰⁵ The scenario leading up to election day appeared no different

A Tough Pill to Swallow, 20 Pepp. L. Rev. 689, 712 (1993). For a complete copy of the proposal, see Cox, *supra* note 271, at 263. Proposition 161 also lost 54% to 46%, even though more than 4.5 million citizens voted in favor of it. Bjorck, *supra* note 18, at 384. When asked, doctors said they voted against the bill because it lacked safeguards to protect the poor, depressed, those suffering pain, the mentally incompetent and seniors. *Id.* Others were also concerned that the initiative did not specify the type of doctor permitted to perform the act, and that it did not require a waiting period. Penrose, *supra*, at 713.

Supporters of these two measures have given various explanations for each defeat. Some have blamed it on the use of rhetoric. Derek Humphry of the Hemlock Society said at the time, " 'Aid-in-dying'—as the campaigners called it—can mean anything from a physician's lethal injection all the way to holding hands with the dying patient and saying 'I love you.' [The campaigners] avoided the words 'suicide' and 'euthanasia' as though they were obscenities." Cox, *supra* note 271, at 168 (quoting Derek Humphry, *Why Were They Beaten in Washington?*, Hemlock Q., Jan. 1992, at 4).

Not all agree with Humphry on this matter:

If you doubt that word games are becoming crucial to our social and political struggles, listen to Derek Humphry. A leading figure in the euthanasia movement, Humphry says his side lost at the polls in Washington state last fall largely because it lost the battle over language. . . In passing, Humphry pointed out the vagueness of "aid in dying." It can mean, he says, "anything from a physician's lethal injection all the way to holding hands with a dying patient and saying, 'I love you.'" Anyone who stretches a phrase to cover both killing and moral support is a serious player in the language games.

John Leo, *Stop the Murdering Language!*, U.S. News & World Report, April 12, 1993, at 23.

Humphry also blamed the lack of adequate safeguards for the failure in Washington, arguing that the campaigners made the mistake of painting the law with a "broad brush," intending to hammer out the details only after the voters approved the act. Cox, *supra* note 271, at 168 (quoting Derek Humphry, *Why Were They Beaten in Washington?* Hemlock Q., Jan. 1992, at 4). For example, in California, there was no need for witnesses to the oral request. Furthermore, no "cooling-off" period was necessary between the time the patient made the request and when the physician carried it out. Bjorck, *supra* note 18, at 385 (quoting James W. Walters, *Perspective on Prop. 161; Aid in Dying is Human, Humane; Assisted Suicide for the Terminally Ill Doesn't Conflict with Medical or Religious Interests; It Does Respect Individual Rights*, L.A. Times, Oct. 18, 1992, at M5).

Disproportionate campaign funding may also have caused the initiative to fail. Those opposing the act raised 2.8 million dollars compared to only \$215,000 supporters collected. *Id.* The L.A. County Medical Association, the California Association of Catholic Hospitals, the Los Angeles County Medical Association, the California Nurses Association and the Catholic Church all fought against the statute. Hoehne, *supra* note 296, at 241; Penrose, *supra*, at 711.

In addition, those who wrote the initiatives may have worded them vaguely. For example, the California version did not indicate whether patients must necessarily exhaust all forms of treatment before a physician can certify them as terminal. Pugliese, *supra* note 303, at 1321.

Those who supported the act cited further reasons for its failure, including negative publicity arising out of Dr. Kevorkian's activities and the lack of a residency requirement for physicians who wished to practice assisted suicide. Penrose, *supra* at 710.

305. *Voters in Oregon Allow Doctors to Help the Terminally Ill Die*, N.Y. Times, Nov. 11, 1994, at A28.

The Oregon act is entitled Measure 16, the Death with Dignity Act, and got 95,777 signatures of 66,771 required to put the initiative on the ballot. Evan More, *Taking Life in Their Hands; Should We Be Free to Choose Suicid—and to Ask for Help?*,

than that of the prior two similar initiatives that failed. Once again, a strong coalition emerged that opposed legalizing assisted suicide, a coalition that included the American Medical Association and various church organizations.³⁰⁶ This coalition outspent the proponents ten to one in advertising campaigns and other publicity events.³⁰⁷ Nevertheless, the Death with Dignity Act passed by a vote of fifty-two percent to forty-eight percent.³⁰⁸ Even though U.S. District Judge Michael Hogan blocked Orgeon from implementing the law until the court has ruled on the issue,³⁰⁹ the fact that the people passed the initiative demonstrates broad public support for assisted suicide.

Other states recently have considered (or are currently debating) the issue. In New York, for example, a task force rejected the idea of legalizing euthanasia.³¹⁰ In addition, in 1992, the state legislatures of Iowa, Maine, Michigan and New Hampshire considered bills legalizing assisted suicide, yet these states did not pass any of these bills.³¹¹ Various state legislatures are currently discussing the issue, including those in Connecticut and Virginia.³¹² In addition, California, New Hampshire and Washington are reconsidering measures.³¹³

Currently, however, most state legislatures retain statutes prohibiting assisted suicide. While this is the status of the law at the present time, as each year passes, more and more legislatures will consider whether or not to legalize the act. But as it stands, those who seek such assistance may find that many physicians are unwilling to provide it. In sum, the overall context of assisted suicide has not changed between the time of the framing of the Fourteenth Amendment and its current application in society.

C. No Change in Context

After ascertaining both the context of the writing and of the application, the final step in "Fidelity in Translation" is a process Lessig

Hous. Chron., Oct. 2, 1994, at A1. It contains other safeguards such as only those older than 18 with a terminal illness could make requests, a patient must make two requests to the same physician, wait at least 15 days and be counseled about alternatives, pass a competency assessment, and have a second physician confirm the illness. Art Caplan, *Death Be Not Allowed: Resist Assisted Suicide*, Hous. Chron., Oct. 1, 1994, at Religion 3.

306. *Measure on Suicide Fought by Churches*, L.A. Times, Nov. 5, 1994, at B4.

307. Ellen Goodman, *Death on the Ballot*, Boston Globe, Nov. 3, 1994, at 19.

308. *Voters in Oregon Allow Doctors to Help the Terminally Ill Die*, N.Y. Times, Nov. 11, 1994, at A28.

309. *U.S. Judge Keeps Oregon's New Suicide Law in Limbo*, L.A. Times, December 28, 1994, at A5.

310. One reason the legislature rejected legalizing euthanasia was because it feared the right would become a duty to act. Bob Keeler, *Assisted Suicide Rejected; State Panel Cites Dangers*, Newsday, May 26, 1994, at 3.

311. Pugliese, *supra* note 303, at 1319.

312. Bjorck, *supra* note 18, at 386.

313. *Id.* at 386; *States Wrangle with Death Wishes*, USA Today, May 23, 1994, at 8A.

calls "translation."³¹⁴ Where there has been no change in either a legal or a non-legal factor, a court is required to uphold the original intent of the ratifiers.³¹⁵

As previously discussed, the contexts of suicide and assisted suicide have not changed.³¹⁶ In addition, "translation" is not needed because the Supreme Court has not expanded the categories of what constitutes a fundamental right.³¹⁷ Whenever a court engages in substantive liberty analysis, it considers the historical basis for the right in question. This was true in cases such as *Cruzan v. Director, Missouri Department of Health*,³¹⁸ *Bowers v. Hardwick*³¹⁹ and *Roe v. Wade*.³²⁰ Therefore, translation is not required because the legal treatment of assisted suicide has not changed and the constitutional principles that apply to the act are not expanding.

Because the legal factors have remained constant, the only reason for a court to engage in translation is if non-legal factors suggest a need for change. It is important to remember, however, that the court only should translate those changes that are not "political."³²¹

The most important non-legal consideration is that advances in medical treatment can keep a patient alive for longer periods of time than in the past, thus prolonging the painful experience of terminal illness.³²² On the other hand, pain killers have become increasingly sophisticated.³²³ Whether these differences are actually beneficial to the patient is unclear.³²⁴ The answer to this question, however, is based on moral considerations. "Fidelity in Translation," on the other hand, requires the courts to avoid making a determination based on these non-legal, "political" elements, because the translator's job is not to make the text better.³²⁵ Moral arguments that may favor modi-

314. Lessig, *supra* note 11, at 1189.

315. *See supra* part II.C.

316. *See supra* parts III.A. and III.C.

317. For a discussion of two other legal factors, see parts III.A. and III.B. (describing assisted suicide and suicide).

318. 497 U.S. 261 (1990).

319. 478 U.S. 186 (1986).

320. 410 U.S. 113 (1973).

321. *See* Lessig, *supra* note 11, at 1254. "Political" changes are those changes that the legislature should correct, those changes which the original ratifiers themselves would have battled over. *Id.*

322. Robert L. Risley, *Ethical and Legal Issues in the Individual's Right to Die*, 20 Ohio N.U. L. Rev. 597, 606 (1994) (noting that the modern medicine can keep the body alive now even when the brain has died).

323. Some would argue that medical technology improves the prospects of patients, giving them more time to heal. On the other hand, patients attached to life sustaining equipment may believe they have no chance at all of living a meaningful life and would therefore rather die with dignity.

324. But legalizing assisted suicide could create an obligation to die. The law should not require that people choose death. Because of this possibility, a court should not consider this factor as changing a non-legal presupposition. *See supra* notes 115, 219 and 304.

325. Lessig, *supra* note 11, at 1253.

fyng the laws are for the people to make through their elected representatives in the state legislatures. Laws that support assisted suicide are examples of this type of change for the "better"—a change the judiciary should not make. According to "Fidelity in Translation," the courts should respect the separation of powers doctrine and leave it to the legislatures to pass laws that either permit or prohibit assisted suicide. Therefore, even the non-legal factors do not mandate translating the Constitution to create a right to assisted suicide.

CONCLUSION

Returning to the thoughts of Dr. Kevorkian,³²⁶ his fight in the courts will likely prove unfruitful. A court choosing to interpret the Constitution according to Lawrence Lessig's "Fidelity in Translation" would find that Kevorkian's patients have no constitutional right to seek assisted suicide. Therefore, to respect the intent of the ratifiers, the judiciary should not invalidate any laws relating to assisted suicide, no matter how persuasive the moral arguments favoring invalidation appear. If the arguments supporting the act are so overwhelming, state legislatures will recognize this fact and pass laws that permit assisted suicide. It is here that the advocates of assisted suicide should focus their efforts. Until the time, however, when assisted suicide supporters are able to convince the people that their argument better serves justice, the courts do not possess the authority to find a constitutional right to engage in assisted suicide in the Due Process Clause of the Fourteenth Amendment.

326. See *supra* note 1 and accompanying text.