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READING THE MYSTERY PASSAGE NARROWLY: A LEGAL, ETHICAL AND PRACTICAL ARGUMENT AGAINST PHYSICIAN ASSISTED SUICIDE

MICHAEL B. HICKEY*

I. INTRODUCTION

The law should not allow people to define their existence by hastening their own deaths. The law also should not protect from governmental intrusion all intimate and personal choices a person makes in a lifetime. Proponents of physician assisted suicide have claimed that the law should protect these choices. The proponents argue that language in the Supreme Court’s decision in Planned Parenthood v. Casey\(^1\) establishes a right to hasten one’s own death. This Note argues, however, that the Constitution does not protect a decision to hasten one’s own death. Moreover, although the choice for physician assisted suicide resembles other choices protected from governmental intrusion by the Constitution, this Note argues that physician assisted suicide is significantly different and should not be the subject of constitutional protection.

In discussing these matters, this Note argues that the Supreme Court should read the language in Casey narrowly (i.e., applying it only to the facts in Casey), rather than broadly (i.e., applying it to circumstances surrounding physician assisted suicide) for three reasons. First, the Note argues that in light of Supreme Court precedent, people erroneously extracted the language from the Court’s Casey opinion when they applied it broadly to physician assisted suicide. Second, the Note argues that reading the language in Casey broadly does not comport with

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a basic philosophical system called limited universalism. Third, the Note explains the real concerns of the slippery slope argument when reading this *Casey* language broadly. This Note concludes that courts should read the mystery passage narrowly. Supreme Court precedent, philosophical argumentation and practical realities fail to justify reading the language in *Casey* broadly.

II. THE LEGAL CASE AGAINST READING THE MYSTERY PASSAGE BROADLY

A. Liberty Interests

The Fourteenth Amendment’s Due Process Clause protects certain liberty interests. These interests represent individuals’ freedom to make certain choices. If such an interest meets certain criteria, the Federal Constitution protects from governmental intrusion individuals exercising their choice. Robert Kline argued that the Supreme Court has implemented two approaches to determine whether a liberty interest exists:

One approach examines whether an interest is “implicit in the concept of ordered liberty” or is supported by the history and traditions of our nation. The second, more expansive, approach avoids making the Constitution into a “hidebound document” by determining which evolving liberty interests are entitled to constitutional protection.

Whether a liberty interest exists drives the debate about the constitutionality of physician assisted suicide.

Kline also distinguished between a liberty interest and a liberty right. He wrote that “[a] government regulation limiting an individual’s liberty *right* will face strict judicial scrutiny. A regulation limiting an individual’s liberty *interest*, will be subject to a test balancing the state’s interest against the importance of the liberty interest.” According to Kline, if physician assisted suicide is a liberty right, a government regulation that limits it must survive

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2. The Fourteenth Amendment provides in pertinent part:
   No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
   U.S. CONST. amend. XIV, § 1.


4. Id. at 532.
strict judicial scrutiny to be constitutional. If physician assisted suicide is a liberty interest, however, a government regulation that limits it merely must survive a balancing test between the individual and the state's interests. Therefore, whether physician assisted suicide is a liberty right or interest significantly impacts the hurdle through which the regulation must leap to be constitutional.

Attempting to provide guidance about what liberty interests should be protected, Thomas Grey has argued that we have an "unwritten Constitution" that protects some liberty interests that the Constitution does not enumerate. Grey suggested that our Constitution entails a concept of "higher law" which protects "natural rights." Upon this basis, Grey built a theory of constitutional law that encourages judges to enforce rights that the Constitution does not mention.

First, Grey constructed the "pure interpretive model," with which he disagrees. It is an interpretation that focuses on the text of the Constitution and entails looking to the purposes behind the Constitution to find constitutional norms. The pure interpretive model differs from Grey's own interpretation of the Constitution in that it does not include the "courts' additional role as the expounder of basic national ideals of individual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law in the written Constitution." Thus, the primary difference is that the pure interpretive model imposes norms found only in the Constitution, and Grey's theory imposes norms "of basic national ideals of individual liberty and fair treatment[...]." Grey's "living Constitution" allows the judiciary to develop and shape the content of the abstract rights found in the Constitution.

Grey's defense for his living Constitution proposition boils down to two arguments: first, if courts accept the pure interpretive model, they must abandon all of the procedural and substantive due process doctrines, especially in areas of criminal procedure. Grey argued that the courts have implemented norms not found in the Constitution in establishing these doctrines. Because Grey thought that it is wrong to abandon such
doctrines, he argued that courts should perpetuate the living Constitution.

Similarly, Grey's second defense was essentially that courts have always been implementing norms not mentioned or implied in the Constitution. Thus, Grey thought that courts could continue to do so. Grey summarized his argument:

[T]here was an original understanding, both implicit and textually expressed, that unwritten higher law principles had constitutional status. From the very beginning, and continuously until the Civil War, the courts acted on that understanding and defined and enforced such principles as part of their function of judicial review. Aware of that history, the framers of the 14th amendment reconfirmed the original understanding through the "majestic generalities" of section I. And ever since, again without significant break, the courts have openly proclaimed and enforced unwritten constitutional principles.\(^2\)

It was against the backdrop of these theories that the Court approached the question of substantive due process in the 1980s and 1990s.

B. Cruzan

The Supreme Court has decided a long line of cases regarding an individual's right to make a decision free from governmental intrusion. The Supreme Court has established that this right includes protection for some decisions about marriage,\(^13\) procreation,\(^14\) contraception,\(^15\) family relationships,\(^16\) and child

\(^{12}\) Id. at 717.

\(^{13}\) See Loving v. Virginia, 388 U.S. 1 (1967) (holding that Virginia statute prohibiting interracial marriages violated both the Equal Protection and Due Process Clauses of the Fourteenth Amendment).


\(^{15}\) See Eisenstadt v. Baird, 405 U.S. 438 (1972) (holding that Massachusetts statute criminalizing the use of contraceptives by unmarried persons violated the Equal Protection Clause of the Fourteenth Amendment); Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that Connecticut statute criminalizing the use of contraceptive devices violated the right of married persons to use contraceptives).

\(^{16}\) See Moore v. East Cleveland, 431 U.S. 494 (1977) (holding that a zoning ordinance preventing a woman from living with her two grandsons violated the Due Process of the Fourteenth Amendment).
rearing and education. Seventeen years after the Supreme Court decided in Roe v. Wade that a woman has a right to terminate a pregnancy prior to fetal viability—i.e., a right to end the developing life of the fetus—the Court considered in Cruzan v. Director, Missouri Department of Health whether a patient has a right to be free from unwanted, life-sustaining medical treatment.

In Cruzan, Nancy Cruzan was in a persistent vegetative state as a result of a severe car crash, and her parents wanted to terminate her artificial nutrition and hydration. The hospital would not do so without a court order, so the Cruzans brought a declaratory judgment action. The trial court found that there was virtually no hope that Nancy Cruzan would ever come out of her persistent vegetative state. Only the tubes that fed her nutrition and hydration sustained Nancy’s life. Although all knew it would cause her death, Nancy’s parents sought to have those tubes removed.

The state trial court determined that Nancy had a fundamental right under the State and Federal Constitutions to refuse or direct withdrawal of life sustaining medical procedures. The Supreme Court of Missouri reversed. Although the state supreme court acknowledged the common-law doctrine of informed consent, which entails a right to refuse life-sustaining medical treatment, the court hesitated to apply that doctrine to the facts of this case. The Missouri Supreme Court declined to hold that the State Constitution guaranteed a right to refuse life-sustaining medical treatment in every circumstance, and expressed reservations about whether the Federal Constitution did either. Moreover, the Missouri Supreme Court held that Nancy’s parents failed to provide clear and convincing evidence that Nancy’s wish actually was to terminate the life-sustaining medical treatment.

17. See Pierce v. Society of Sisters, 268 U.S. 510 (1925) (holding that Oregon statute requiring all children between the ages of eight and sixteen to attend public school violated the Due Process Clause of the Fourteenth Amendment); Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that Nebraska statute prohibiting the teaching in school of modern languages other than English violated the Due Process Clause of the Fourteenth Amendment).
20. See id. at 266.
21. See id. at 267-68.
22. See id. at 268.
23. See Cruzan v. Harmon, 760 S.W.2d 408, 416-17 (Mo. 1988).
24. See id. at 417-18.
25. See id. at 424.
Affirming the Missouri Supreme Court, the Supreme Court of the United States opined that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." Moreover, the Court "assume[d] that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition." Although Nancy could not exercise her own rights because she was not competent, another person could exercise her rights on her behalf. The Court reasoned, however, that determining that Nancy has a liberty interest in refusing lifesaving hydration and nutrition did not end the inquiry. The Court then balanced the state interests against Nancy's liberty interests, and held that Missouri constitutionally could require proving the incompetent person's wishes by clear and convincing evidence in light of the significant state interests.

Justice Scalia authored a concurring opinion to emphasize his belief that the Supreme Court should not delve into the field of determining when life ends. Foreshadowing the Court's analysis in *Washington v. Glucksberg*, Scalia wrote that "[i]t is at least true that no 'substantive due process' claim can be maintained unless the claimant demonstrates that the State has deprived him of a right historically and traditionally protected against state interference. That cannot possibly be established here." According to Justice Scalia, the history and tradition of our nation grounds the substantive due process analysis of whether a liberty interest exists. Moreover, Justice Scalia noted that the right to suicide is not rooted in the history and tradition of our nation. However, the Court in *Cruzan* set the stage for a right to physician-assisted suicide claim by implicitly holding that a person has a constitutionally protected liberty interest in refusing unwanted medical treatment.

C. *Casey*

Two years after the Court decided *Cruzan*, the court faced another decisional privacy issue. In *Planned Parenthood v. Casey*,

27. *Id.* at 279.
28. *See id.*
29. *See id.* at 284.
30. *Id.* at 293 (Scalia, J., concurring).
32. *Cruzan*, 497 U.S. at 294 (Scalia, J., concurring) (citations omitted).
33. *See id.* at 295.
abortion clinics and physicians challenged the constitutionality of five provisions of the Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989. The clinics and physicians argued that the act violated the Due Process Clause of the Fourteenth Amendment because the provisions were undue burdens on a woman’s right to decide to terminate a pregnancy, a right the Supreme Court held existed in Roe v. Wade.

The district court held a three-day bench trial to determine whether the Pennsylvania provisions were unconstitutional. The district court held that all of the provisions were unconstitutional and issued an injunction against Pennsylvania enforcing the provisions. The Court of Appeals for the Third Circuit affirmed in part and reversed in part, holding that all of the provisions except for the husband notification requirement were constitutional. The Supreme Court granted certiorari.

Justices O’Connor, Kennedy and Souter authored a joint opinion for the Supreme Court, in which Justices Blackmun and Stevens joined in several parts. The joint opinion first reaffirmed the Court’s decision in Roe that a woman has a right to decide to terminate a pregnancy prior to the time of fetal viability. The joint opinion relied heavily on the doctrine of stare decisis here. However, the joint opinion, which carried five votes for this reasoning, also relied on the mystery passage, which is discussed below. The joint opinion then turned to the five provisions in the Pennsylvania law individually. The joint opinion concluded that none of the provisions, besides the spousal notification provision, imposed an undue burden to a woman’s right to terminate a pregnancy. Thus, although a woman has a liberty interest in terminating a pregnancy, states can impose certain restraints on such an act. Even though it may be an intimate

35. 18 Pa. Cons. Stat. §§3203-3220 (1990). The statute required the following:

(1) that a woman seeking an abortion give her informed consent prior to the operation; (2) that a woman seeking an abortion be provided with information about abortions twenty-four hours in advance of the operation; (3) that a married woman notify her husband of her decision to have an abortion; (4) that a minor inform at least one parent or obtain court approval.

36. 505 U.S. at 844-45.
40. See id. at 861.
41. See id. at 879-901.
and personal choice, central to personal dignity and autonomy, states nevertheless can impose guidelines on terminating a pregnancy.

In its reasoning, the joint opinion noted that the Fourteenth Amendment protects from federal interference more liberty interests than the first eight amendments to the Constitution name or courts have previously declared. The joint opinion stated "[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." For example, although the Constitution does not provide explicitly for a liberty interest in a married couple choosing to use contraception within the confines of their home, the Due Process Clause of the Fourteenth Amendment protects such an interest.

The joint opinion in *Casey* recognized that the test for whether the Fourteenth Amendment protects a liberty interest is not simply whether that interest appears in the Constitution. Five Justices voted for the section in the *Casey* opinion that noted: "[t]he inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment." In this way, the joint opinion argued that reasoned judgment should be the scale used to determine whether a liberty interest exists.

The joint opinion used the reasoned judgment scale when weighing the issue in *Casey*. The opinion 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. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

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44. See id. at 847-48.
45. Id. at 848.
47. *Casey*, 505 U.S. at 849.
48. Id. at 851 (citations omitted).
This quotation—which I call the mystery passage—is crucial. According to the joint opinion, the liberty that the Fourteenth Amendment protects involves such matters as marriage, procreation, contraception, family relationships, child rearing, and education. One characteristic that the matters listed share is that they all involve "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy." This characteristic tips the reasoned judgment scale in favor of recognizing a liberty interest.

Justice Scalia criticized the joint opinion's reasoned judgment scale. Scalia noted that the authors of the joint opinion never claimed that the decision in Roe would support the reasoned judgment scale; rather, the authors retreated to the doctrine of stare decisis. Scalia went on to comment:

The emptiness of the "reasoned judgment" that produced Roe is displayed in plain view by the fact that . . . the best the Court can do to explain how it is that the word "liberty" must be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice. . . . But it is obvious to anyone applying "reasoned judgment" that the same adjectives can be applied to many forms of conduct that this Court . . . has held are not entitled to constitutional protection—because, like abortion, they are forms of conduct that have long been criminalized in American society. To Justice Scalia, the reasoned judgment scale, which the phrase "most intimate and personal choices" further clarifies, does not yield an intelligible rule. The reasoned judgment scale faces the same practical difficulties that the living constitution theory encounters: how do we consistently decipher which liberty interests are imbedded in the Constitution? We cannot look to history because, as Justice Scalia noted, some forms of conduct to which the mystery passage would apply have long been criminalized in American society. Justice Scalia concluded, "[i]t is not reasoned judgment that supports the Court's decision; only personal predilection." If we do not find the scale in the Constitution itself, according to Justice Scalia, only personal preferences can shape the scale.

49. *See id.* at 982-83 (Scalia, J., concurring in the judgment in part and dissenting in part).
50. *Id.* at 983-84 (citations omitted).
51. *Id.* at 984.
Justice Scalia, however, overvalued the weight of stare decisis in the joint opinion’s reasoning. The joint opinion relied on both stare decisis and the reasoned judgment scale to arrive at its decision. The joint opinion did not state that stare decisis was the sole basis for reaffirming the Court’s holding in *Roe*. Moreover, the joint opinion’s reasoning that included the mystery passage arrived at the same conclusion: reaffirming the Court’s decision in *Roe*. Absent evidence to the contrary, the argumentation that included the mystery passage must be part of the Court’s *ratio decidendi*.

Notwithstanding the problems that the reasoned judgment scale and the mystery passage face, the Fourteenth Amendment does not protect—and the joint opinion does not argue that it does—every intimate and personal choice, and every choice central to personal dignity and autonomy. If the Fourteenth Amendment did that, a contradiction would arise. Consider a person who defines his existence by screaming “Fire!” in a crowded theater when there is not a fire. Presumably, this person’s decision to scream “Fire!” is the most intimate and personal choice he will make, and a choice central to his dignity and autonomy. However, the Fourteenth Amendment surely fails to protect such a liberty interest, if a liberty interest indeed exists here. Therefore, merely because a choice is the most intimate and personal choice a person may make in a lifetime, and a choice central to personal dignity and autonomy, does not mean necessarily that the choice is a liberty interest that the Fourteenth Amendment protects.

The Fourteenth Amendment also does not protect every intimate and personal choice for self-regarding conduct. For example, a person cannot smoke marijuana in her own home. She may define her existence by smoking marijuana. However, although she may be alone and is in danger of hurting only herself, the law does not permit her to smoke marijuana. The Fourteenth Amendment does not shield the individual, even if she will only affect herself, in all intimate and personal choices.

The joint opinion, however, confined the analysis of the issue to whether a liberty interest exists to terminate a pregnancy and, if so, what limits states can impose on it. The joint opinion did not consider the liberty interests of the person who screams “Fire!” in a crowded theater or of the person who smokes marijuana in her own home. In the paragraph following the mystery passage, the joint opinion distinguished abortion from choices relating to marriage, procreation, contraception, family relationships, child rearing and education. That is, the joint opinion distinguished those choices traditionally recognized as carrying
Fourteenth Amendment protection. The joint opinion also distin-
guished abortion from all other choices. The joint opinion
stated "[a]bortion is a unique act."\(^{52}\)

The joint opinion's declaration here is important because it
offers a rational basis to limit the mystery passage in the joint
opinion's preceding paragraph. As we will see, reading the mys-
tery passage broadly leads down a slippery slope to conclusions
that are absurd. Someone could argue, as Judge Reinhardt did in
*Compassion in Dying v. Washington*,\(^{53}\) that deciding to hasten
one's own death is as intimate and personal a choice as is the
decision to terminate a pregnancy.\(^{54}\) The joint opinion, how-
ever, stated that abortion is a unique act. To argue that the Con-
stitution also protects other choices, e.g., the choice to hasten
one's own death, as liberty interests, is fallacious. The joint opin-
ion qualified the mystery passage by clearly stating that abortion
is a unique act. Abortion is unique in the sense that other
choices cannot justly be compared to it. Therefore, the mystery
passage should only apply to the unique act, i.e., abortion.

In his dissent, Chief Justice Rehnquist argued that abortion
is different from other liberty interests. He wrote that "[u]nlike
marriage, procreation, and contraception, abortion 'involves
the purposeful termination of a potential life.' The abortion deci-
sion must therefore 'be recognized as *sui generis*, different in kind
from the others that the Court has protected under the rubric of
personal or family privacy and autonomy.'"\(^{55}\) When we turn to
physician assisted suicide, the question becomes whether an interest in physician assisted suicide is significantly different from choices that the Court has recognized as liberty interests in the past. Is physician assisted suicide also unique? If the decision in *Casey* is to ground the constitutionality of a liberty interest in hastening one's death, the argument for a liberty interest in physician assisted suicide must be substantially similar to the argument for a liberty interest in abortion.

D. *Bowers*

The Supreme Court has not found a liberty interest in every personal choice. In *Bowers v. Hardwick*,\(^{56}\) Michael Hardwick, a

\(^{52}\) Id. at 852.

\(^{53}\) 79 F.3d 790 (9th Cir. 1996).

\(^{54}\) See id. at 800-02.


\(^{56}\) 478 U.S. 186 (1986).
homosexual, challenged the constitutionality of the Georgia statute that criminalized consensual sodomy. The police charged Hardwick with committing sodomy with another adult male in the bedroom of Hardwick’s own home. The district court granted the Attorney General of Georgia’s motion to dismiss for failure to state a claim upon which relief could be granted. The Eleventh Circuit reversed the district court’s decision. It held that the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment protected private and intimate association and that such associations were beyond the reach of state regulation. When the case reached the Supreme Court, Justice White, delivering the majority opinion, framed the issue narrowly: “The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . . .” The Court held that the Constitution confers no liberty interest to engage in homosexual sodomy, even in the privacy of one’s own home.

The Court would not infer a liberty interest in homosexual activity from prior Court decisions. One reason the Court could not infer a liberty interest is because of how narrowly the Court framed the issue. Jed Rubenfeld argued that “[s]o stated, the issue was for the majority literally a foregone conclusion.” Although the Court has traditionally found a liberty interest in matters dealing with the family, marriage and procreation, the Court stated that there was “[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other . . . .” Thus, the Court would not expand the set of liberty interests which the Fourteenth Amendment protects to include consensual sodomy in the privacy of one’s own home.

57. The Georgia statute provided, in pertinent part:
   (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . .
   (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. . . .

GA. CODE ANN. § 16-6-2 (Michie 1984).
58. See Bowers, 478 U.S. at 187-88.
59. See id. at 188.
60. See Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985).
61. See id. at 1212-13.
63. See id. at 195-96.
64. See id. at 190.
66. See supra notes 13-17 and accompanying text.
An underlying theme in Justice White's opinion was the notion of judicial legitimacy. The Court was unwilling to protect rights that the Constitution does not enumerate. The Court opined that "[t]he case also calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate." Furthermore, the opinion stated:

Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. The Court was reluctant to establish a liberty interest in consensual sodomy for fear of undermining judicial legitimacy.

The decision in Bowers also supports refusing to expand the set of liberty interests to include physician assisted suicide. One could argue that physician assisted suicide can be inferred from decisions, such as Cruzan and Casey, which dealt with refusing life-sustaining medical treatment and terminating a pregnancy. However, the decision in Bowers sets a precedent of refusing to expand the set of liberty interests because of a claimed right's similarity with previously recognized rights. Even if physician assisted suicide is similar to refusing life-sustaining medical treatment, a more substantial argument is necessary to support recognizing physician assisted suicide as a liberty interest. There is a connection between family, marriage, or procreation on the one hand and physician assisted suicide on the other. However, as the decision in Bowers indicates, that connection does not mean necessarily that hastening one's death is a liberty interest.

E. Compassion in Dying I, II & III

Two years after the Supreme Court's decision in Casey, a case began in the United States District Court for the Western District of Washington that threatened to expand the doctrine of decisional privacy even further. In Roe, Cruzan and Casey, the Court reaffirmed its expansive reading of the Due Process Clause. Moreover, in light of the mystery passage in Casey, people argued that physician assisted suicide was also a liberty interest protected by the Fourteenth Amendment. They argued that choosing suicide for a terminally-ill patient is as monumental a decision as terminating a pregnancy or removing life-sustaining medical

68. Id.
69. Id. at 191.
treatment. In this context, a challenge to a law that prohibited physician assisted suicide was inevitable.

In *Compassion in Dying v. Washington*, terminally ill patients, physicians and a nonprofit organization sought to have declared unconstitutional a Washington law criminalizing physician assisted suicide. The Washington statute provided in pertinent part: “A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide.” The central issue in *Compassion in Dying* was whether a terminally ill person had a constitutionally-protected liberty interest in hastening the person’s own death. If such a liberty interest existed, the succeeding question was whether prohibiting a physician from aiding the terminally ill person to exercise that right violated the person’s due process rights.

In the district court, District Judge Rothstein held that the Washington statute was unconstitutional. Judge Rothstein first reasoned that the statute violated a liberty interest that the Fourteenth Amendment guaranteed. Judge Rothstein noted the “long line of cases” where the Supreme Court has protected choices “relating to marriage, procreation, contraception, family relationships, child rearing and education . . . .” Judge Rothstein then quoted the mystery passage from *Casey*. Judge Rothstein acknowledged that the Supreme Court wrote the mystery passage in a different context from this case’s facts. However, Judge Rothstein found “the reasoning in *Casey* highly instructive and almost prescriptive.” Judge Rothstein held that like terminating a pregnancy, hastening one’s death is an intimate and personal choice. Moreover, Judge Rothstein concluded that since hastening one’s death is an intimate and personal choice, in light of the mystery passage, it must be a liberty interest.

When the Ninth Circuit first heard the case, Judge Noonan authored the opinion for the majority of the three judge panel. The court reversed the district court’s holding that the decision to hasten one’s own death is a liberty interest protected by the Due Process and Equal Protection Clauses of the Fourteenth

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70. 79 F.3d 790 (9th Cir. 1996).
73. *Id.* at 1459.
74. *Id.*
75. Judge Rothstein then evaluated whether the Washington statute provided an undue burden, and held that it did. *See id.* at 1464-66. Buttressing her argument, Judge Rothstein also held that the Washington statute violated the Equal Protection Clause of the Constitution. *See id.* at 1466-67.
Amendment. Judge Noonan first argued that the mystery passage should not be taken out of context. He criticized Judge Rothstein’s reasoning that the mystery passage was “almost prescriptive.”

Judge Noonan argued that reading the mystery passage broadly leads to a conclusion that is a “reductio ad absurdum.” He wrote:

If at the heart of the liberty protected by the Fourteenth Amendment is this uncurtailable ability to believe and to act on one’s deepest beliefs about life, the right to suicide and the right to assistance in suicide are the prerogative of at least every sane adult. The attempt to restrict such rights to the terminally ill is illusory. If such liberty exits in this context, as Casey asserted in the context of reproductive rights, every man and woman in the United States must enjoy it.

According to Judge Noonan, applying the mystery passage in the context of physician assisted suicide leads to absurd results. If we applied it and read it broadly, the mystery passage would permit physician assisted suicide for every sane adult. Permitting physician assisted suicide for every sane adult is the absurd conclusion that Judge Noonan argued disproves the hypothesis that judges should read the mystery passage broadly and apply it in the context of physician assisted suicide.

Judge Noonan also argued that the district court’s decision lacked foundation not only in legal precedent, but also in the traditions of our nation. Judge Noonan went so far as to write that inventing a constitutional right to physician assisted suicide is “antithetical to the defense of human life that has been a chief responsibility of our constitutional government.” Moreover, Washington had many significant interests supporting the constitutionality of its statute.

Judge Reinhardt, who authored the majority opinion overturning the panel decision in Compassion in Dying, first noted the broad approach by which he would address the issue. Judge Reinhardt remarked that Judge Noonan “defined the claimed liberty interest as a ‘constitutional right to aid in killing one-

76. See Compassion in Dying v. Washington, 49 F.3d 586, 590 (9th Cir. 1995).
77. Id.
78. Id. at 591.
79. Id.
80. Id.
81. See id. at 592-93.
Judge Reinhardt's opinion argued that such a narrow approach was not appropriate because this narrow interest could not exist without a broader interest. One cannot have a constitutional right to aid in killing oneself without having a constitutional right to hasten the person's own death. Therefore, Judge Reinhardt first tackled the broader issue of whether a person has a liberty interest in hastening the person's own death.

Judge Reinhardt summarized his approach to deciding the case when he wrote: "it is the end and not the means that defines the liberty interest." Judge Reinhardt argued that the court should determine two issues in succession. First, the court should determine whether there is a liberty interest in hastening one's own death. Only after the court has determined that issue should the court determine whether prohibiting a physician from assisting the terminally ill person to exercise that liberty interest violates the Due Process Clause. The first issue is broad in scope, and the second issue is narrow.

Judge Reinhardt made a fallacious jump when he applied the Supreme Court's decision in *Casey* to the *Compassion in Dying* case. He stretched to extreme the mystery passage. Judge Reinhardt argued that because the decision to hasten one's own death is an intimate and personal choice, it is therefore a liberty interest. He wrote:

> Like the decision of whether or not to have an abortion, the decision how and when to die is one of 'the most intimate and personal choices a person may make in a lifetime,' a choice 'central to personal dignity and autonomy.' . . . How a person dies not only determines the nature of the final period of his existence, but in many cases, the enduring memories held by those who love him.

Judge Reinhardt likened the decision to have an abortion to the decision to hasten one's own death on the grounds that they are both personal and intimate choices, choices central to personal dignity and autonomy; and on this point, Judge Reinhardt is correct.

82. Compassion in Dying v. Washington, 79 F.3d 790, 801 (9th Cir. 1996) (quoting Compassion in Dying, 49 F.3d at 591).

83. *Id.*

84. See *id.* at 815-16. Reinhardt used the mystery passage from *Casey*: "'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.' *Id.* at 813 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)).

85. *Id.* at 813-14.
Judge Reinhardt's analysis, however, is flawed because he used the wording of the mystery passage out of its context to determine that a liberty interest existed in hastening one's own death. According to the joint opinion in *Casey*, one theme that all the liberty interests which were listed shared was that they all were "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy." It does not follow, however, that because a choice is intimate and personal, and central to personal dignity and autonomy, that the Fourteenth Amendment protects it as a liberty interest. This does not follow even according to the reasoned judgment scale. A choice that is intimate and personal, central to personal dignity and autonomy, without more, merely shares common characteristics with liberty interests, such as decisions dealing with child rearing, education, marriage, procreation, and abortion. If something shares characteristics with a member of a certain group, it does not mean necessarily that the thing is indeed a member of that group. Therefore, if hastening one's death shares characteristics with terminating a pregnancy, which is a liberty interest, it does not mean necessarily that hastening one's death is a liberty interest.

The mystery passage was one component in the *Casey* decision. Another important component, as explained above, was the weight of the doctrine of stare decisis. The mystery passage alone did not carry the *Casey* decision. To liken hastening one's death to terminating a pregnancy does not carry enough force to establish physician assisted suicide as a liberty interest. Comparatively, the weight of the mystery passage played a much larger role in Judge Reinhardt's decision than in the decision in *Casey*.

F. *Glucksberg*

The Supreme Court in *Washington v. Glucksberg*86 seized the opportunity to clarify the Court's substantive due process analysis. Chief Justice Rehnquist, delivering the opinion of the Court, began the opinion by defining the issue in the case: whether the Washington statute's prohibition against causing or aiding a suicide offended the Fourteenth Amendment.87 The Court held that the Washington statute did not violate the Fourteenth Amendment, and overruled the Ninth Circuit's en banc decision.88

86. 117 S. Ct. 2258 (1997).
87. See id. at 2261.
88. See id. at 2275.
The Court clarified that its method of substantive due process analysis has two components. First, the Fourteenth Amendment protects fundamental rights and liberties that are "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Second, the Court requires a careful description of the asserted fundamental liberty interests. In working through this analysis, the Court emphasized the importance of the history and traditions of our nation. Indeed, Chief Justice Rehnquist noted that "our Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decisionmaking,' that direct and restrain our exposition of the Due Process Clause." Furthermore, the lack of acceptance for suicide or assisted suicide throughout history seemed to influence Chief Justice Rehnquist's opinion.

In his concurring opinion, Justice Souter also expounded on the Court's substantive due process analysis. Justice Souter wrote that "the process of substantive review by reasoned judgment . . . is one of close criticism going to the details of the opposing interests and to their relationships with the historically recognized principles that lend them weight or value." This "reasoned judgment" language underscored Justice Souter's substantive due process analysis in his concurrence. Furthermore, the reasoned judgment language echoed the reasoned judgment language of the joint opinion that received five votes in Casey. Although the reasoned judgment language powers Justice Souter's concurring opinion, he nonetheless recognized the importance of history in substantive due process analysis.

The first section of the Court's opinion explored the history of suicide and assisted suicide. The Court noted that assisting a suicide is a crime in almost every state. Moreover, "for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide." Although Americans eventually abolished harsh common law penalties for committing suicide, state legislatures and courts

89. Id. at 2268 (citing Moore v. East Cleveland, 431 U.S. 502, 503 (1977); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); Palko v. Connecticut, 302 U.S. 319, 325 (1937)).
90. See id.
91. Id. (citing Collins v. Harker Heights, 503 U.S. 115, 125 (1992)).
92. Id. at 2284 (Souter, J., concurring in the judgment) (citing Poe v. Ullman, 367 U.S. 497, 542-44 (1961) (Harlan, J., dissenting)).
93. See id. at 2263.
94. Id.
have continued to prohibit assisting suicides. Chief Justice Rehnquist ended the first section of the opinion by marking our nation’s conviction against assisted suicide:

Attitudes toward suicide itself have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, assisting suicide. Despite changes in medical technology and notwithstanding an increased emphasis on the importance of end-of-life decisionmaking, we have not retreated from this prohibition.\(^95\)

In light of this, Chief Justice Rehnquist concluded that assistance in committing suicide did not have a place in our nation’s history.\(^96\)

Although it may not be imbedded in our nation’s history and tradition, the physicians challenging the law argued that physician assisted suicide is consistent with the Court’s substantive due process line of cases. For example, the doctors argued that in *Cruzan* the Court “acknowledged that competent, dying persons have the right to direct the removal of life-sustaining medical treatment and thus hasten death.”\(^97\) Chief Justice Rehnquist countered, however, that there was more to the decision in *Cruzan* than abstract concepts of personal autonomy. The history and traditions of our nation always have protected the right to refuse life-sustaining medical treatment.\(^98\) According to Chief Justice Rehnquist, the Court’s decision in *Cruzan* flowed from this type of reasoning, rather than mere abstract concepts of personal autonomy.

The doctors also relied on the mystery passage in *Casey*. Chief Justice Rehnquist clarified the meaning of the mystery passage in this respect:

By choosing [the mystery passage] language, the Court’s opinion in *Casey* described, in a general way and in light of our prior cases, those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment. The opinion moved from the recognition that liberty necessarily includes freedom of conscience and belief about ultimate considerations to the observation that ‘though the abortion decision may origi-

\(^95\) Id. at 2267.
\(^96\) See id. at 2269.
\(^97\) Brief of Respondents at 23, *Glucksberg* (No. 96-110) (citing *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990)).
\(^98\) See *Glucksberg*, 117 S. Ct. at 2270.
nate within the zone of conscience and belief, it is more than a philosophic exercise." That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, and *Casey* does not suggest otherwise.

*Glucksberg* directed courts to interpret the mystery passage in conjunction with the Supreme Court's previous decisions and the history and tradition of our nation. Courts should not remove the mystery passage from its context, or extend the Due Process Clause of the Fourteenth Amendment to protect any and all important, intimate and personal decisions.

Aside from the arguments concerning the effect of prior substantive due process cases on physician assisted suicide, one amicus brief argued that the Court would be imposing its own values on terminally-ill patients if it denied the right to physician assisted suicide. It stated:

"Denying that opportunity to terminally-ill patients who are in agonizing pain or otherwise doomed to an existence they regard as intolerable could only be justified on the basis of a religious or ethical conviction about the value or meaning of life itself. Our Constitution forbids government to impose such convictions on its citizens." The brief argued that a state cannot totally prohibit abortion because that would "impose one conception of the meaning and value of human existence on all individuals." Furthermore, the philosophers argued, the mystery passage reflects an idea underlying many of the liberty interests that our Constitution protects. The philosophers argued that the Court should find a liberty interest in physician assisted suicide, which could not be overridden by the states.

The philosophers' brief failed to recognize that the Fourteenth Amendment's Due Process Clause protects only certain liberty interests. For this protection, liberty interests must be part of our nation's history and traditions. As articulated by Chief Justice Rehnquist, suicide is not imbedded in our nation's


100. Brief for Ronald Dworkin et al. as Amici Curiae in support of Respondents, 1996 WL 708956, at *3,* Glucksberg* (No. 96-110).

101. *Id.* at *8.

102. *See id.* at *5-6.
history and tradition. Therefore, state governments can legislate constitutionally on the issue of physician assisted suicide, and can impose their values regarding physician assisted suicide through acting upon their state interests.

Justice Souter argued in his concurring opinion that the Washington statute is constitutional and that the Court should reject finding a liberty interest in hastening one's death. One reason Justice Souter offered was the weight of the slippery slope argument. He wrote:

The case for the slippery slope is fairly made out here, not because recognizing one due process right would leave a court with no principled basis to avoid recognizing another, but because there is a plausible case that the right claimed would not be readily containable by reference to facts about the mind that are matters of difficult judgment, or by gatekeepers who are subject to temptation, noble or not.

Justice Souter argued that finding a liberty interest in hastening one's own death, and assistance in doing so, cannot withstand practical challenges. Too large a danger exists, according to Justice Souter.

Justice O'Connor emphasized similar concerns in her confluence. Justice O'Connor argued that even if a liberty interest in hastening one's death exists, the state's interests sufficiently justify a prohibition against physician assisted suicide. The states have an important and legitimate interest in protecting life, and may protect people who are not truly competent or facing imminent death from physician assisted suicide. States also have an interest in protecting people from physician assisted suicide whose decision is not truly voluntary. These concerns led Justice O'Connor to assert that even if there was a liberty interest in hastening one's death, Washington constitutionally could prohibit physician assisted suicide.

The Supreme Court in Glucksberg clarified two important points. First, the Court stressed the importance of the history and traditions of our nation in substantive due process analysis. Second, the Court explained that courts should interpret the mystery passage in light of the entire opinion in Casey. Extracting the mystery passage from its context in Casey can lead

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103. See Glucksberg, 117 S. Ct. at 2275 (Souter, J., concurring in the judgment).
104. Id. at 2291.
105. See id. at 2303 (O'Connor, J., concurring).
to inappropriate results. Thus, according to the Court, all important, intimate and personal choices are not liberty interests.

III. LIMITED UNIVERSALISM: AN ETHICAL ARGUMENT AGAINST READING THE MYSTERY PASSAGE BROADLY

The Supreme Court should read the mystery passage narrowly not only because reading it broadly does not comport with Court precedent, but also because reading it broadly does not comport with a basic philosophical system. To illuminate this point, this section defends limited universalism, a claim that some universal standards exist but they do not constitute one's morality in its entirety. This section argues that a supercode of core moral standards, i.e., morality in the narrow sense, found in every moral culture grounds judgments about the wrongness of actions. Furthermore, this section argues that cultures define the core moral standards differently and assign them different weights, creating various moral systems (i.e., morality in the broad sense). Although they agree with morality in the narrow sense, the resulting moral systems vary widely. Finally, this section argues that the mystery passage is a manifestation of assigning different weights to core moral standards. In this light, we can examine the ethical dimensions of the mystery passage.

Tom Beauchamp argues that there is morality in the narrow sense. He wrote, "a body of general ethical precepts constitutes morality wherever it is found. I will call this shared, universal system of beliefs 'morality in the narrow sense.'" According to Beauchamp, we can find certain core standards in every culture. This set of core moral standards constitutes a supercode that is universally applicable to all cultures. If this is so, a single morality exists that is pervasive in all cultures. Therefore, not conforming to morality in the narrow sense is being immoral or amoral, rather than following a different morality. As we discovered the nature of human beings, we must have discovered morality in the narrow sense because one set of core moral standards exists for all cultures.

Consequential argumentation justifies the existence of morality in the narrow sense. There are certain standards that humans must follow or they could not operate together in a society. Logically, this holds through time and across cultural boundaries. Marcus Singer argues, "[i]f the consequences of

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106. Much of the material in this section comes from a thesis written by the author at Georgetown University in May 1995.

everyone's doing some action x would be undesirable, then no one ought to do x without a reason. For example, a core standard is do not kill. The consequences of everybody feeling free to commit murder would cripple, if not destroy, a society. Therefore, in order for a society to continue, the society must have a core moral standard of do not kill. Thus, there are core moral standards, for if none existed, societies could not operate. Moreover, these core moral standards are the same for every culture because at the most fundamental level each culture must deal with similar questions of civility.

This argument does not necessitate, however, that every domain-specific moral standard be universal; the argument permits different interpretations of morality in the narrow sense. Beauchamp wrote, "[d]espite the nonrelativity of norms of morality in the narrow sense, a relativity or pluralism of judgments and practices is an inevitable outcome of moral decisionmaking and historical development in cultures." These judgments and practices constitute morality in the broad sense. For example, cultures interpret the core moral standard do not kill differently. Although the standards may differ, cultures must have a moral system (in the broad sense) with standards about killing. Furthermore, because of the "relativity or pluralism of judgments and practices," cultures create different moralities. In sum, there is one morality in the narrow sense, and consequentialism proves its existence. However, there are many moralities in the broad sense. Moreover, due to the relativity and pluralism of judgments and practices, each society creates moralities in the broad sense.

This account of morality in the narrow and broad senses is similar to Michael Philips' core moral standards, domain-specific standards and group-related standards. I argue that the core moral standards are the standards of morality in the narrow sense, i.e., those standards that all societies have. As Philips does, I argue that these core moral standards are domain sensitive, changing in weight according to different domains or cultures. Furthermore, domain-specific standards and group-related standards constitute morality in the broad sense, allowing for variance between cultures. However, I argue that the core

110. See Michael Philips, Between Universalism and Skepticism: Ethics as a Social Artifact 89-95 (1994).
111. See id. at 7.
moral standards are pervasive, contrary to Philips' argumentation.

I agree with Philips that the constancy assumption is an illusion. Philips wrote:

A good many discussions in ethics and applied ethics presuppose that moral standards have constant weights or rankings across contexts... the constancy assumption holds that if a moral standard has a weight of a given magnitude in a given case, it has a weight of that magnitude in every case... [Ethics as a Social Artifact] maintains that constancy is an illusion.112

Although a moral standard has a certain weight in one culture, it does not necessarily have the same weight in every culture. Each culture creates its own morality in the broad sense, interpreting the core moral standards and assigning them weights differently. In this way, both Philips' theory and my theory preserve the rich diversity among the different cultures.

Although my construction of moral philosophy is similar to Philips', we disagree on one fundamental issue: Philips thinks there are conditions for or types of core moral standards, though there are no shared standards themselves.113 I, however, argue that there are core moral standards, though they are abstract. Philips might agree that core moral standards could be abstract, but then argue that they would be so abstract as to be meaningless.

Philips argued that it is not valid to generalize standards to core moral standards, and thus he only explicated the conditions for or types of core moral standards. Philips wrote that "both [core standards'] importance and, in some cases our criteria for applying them vary from domain to domain... For these reasons it is, strictly speaking, misleading to speak of the prohibition against lying (stealing, killing, etc.)."114 Speaking of the prohibition against lying is a method of understanding the underlying theme that pervades all cultures. It is speaking of a core moral standard that comes to fruition in different domains in different ways. For example, a Japanese person might find it moral to lie to protect the reputation of his or her company, whereas in a similar instance an American might find it moral to tell all the facts. Both cultures, however, do have a general moral standard "do not lie." The variance in the exact domain-specific standard about the prohibition of lying among different domains does not

112. Id. at 100.
113. See id. at 95.
114. Id.
negate the validity of the core standard's consistency in morality in the narrow sense. Rather, the variance supports the pluralism of judgments and practices among different domains about the core moral standards.

Philips goes on to write that "these activities are regulated differently in different domains and for good reasons. Strictly speaking, then, there is no perfectly general standard 'don't lie.'"\textsuperscript{115} To Philips, there is no perfectly general standard for two reasons: first, because core standards vary in importance; and second, because the criteria for applying them vary from domain to domain. These two reasons do not explain why it is invalid to generalize certain standards present in all domains as core moral standards. Although manifestations of core moral standards do vary in some respects, similarities nevertheless exist, e.g., "do not deceive." The fact that different domains regulate the wrongness of deceiving someone does not negate the similarity in the moral standard, "do not deceive," found in moral cultures. Philips' claims, in this respect, should only note that generalizing to the core moral standard is extremely difficult, which I grant; but it is possible. In sum, Philips does not discount the similarities in core moral standards among cultures; rather he merely marks how they vary. Thus, the burden to show that we cannot generalize to core moral standards is still on Philips.

Philips seems to think that if he resorts to naming some core moral standards, he must accept a universalistic attitude similar to Bernard Gert's. I disagree. I do not think that if I claim there are one, two, or several universal moral standards that I must therefore accept that there is one complete set of moral standards like Gert's ten-moral rules that is universally applicable.\textsuperscript{116} However, although he offered no argumentation for it, Philips thinks that I must. This is the distinction between my account of morality and Philips': mine is one of limited universalism and his is between universalism and skepticism. The distinction is slight, but vitally important because one names core moral standards and one does not, respectively.

Bernard Gert argues that he has generalized all of the universally applicable moral rules, which he called his ten-moral rules. Although I will not argue for this type of universalism, I do think that Gert's first eight rules are a solid beginning for naming some core moral standards. The first eight are:

1. Don't kill.

\textsuperscript{115} Id.

2. Don’t cause pain.
3. Don’t disable.
4. Don’t deprive of freedom.
5. Don’t deprive of pleasure
6. Don’t deceive.
7. Keep your promise.
8. Don’t cheat.¹¹⁷

Gert believes that the above list, along with his ninth and tenth rules, comprise a list of all the rules which moral persons must follow. I, however, argue that this list is incomplete, and no rule on the list is absolute. We may want to add another core moral standard, for example, that Beauchamp noted: “[p]rotect and defend the rights of others.”¹¹⁸ Moreover, one rule can override another rule in a certain situation. Morality in the broad sense constitutes the system in which society assigns weights to the different rules. This system governs whether one rule can override another. The justification that Gert offered for these ten rules is that all moral persons would follow them unless an impartial rational person would advocate differently, i.e., unless there is a justifiable reason to infringe a rule. Gert called this the “moral attitude.”¹¹⁹

I concur with Philips’ claim that Gert’s ten-moral-rules analysis underestimates the complexity of moral thinking.¹²⁰ However, I do think that Gert’s justification, though simple, is sufficient for the first eight rules to be core moral standards. Because a core moral standard is a standard for all domains, and because all moral persons would follow Gert’s first eight rules unless an impartial rational person would advocate differently, i.e., unless there is a justifiable reason to infringe a rule. Gert called this the “moral attitude.”¹¹⁹

Because there are core standards, i.e., morality in the narrow sense, that are consistent through time and across cultures, we can evaluate the wrongness of an action according to those standards. However, in assessing the wrongness of an action, we must understand the distinction between infringing a core moral standard and violating one. When an agent infringes a core moral standard, the agent acts contrary to it and has a justifiable reason for doing so. When an agent violates one, the agent does not have that justifiable reason. For example, if I kill an assassin who is trying to kill me, I infringe the core moral standard, “do not kill.” Because not killing an assassin would probably result in the

¹¹⁷. See id. at 157.
¹¹⁸. BEAUCHAMP, supra note 107, at 3.
¹¹⁹. See GERT, supra note 116, at 96-124.
¹²⁰. See PHILIPS, supra note 110, at 119-20.
destruction of all my freedom, namely my freedom to live, and because I assign more importance to this than killing someone who in fact is threatening my life, I can morally kill the assassin without violating a core moral standard. However, I do infringe one. In contrast, the atrocious medical treatments conducted by the Nazi Germans present a clear violation. Defensible justification for those actions is absolutely impossible. A moral agent can never violate a core moral standard regardless of the domain-specific standards involved, but can infringe it.

The method of reflective equilibrium, a concept that John Rawls developed, justifies an agent's moral standards. This justification is pivotal because often agents blindly believe in their moral structure, which sometimes has a critical error. Moreover, if an agent does not have practical justification by means of reflective equilibrium, and although in accordance with the agent's moral system, the agent performs a morally wrong act, the agent is culpably ignorant.

What is reflective equilibrium? Daniel Little said that it is "the idea that moral theories are justified through a process of deliberation in which we consider a wide range of beliefs and judgments as a system, and evaluate competing moral theories in terms of their coherence with this system." Roger Ebertz argued that reflective equilibrium is "the state of one's beliefs . . . when 'principles and judgments coincide.' When a person's beliefs are in reflective equilibrium, the structure of those beliefs, from the particular to the most general, cohere." Simply, reflective equilibrium is a method to determine if one's moral structure is coherent.

Little went on to argue that Rawls' argumentation for reflective equilibrium is weak because "it depends heavily on the substantive moral presuppositions with which one begins." I argue, however, that because the supercode exists, we all share a common starting point, namely the core moral standards. Because of the inevitable pluralism of judgments and practices, however, we arrive at different moral theories, i.e., moralities in the broad sense. Through reflective equilibrium, an agent can see—and is obligated to know—if his or her moral structure is congruent with the supercode. When assessing the culpability of

121. See generally JOHN RAWLS, A THEORY OF JUSTICE (1971).
124. Little, supra note 122, at 373.
an agent, we must note whether the agent has partaken in the method of reflective equilibrium.

How does my ethical system apply to the mystery passage? Ronald Dworkin argued that there should be a "fusion of constitutional law and moral theory."\(^{125}\) Robert Bork summarized Dworkin’s view of a judge’s duties: "the judge is to determine the principles that underlie and explain the nation’s moral judgments, and then apply those principles against any particular moral judgment made by a legislature to decide whether the latter is consistent or aberrational."\(^{126}\) However, Dworkin did insist on a constraint for judges: integrity.\(^{127}\) Regardless of judges’ personal views of justice, judges must rule with integrity.

Dworkin outlined three principle dimensions of integrity. Dworkin wrote:

First, [integrity in law] insists that judicial decision be a matter of principle, not compromise or strategy or political accommodation. . . . Second, as Justices O’Connor, Kennedy, and Souter emphasized in their *Casey* opinion, integrity holds vertically: a judge who claims that a particular liberty is fundamental must show that his claim is consistent with principles embedded in Supreme Court precedent and with the main structures of our constitutional arrangement. Third, integrity holds horizontally: a judge who adopts a principle in one case must give full weight to it in other cases he decides or endorses, even in apparently unrelated fields of law.\(^{128}\)

These three dimensions of integrity hold for all judicial opinions, according to Dworkin. Dworkin realized that this would not result necessarily in uniform judicial decisions. This integrity is an ideal. Moreover, Dworkin argued that to force someone to endure unbearable suffering is a form of tyranny if it is merely to satisfy someone else’s values.\(^{129}\)

How does my ethical theory fuse constitutional law and the mystery passage? The mystery passage concerns our desire to define our own existence free from government intrusion. In general, this is an important value in our nation. However, we have competing core moral standards when we apply the mystery

\(^{128}\) Id.
\(^{129}\) See *id.* at 217.
passage to the issues surrounding physician assisted suicide. We also have another core moral standard: do not kill. An ethically sound interpretation of the mystery passage must balance cogently these two moral standards.

Cultures could weight these competing moral standards differently. To see how our culture, our nation, has weighted them we can look to history. The Court did this in its decision in Glucksberg and held that finding a liberty interest in hastening one's own death is contrary to the history and traditions of our nation. If physician assisted suicide is against the history and traditions of our nation, it cannot agree with the ethical system of our country. A moral agent can see this through reflective equilibrium, taking into account the history and traditions of our nation.

Many logical people argue that physician assisted suicide is ethical and comports with legal precedent. For example, the Court strongly suggested in Cruzan that a person has a liberty interest in refusing life-sustaining medical treatment. Here again, we had to balance moral standards to form morality in the broad sense. With the facts in Cruzan, the Supreme Court weighted the moral standard of refusing medical treatment and protecting bodily integrity more than the moral standard "do not kill." The history and traditions of our nation tipped the scale in favor of the moral standard of refusing life-sustaining medical treatment and protecting bodily integrity. With the facts of physician assisted suicide, however, the Court should weight keeping people alive more than total and absolute personal autonomy. This is not to say that all cultures must come to the same conclusion to be ethical. However, we, as members of our nation's culture, must conclude through reflective equilibrium that in light of our nation's history and traditions, physician assisted suicide is not ethical. Thus, the mystery passage, although it speaks ethically about many other circumstances, does not cover physician assisted suicide.

IV. THE SLIPPERY SLOPE: A PRACTICAL ARGUMENT AGAINST READING THE MYSTERY PASSAGE BROADLY

In addition to legal precedent and philosophical argumentation, practical implications support reading the mystery passage narrowly. Although the law has traditionally protected personal decisions concerning marriage, procreation, contraception, etc., extending this protection to decisions to hasten one's own death would lead to many untenable consequences. The decision to hasten one's own death may be "the most intimate and personal choice a person may make in a lifetime, a choice central to per-
sonal dignity and autonomy." However, if courts recognize a liberty interest for a terminally ill person to hasten the person's own death, that right inevitably will extend to those who are not terminally ill. John Arras argues that "the logic of the case for [physician assisted suicide], based as it is upon the twin pillars of patient autonomy and mercy, makes it highly unlikely that society could stop with this modest proposal once it had ventured out on the slope." 130 Physician assisted suicide and euthanasia will become practically indistinguishable, and patients will have doctors legally kill them on demand. For reasons such as these, the mystery passage from Casey should be read narrowly to prevent sliding down the slippery slope.

Robert Sedler grounded the legality of physician assisted suicide in the mystery passage from Casey. He wrote that "the right to define one's own concept of existence and to make the most basic decisions about bodily integrity surely must include the right of terminally ill persons to make the choice whether to hasten inevitable death or whether to go on living until death comes naturally." 131 However, why would this right not extend to someone not terminally ill? If the terminally ill person has a right to hasten the person's own death because one has a right to define one's own concept of existence and to make the most basic decisions about bodily integrity, then the healthy person must have that right as well. 132 It follows that the healthy person also has a right to hasten the person's own death. Grounding the liberty interest with the precept that one has a right to define one's own existence does not compel—or even suggest—who may exercise that liberty interest. Moreover, following this reasoning, there is no basis for limiting the right of a terminally ill person to hasten the person's own death to the late stages of the illness. Even if the Court limited the right to those terminally ill, there is nothing logically prohibiting a person exercising that right when death is years or decades away. Therefore, reading the mystery passage from Casey broadly will lead down the slippery slope so that healthy people also have a right to hasten their own death and terminally ill people can exercise the right too quickly.

Confusion arises, though, even if we define "terminally ill" and confine the liberty interest to those people in the late stages

of their illness. Yale Kamisar noted that advocates for physician assisted suicide often restrict classifying patients as "terminally ill" to those experiencing severe pain and suffering.\footnote{133. See id. at 744.} Kamisar argued, however, that if "suffering" includes psychological suffering and not merely physical pain, then clearly identifying the "terminally ill" becomes more difficult.\footnote{134. See id.} Does agonizing during a difficult divorce constitute "suffering"? In the absence of externally verifiable evidence of pain and suffering, ambiguity inevitably will arise.

What about those that are physically unable to perform the final act, e.g., people who cannot swallow the pills to bring about death? Even if the law was able to classify adequately which terminally ill people could exercise the right to hasten their own death, it would discriminate against those terminally ill people who could not physically perform the final act, unless the law adopted active euthanasia. On the one hand, the law should not determine whether one has the right to hasten one's own death by determining whether one has the ability to swallow pills. If there is a defensible liberty interest to define one's own existence, which includes a terminally ill person determining the time and manner of the person's own death, one who is not physically able to perform the final act should have that right to hasten death as well. On the other hand, the Court should not recognize a liberty interest in active euthanasia, which would logically follow recognizing the liberty interest of a terminally ill person to hasten the person's own death. Refusing to recognize a liberty interest in hastening one's own death, i.e., reading the mystery passage narrowly, solves this dilemma between advocating physician assisted suicide and opposing active euthanasia.

In light of this dilemma, some doctors who originally advocated physician assisted suicide and opposed active euthanasia have changed their position on active euthanasia. Kamisar noted that in 1992, Dr. Timothy Quill and Dr. Diane Meier supported physician assisted suicide, but "opposed legalizing any form of active euthanasia 'because of the risk of abuse it presents.'\footnote{135. Id. at 747 (quoting Timothy E. Quill et al., Care of the Hopelessly Ill—Proposed Clinical Criteria for Physician-Assisted Suicide, 327 NEW ENG. J. MED. 1380, 1381 (1992)).} However, two years later Dr. Quill and Dr. Meier recanted their position for an absolute ban on euthanasia.\footnote{136. See id. at 748.} They now acknowledge the injustice of denying an established right to hasten one's own death to a person physically unable to swallow
pills merely because of the physical disability. They wrote that “[t]o confine legalized physician-assisted death to assisted suicide unfairly discriminates against patients with unrelievable suffering who resolve to end their lives but are physically unable to do so.” Thus, Dr. Quill and Dr. Meier now advocate at least some form of active euthanasia. This swift change evidences what would happen if the Court recognized a right to hasten one’s own death. Euthanasia quickly follows physician assisted suicide.

If we legalize physician assisted suicide or euthanasia, physically healthy people will want eventually to exercise the right to hasten their own death. The Netherlands in 1993 faced this difficult step in the Assen case. In the Netherlands, “euthanasia is . . . permitted when a doctor faces an unresolvable conflict between the law, which makes euthanasia illegal, and his responsibility to help a patient whose irremediable suffering makes euthanasia necessary.” In the Assen case, Dr. Boudewijn Chabot treated a physically healthy fifty-year-old woman who requested aid in hastening her own death. She had lost her two sons and had divorced her husband. Chabot did not find her clinically depressed or afflicted with psychiatric illness. Chabot merely determined that she was suffering and wanted to die. Chabot gave her pills to hasten her death, and stayed with her until her heart stopped. After Chabot followed the normal procedure for a physician assisted suicide of reporting an unnatural death, the police investigated and charged him. However, the court acquitted him, ruling that Chabot was justified in his actions because his patient was competent to make the decision to die freely, her suffering was irremediable, and the doctor met the Dutch criterion for force majeure, meaning he was compelled by an overpowering force to put the welfare of his patient above the law, which formally prohibits assisted suicide and euthanasia.

139. Id. at 48; see also Carlos Gomez, Regulating Death: Euthanasia and the Case of the Netherlands 37-38 (1991).
140. See id. at 60.
141. See id. at 66-67.
142. See id. at 67.
143. Id. at 47.
The acquittal of Dr. Chabot demonstrates the slippery slope that recognizing physician assisted suicide as a liberty interest presents. The first stage in the slippery slope was when the Netherlands permitted euthanasia and physician assisted suicide for terminally ill patients. Because Dutch courts based this on a doctor’s responsibility to help a patient and to put the patient’s welfare above the law, the Dutch courts logically had to permit euthanasia and physician assisted suicide for physically healthy patients. Dr. Chabot’s patient was not even mentally ill; she merely was upset. On these facts, Dr. Chabot determined that giving his patient pills to hasten her death was putting her welfare above the law. The Dutch court condoned Dr. Chabot’s determination.

Dr. Chabot’s patient’s choice to end her life was one of “the most intimate and personal choices” she would make in her lifetime; it was “a choice central to personal dignity and autonomy”; and it was part of defining her “own concept of existence, of meaning, of the universe, and of the mystery of human life.” However, is American jurisprudence ready to accept that an upset person who is mentally competent and physically healthy has a right to physician assisted suicide? If not, the Court should read the mystery passage narrowly. If the Court were to read the passage broadly, the Court logically would have to recognize the right in physician assisted suicide and euthanasia, and eventually allow mentally competent and physically healthy people to exercise that right. Thus, by reading the quotation narrowly, the Court declines to travel down the slippery slope.

For patients that are terminally ill and suffering unbearable pain, we need to improve our palliative care. Indeed, requests for physician assisted suicide may be due to inadequate palliative care. The New York Task Force discovered that doctors can treat those patients who request physician assisted suicide and euthanasia for depression and their pain.144 Moreover, after the doctors treated the patients, the patients usually withdrew their request to die.145 Courts should not think that honoring a patient’s request for physician assisted suicide is the only solution to a patient’s suffering. We can develop and administer better palliative care.

Sedler and others, however, have argued that the law has already granted the right to hasten one’s own death because the

144. See New York State Task Force on Life and the Law, When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context x-xi (1994).
145. See id.
law allows removal of life support. Sedler compared physician assisted suicide with withdrawing life support. He argued that there is no "principled difference . . . between the right of a competent terminally ill person to hasten inevitable death by refusing life-sustaining medical treatment and the right of the same competent terminally ill person to hasten inevitable death by the use of physician-prescribed medication." Kamisar, however, argued that if there is no principled difference, then the right to hasten one's death cannot consistently be limited to those who are terminally ill because the right to refuse medical treatment has no such limitation. We cannot ground the right to hasten one's own death in the similarity with the withdrawal of life-sustaining medical treatment. If we do so, we will travel down the slippery slope where we will confer that right to those not terminally ill. The courts did not limit withdrawal of life-sustaining medical treatment to the terminally ill. No reason suggests that physician assisted suicide would be different.

Sedler went on to note that the opponents of physician assisted suicide often support their argument with the government's interest in "preserving life." Sedler argued, however, that the government should not intrude on the terminally ill person's choice to hasten the person's own death because for these people there is no life to preserve. The life ahead of a terminally ill person can seem grim. For example, the terminally ill patients in Compassion in Dying struggled with a painful and bleak existence. However, the law should preserve life. The law should not suggest that terminally ill people have nothing left to offer society and that therefore society should dismiss them. Jurisprudence that recognizes a right to hasten one's own death can only send a negative message to those who face a difficult existence. Although this does not mandate opposing physician assisted suicide, it is another persuasive factor.

Judge Reinhardt in Compassion in Dying tried to alleviate the slippery slope concerns in recognizing a liberty interest in hastening one's own death. He wrote:

since doctors are highly-regulated professionals, it should not be difficult for the state or the profession itself to establish rules and procedures that will ensure that the occasional negligent or careless recommendation by a licensed

146. Sedler, supra note 131, at 729.
147. See Kamisar, supra note 132, at 741.
149. See id. at 730.
150. See Compassion in Dying v. Washington, 79 F.3d 790, 794-95 (9th Cir. 1996).
physician will not result in an uninformed or erroneous decision by the patient or his family.\textsuperscript{151}

Moreover, Judge Reinhardt argued that the Supreme Court has not refused "to recognize a substantive due process liberty right or interest merely because there were difficulties in determining when and how to limit its exercise or because others might someday attempt to use it improperly."\textsuperscript{152} Judge Reinhardt believes that concerns about how a person exercises a liberty right should not prohibit a court determining that such a liberty right exists. For example, concerns about how a woman would exercise her liberty interest to terminate a pregnancy—although the concerns are very important—should not determine ultimately whether such a liberty interest exists. A person can take any right to an illogical extreme. Moreover, Judge Reinhardt recognized that the slippery slope fears which the opponents of \textit{Roe} voiced have not materialized.\textsuperscript{153}

We know, however, the slippery slope concerns with physician assisted suicide have materialized. The Dutch experiment with physician assisted suicide provides a real example of the slippery slope. Herbert Hendin noted that "[o]nce the Dutch permitted assisted suicide, it was not possible medically, legally or morally to deny more active medical help such as euthanasia to individuals who could not effect their own deaths."\textsuperscript{154} Although the slippery slope concerns voiced in \textit{Roe} did not materialize, the slippery slope concerns regarding physician assisted suicide did materialize in the Netherlands. The events in the Netherlands adds credence to the slippery slope concerns here in America.

Regarding physician assisted suicide, judges should consider the concerns about the slippery slope. Judges do not decide cases in a vacuum; people must implement judges' decisions in the world around us. Deciding a case purely on theoretical grounds can lead to absurd results when people implement that decision. Where neither judicial precedent nor the history or traditions of our nation establish a liberty interest, judges should consider the concerns about the slippery slope. Otherwise, in such a case, a judge would be in danger of deciding a case in a vacuum, purely on theoretical grounds. The judge would be in danger of making a practically absurd ruling. Practicality should be a desired attribute of a court's decision.

\begin{itemize}
\item 151. \textit{Id.} at 827.
\item 152. \textit{Id.} at 831.
\item 153. See \textit{id.}
\end{itemize}
At first glance, however, physician assisted suicide seems reasonable. Denying a terminally ill person who endures unmanageable suffering the right to exit this world quickly and with dignity is difficult. However, framing the issue in this charged manner is an appeal to emotion. The inevitable ramifications of recognizing a right to physician assisted suicide overwhelm any such decision. If we recognize a right to physician assisted suicide for a terminally ill person, we eventually will recognize such a right for a chronically ill person. If we recognize a right to physician assisted suicide for a chronically ill person, we eventually will recognize such a right for a mentally competent and physically healthy person. Therefore, if we legalize physician assisted suicide, we eventually will legalize active euthanasia. Thus, recognizing a right to physician assisted suicide inevitably would start us down the slippery slope.

V. Conclusion

Before the Court spoke on the issue in Glucksberg, proponents of physician assisted suicide claimed that the right to hasten one's own death naturally followed from the Court's prior decisions. These proponents claimed that the mystery passage almost proscribed finding a liberty interest in physician assisted suicide. The Court in Glucksberg, however, refused to recognize such a liberty interest, and said that the mystery passage does not support classifying all intimate and personal choices as liberty interests. Although the importance of the decisions to terminate a pregnancy and to hasten one's death may be similar, and both decisions may be the most intimate and personal choices a person will make in a lifetime, the Court refused to hold that the decision to hasten one's death is a liberty interest. Moreover, in clarifying its substantive due process analysis, the Court stressed the importance of the history and traditions of our nation.

We should not allow a person to define her existence through hastening her death not only because legal precedent does not establish such a liberty interest, but also because it does not make sense ethically. America is not a society where one ethical system controls all; rather, there is an amalgam of ethical systems. However, some core moral standards exist that are common to all ethical systems. The mystery passage reflects two competing core moral standards: supporting autonomy and refraining from killing. The history and traditions of our nation have not supported autonomy such that we will allow a person to commit suicide. In this instance, our collected ethical system values refraining from killing more than supporting autonomy.
Therefore, the law should not recognize a liberty interest in hastening one's death because it would produce a schism between constitutional law and moral theory.

Reading the mystery passage broadly and recognizing a liberty interest in physician assisted suicide also will lead to undesirable results. As the Dutch experienced in the Netherlands, doctors eventually would be able to aid in the suicide of a mentally competent and physically healthy person. The dangers for abuse are too prevalent to allow a liberty interest in physician assisted suicide. As Justice O'Connor noted in her concurring opinion in Glucksberg, even if hastening one's death was a liberty interest, significant state interests would allow a state to prohibit its practice.

In sum, judges should read the mystery passage narrowly, and not remove it from its context in Casey. Not all intimate and personal choices are liberty interests merely because of the language in the mystery passage. Supreme Court precedent, moral philosophy and practical realities do not suggest an other than narrow reading of the mystery passage.