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## A Nadir of State Constitutional Jurisprudence: Failing to Protect Terminally Ill Patients' Choice for a More Peaceful Death in New Mexico

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# A NADIR OF STATE CONSTITUTIONAL JURISPRUDENCE: FAILING TO PROTECT TERMINALLY ILL PATIENTS' CHOICE FOR A MORE PEACEFUL DEATH IN NEW MEXICO

Kathryn L. Tucker\*

## I. INTRODUCTION

The New Mexico Supreme Court recently considered whether a dying patient has a right protected by the New Mexico Constitution to choose a more peaceful death via aid in dying. Physicians who care for patients with terminal illnesses and a patient with a terminal illness claimed that this choice, one of the most profoundly personal a person will make in a lifetime, was deserving of recognition and protection under the New Mexico Constitution's guarantees to liberty, happiness and due process.<sup>1</sup>

The trial court, following trial, found that no right was more fundamental:

This Court cannot envision a right more fundamental, more private or more integral to the liberty, safety and happiness . . . than the right of a competent, terminally ill patient to choose aid in dying. If decisions made in the shadow of one's imminent death regarding how they and their loved ones will face that death are not fundamental and at the core of these constitutional guarantees, [then] what decisions are?<sup>2</sup>

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1. See N.M. CONST. art. II, §§ 4, 18.

2. *Morris v. Brandenburg*, No. D-202-CV 2012-02909, 2014 WL 10672997, at \*7 (2d Jud. Dist. Ct. N.M. Jan. 13, 2014) *rev'd*, *Morris v. Brandenburg*, 2015-NMCA-100, 356 P.3d 564, *aff'd*, *Morris v. Brandenburg*, 2016-NMSC-027, 376 P.3d 836.

The intermediate appellate court reversed in a fractured ruling with three opinions.<sup>3</sup> The New Mexico Supreme Court rendered a decision that failed to honor the tradition of robust state constitutional jurisprudence in New Mexico,<sup>4</sup> and abdicated its responsibility to do an independent analysis, inappropriately deferring to a decision of the Supreme Court of the United States twenty years prior, *Washington v. Glucksberg*.<sup>5</sup>

This article contends that the New Mexico Supreme Court erred in doing so for two reasons. First, it was error to defer to a decision of the United States Supreme Court where a claimed state constitutional right is at issue. Second, it is erroneous to read *Glucksberg* as requiring, or even supporting, this outcome.

State high courts fail in their duty when they abdicate their responsibility to identify and define the nature and scope of rights protected by the state constitution on grounds that the United States Supreme Court has spoken on the matter through the lens of federal constitutional jurisprudence. This failure was manifest in the *Morris* decision. If State high courts, in conducting their independent analysis of state constitutional provisions, choose to look to *Glucksberg* for whatever persuasive value it might offer, those courts would still have no reason to view that decision as creating a barrier to their recognition of a right to choose a more peaceful death via aid in dying.

## II. STATE HIGH COURT INTERPRETATION OF STATE CONSTITUTIONAL PROVISIONS IS INDEPENDENT OF THE U.S. SUPREME COURT'S INTERPRETATION OF THE FEDERAL CONSTITUTION.

It is axiomatic that decisions of the United States Supreme Court “are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges . . . seriously err if they so treat them.”<sup>6</sup>

3. See *Morris*, 2015-NMCA-100. Judge Garcia wrote the majority opinion; he did not reject Petitioners’ claim entirely, acknowledging that aid in dying might qualify as an important right subject to intermediate scrutiny. See *id.* ¶¶ 49–50. He deferred to the New Mexico Supreme Court, holding that it, not the Court of Appeals, should decide the nature and scope of a state constitutional right in a case of first impression. See *id.* ¶ 38. Judge Hanisee concurred in part, urging judicial abdication of the issue to the legislative process. See *id.* ¶ 67 (Hanisee, J., concurring in part). Both ignored the record before the court, and relied on the United States Supreme Court ruling in *Washington v. Glucksberg*, 521 U.S. 702 (1997). Judge Vanzi, dissented, opining that terminally ill, competent patients should have a constitutionally protected right to choose aid in dying. See *id.* ¶ 71 (Vanzi, J., dissenting). The divided Court of Appeals did not express a majority view as to which level of scrutiny should apply.

4. See *Griego v. Oliver*, 2014-NMSC-003, 316 P.3d 865; *State v. Garcia*, 2009-NMSC-046, 217 P.3d 1032; *Montoya v. Ulivarri*, 2007-NMSC-035, 163 P.3d 476; *In re Pamela A.G.*, 2006-NMSC-019, 134 P.3d 746; *New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, 975 P.2d 841; *Oldfield v. Benavides*, 1994-NMSC-006, 867 P.2d 1167; *Jaramillo v. Jaramillo*, 1991-NMSC-101, 823 P.2d 299.

5. See *Morris*, 2016-NMSC-027, ¶¶ 20–34.

6. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977) (footnote omitted).

It is up to the States to exercise their prerogative of developing their own law. If State courts fail in that duty, they fail to safeguard the rights and protections to which their citizens are entitled. “Whatever protections [state law] does confer are surely disparaged when [a state court] refuses to adjudicate their very existence because of the enumeration of certain rights in the Constitution of the United States.”<sup>7</sup> State high courts can and should criticize United States Supreme Court decisions, and recognize greater constitutional protections for their citizens under their state constitution where appropriate.<sup>8</sup>

These principles are foundational to the proper functioning of state and federal courts in exercising their very different respective sovereign powers.<sup>9</sup> Failing to observe these principles, the New Mexico Supreme Court held “We conclude that *Glucksberg* controls.”<sup>10</sup> While giving lip service to its ability to extend greater protections,<sup>11</sup> the *Morris* court went on to hold “we choose not to deviate from the ultimate holding in *Glucksberg*.”<sup>12</sup> Concluding: “the *Glucksberg* approach with respect to physician aid in dying is not flawed.”<sup>13</sup>

The error of the New Mexico Supreme Court’s reasoning is apparent. Consider, for example, the *Morris* court’s reliance on the state interest articulated in *Glucksberg* in protecting vulnerable populations. *Id.* The uncontroverted record in *Morris* established that there was no adverse impact on vulnerable populations when aid in dying was available. Such evidence was not available to the *Glucksberg* court because at that time there was no open practice. For the *Morris* court to suggest it was following *Glucksberg* in part because it shared the concern about possible harm

7. *Massachusetts v. Upton*, 466 U.S. 727, 738 (1984) (Stevens, J., concurring); *see also* *Murdock v. Memphis*, 87 U.S. 590, 626 (1875) (“The State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise.”).

8. *See, e.g., Gainesville Woman Care, LLC v. State of Florida*, 210 So. 3d 1243, 1251 (Fla. 2017) (“[O]ur Supreme Court has clearly stated that federal law has no bearing on Florida’s more extensive right of privacy.”).

9. These arguments are cogently set forth in an amicus brief filed in a case similar to *Morris* pending in NY by a coalition of respected law professors at New York law schools. *See* Brief for Amici Curiae New York Law Professors in Support of Plaintiffs-Appellants, *Myers v. Schneiderman*, 85 N.E.3d 57 (N.Y. Ct. App. 2017), 2017 WL 2837556. It is difficult to know the impact of amicus briefs; advocates differ in their view of the benefit of pursuing amicus participation. *Compare* Matthew L.M. Fletcher, *The Utility of Amicus Briefs in the Supreme Court’s Indian Cases*, 2 AM. INDIAN L. J., 38, 45 (2013) (“[A]micus briefs are not all that influential. . . .”), *with* Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 603 (1984) (“Occasionally, a case will be decided on a ground suggested only by an amicus, not by the parties. Frequently, judicial rulings, and thus their precedential value, will be narrower or broader than the parties had urged, because of a persuasive amicus brief. Courts often rely on factual information, cases or analytical approaches provided only by an amicus. A good idea is a good idea, whether it is contained in an amicus brief or in the brief of a party.”), *and* Paul M. Smith, *The Sometimes Troubled Relationship Between Courts and Their “Friends”*, 24 LITIG. 24, 26 (1998) (“Amicus briefs influence courts to favor your side in lots of different . . . ways.”). Unfortunately, the New York Court of Appeals made similar mistakes in *Myers* as are criticized herein. *See Myers*, 85 N.E.3d 57.

10. *Morris*, 2016-NMSC-027, ¶ 31.

11. *See id.* (“We may diverge from the *Glucksberg* precedent if we determine that the federal analysis is flawed or that New Mexico has distinct characteristics in the relevant area or that structural differences between our government and the federal government exist.”).

12. *Id.*

13. *Id.* ¶ 33.

to vulnerable populations made no sense at all in light of the record, which established this concern had no foundation. Similarly, plaintiffs presented evidence at trial showing that since aid in dying became available in Oregon, end-of-life care improved in measurable ways: referrals to hospice care occur more often and earlier, and palliative care and communication between patient and physician have improved. All of these developments improve quality of life of patients with terminal illnesses. The State presented *no* evidence at trial to demonstrate its concerns were rationally related to a prohibition on aid in dying. Plaintiffs presented the New Mexico Supreme Court with the most well-developed evidentiary record concerning the practice of aid in dying in any litigation in the United States.<sup>14</sup> As recognized by the trial court, the record demonstrates the profoundly intimate nature of the decision that was at issue, the safety of the practice, and that the practice benefits, rather than harms, end-of-life care in general.

The Court made a pretense of independent analysis, stating “We agree that . . . New Mexico has historically placed great importance on patient autonomy and dignity in end-of-life decision-making.”<sup>15</sup> It failed, however, to give this heightened respect for end of life autonomy and dignity proper credence, asserting that provisions of state law suggested “end-of-life decisions are inherently fraught with the potential for abuse and undue influence”.<sup>16</sup> Yet, as noted above, the record established there has been no evidence of abuse or harm in jurisdictions where aid in dying is openly available, and to the contrary measurable improvements occurred. To suggest that the admittedly heightened respect for autonomy and dignity could not be honored due to overriding concerns about abuse or harm was without any evidentiary support.

In sum, there was no reason for the New Mexico Supreme Court to conclude that the United States Supreme Court’s approach in *Glucksberg* was right for New Mexico, especially in light of developments in both federal constitutional jurisprudence and the facts pertinent to the practice of aid in dying in the two decades since *Glucksberg*.

### **III. GLUCKSBERG PRESENTS NO BARRIER TO A STATE HIGH COURT RECOGNIZING A PROTECTED INTEREST IN A DYING PATIENT’S RIGHT TO CHOOSE A MORE PEACEFUL DEATH VIA AID IN DYING.**

The *Morris* court relied on the twenty year old United States Supreme Court holding in *Glucksberg* that a state’s ban on ‘assisted suicide’ did not violate due process or equal protection guarantees under the federal Constitution.<sup>17</sup> This reliance was misplaced for multiple reasons.

Even had the New Mexico Supreme Court been bound by *Glucksberg*, that decision presented no barrier to the supreme court finding a state constitutional right

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14. See *id.* ¶¶ 3–13. Where plaintiffs have introduced such evidence and the state has presented none to demonstrate its interest, the appropriate resolution is to strike down the challenged law, as was the case in *Gainesville Woman Care, LLC*. See *Gainesville Woman Care, LLC v. State of Florida*, 210 So. 3d 1243, 1265 (Fla. 2017).

15. *Morris*, 2016-NMSC-027, ¶ 36.

16. *Id.*

17. *Id.* ¶ 31

to choose aid in dying. A painstaking review of the opinion makes this clear. Justice Rehnquist delivered the Court's opinion. In rejecting what it understood to be plaintiffs' facial challenge to Washington's ban on assisted suicide and a fundamental liberty interest in "a right to commit suicide which itself includes a right to assistance in doing so,"<sup>18</sup> the *Glucksberg* Court emphasized the states' longstanding prohibition on assisted suicide, reflecting a "commitment to the protection and preservation of all human life."<sup>19</sup> Because the right to "suicide" had not been historically protected, the Court applied rational basis scrutiny.<sup>20</sup> Pointing to the state's interests in life, preservation of the medical profession, prevention of suicide generally, protection of vulnerable groups, and avoidance of euthanasia, the Court found those interests were reasonably related to its prohibition against assisted suicide.<sup>21</sup>

Though the Court declined at that time to extend federal constitutional protection to aid in dying it invited states to address the issue: "Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."<sup>22</sup>

In her concurrence, Justice O'Connor made clear she joined the Court's rejection of the generalized right to commit suicide and did not reach the question of "whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death."<sup>23</sup> Further, Justice O'Connor left the question to the states for the time being, explaining "the . . . challenging task of crafting appropriate procedures for safeguarding . . . liberty is entrusted to the 'laboratory' of the States . . . in the

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18. *Washington v. Glucksberg*, 521 U.S. 702, 723 (1997). A foundational error in *Glucksberg* was the Court's assumption that the choice of a mentally competent terminally ill patient for a more peaceful death via aid in dying was a form of "suicide." In the decades since *Glucksberg* many mental health, medical, and public health professional associations, including most recently the American Association of Suicidology, have explicitly recognized that the choice for aid in dying is no kind of "suicide." See AM. ASS'N OF SUICIDOLOGY, STATEMENT OF THE AMERICAN ASSOCIATION OF SUICIDOLOGY: "SUICIDE" IS NOT THE SAME AS "PHYSICIAN AID IN DYING" 1 (October 30, 2017), <http://www.suicidology.org/Portals/14/docs/Press%20Release/AAS%20PAD%20Statement%20Approved%2010.30.17%20ed%2010-30-17.pdf> ("The American Association of Suicidology recognizes that the practice of physician aid in dying . . . is distinct from the behavior that has been traditionally and ordinarily described as 'suicide,' the tragic event our organization works so hard to prevent."); see also *id.* at 4 ("[S]uicide and physician aid in dying are conceptually, medically, and legally different phenomena. . . . [W]e believe that the term 'physician-assisted suicide' in itself constitutes a critical reason why these distinct death categories are so often conflated, and should be deleted from use. Such deaths should not be considered to be cases of suicide. . . .") (emphasis in original). States that have enacted statutes permitting aid in dying all explicitly provide that the conduct of a physician in providing aid in dying is not to be considered "assisted suicide." See, e.g., CAL. HEALTH & SAFETY CODE § 443.18 (West 2016); COLO. REV. STAT. ANN. § 25-48-121 (West 2016); D.C. CODE ANN. § 7-661.15 (West 2017); OR. REV. STAT. ANN. § 127.880 (West 2017); VT. STAT. ANN. tit. 18, § 5292 (West 2013); WASH. REV. CODE ANN. § 70.245.180 (West 2017).

19. *Glucksberg*, 521 U.S. at 710.

20. See *id.* at 728.

21. *Id.* at 728–733.

22. *Id.* at 735.

23. *Id.* at 736 (O'Connor, J., concurring).

first instance.”<sup>24</sup> Justices Ginsberg and Breyer, concurred in Justice O’Connor’s opinion.

Justice Souter, concurred in the judgment, but for different cause. He rejected the majority’s historically bound analysis of the right at issue, explaining that “[t]he text of the Due Process Clause . . . imposes nothing less than an obligation to give substantive content to the words ‘liberty’ and ‘due process of law.’”<sup>25</sup> Instead of narrowly seeking historical recognition of the right to suicide, Justice Souter acknowledged the Court’s recognition of a liberty interest in bodily integrity in *Casey* and others.<sup>26</sup> Without reaching a determination of whether the right at issue was fundamental, he found the State’s interest in preventing euthanasia, both voluntary and involuntary, sufficient to reject the right to aid in dying at that time. For Justice Souter the “substantiality of the factual disagreement” was controlling at that time.<sup>27</sup> “Since there is little experience directly bearing on the issue, the most that can be said is that whichever way the Court might rule today, events could overtake its assumptions, as experimentation in some jurisdictions confirmed or discredited the concerns about progression from assisted suicide to euthanasia.”<sup>28</sup> Justice Souter left the question to the states for time being.<sup>29</sup>

Justice Stevens concurred, but also wrote separately to explain that he rejected the facial challenge to Washington’s ban, not the as-applied challenge before this Court, and “that there is . . . room for further debate about the limits that the Constitution places on the power of the States to [criminalize aid in dying].”<sup>30</sup> As such, Justice Stevens also rejected the majority’s historical approach to constitutional analysis and did not preclude future constitutional claims.

Justice Breyer, concurring with Justice O’Connor, writing separately, also rejected the strict, historical approach of the majority, but found the availability of palliative sedation sufficient to mollify terminally ill patients who would prefer aid in dying.<sup>31</sup>

Not only did a majority of the justices refuse to foreclose a future, federally protected right to aid in dying, but all of the justices encouraged the states to address the issue of aid in dying for themselves. Moreover, it is critical to appreciate that the *Glucksberg* Court did not have evidence of the safe and beneficial practice of aid in dying before it, which the *Morris* court did. *Glucksberg* can in no way be properly understood to create a barrier to the New Mexico Supreme Court in recognizing aid in dying as constitutionally protected under the New Mexico constitution in light of all of this.

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24. *Id.* at 737 (alterations in original) (quoting *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 292 (1990) (O’Connor, J., concurring)).

25. *Id.* at 764 (Souter, J., concurring).

26. *Id.* at 777.

27. *Id.* at 786.

28. *Id.* at 787.

29. *Id.* at 789.

30. *Id.* at 738 (Stevens, J., concurring) *see also id.* at 741 (“But just as our conclusion that capital punishment is not always unconstitutional did not preclude later decisions holding that it is sometimes impermissibly cruel, so is it equally clear that a decision upholding a general statutory prohibition of assisted suicide does not mean that every possible application of the statute would be valid.”).

31. *Id.* at 792 (Breyer, J., concurring).

Moreover, the rigid historical analysis of substantive due process rights exemplified in *Glucksberg* has since been abandoned.<sup>32</sup> In the context of same-sex marriage, the *Obergefell* court rejected a constitutional approach bound to historical recognition of a right, holding that “[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution.”<sup>33</sup> In so doing, a court’s duty cannot be “reduced to any formula.”<sup>34</sup> Instead, courts must “exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect.”<sup>35</sup> Though history informs that inquiry, it does “not set its outer boundaries,” allowing us to learn from it without the past dictating the present.<sup>36</sup>

Thus it is clear that the United States Supreme Court opinion in *Glucksberg* ought present no barrier to a state high court finding a constitutional right under a state constitution to a patient’s choice for a more peaceful death via aid in dying.

In addition, as noted above, a key underpinning of *Glucksberg* was the dearth of information on whether an open practice of aid in dying would present danger. The New Mexico Supreme Court considered the issue in a landscape rich with data: in the two decades following *Glucksberg* an open practice of aid in dying ensued, generating data demonstrating that no danger arises when patients are empowered to choose a more peaceful death via aid in dying. Concerns that had given the *Glucksberg* court pause were shown in *Morris* to be, in fact, not concerning. The *Morris* trial court heard evidence presenting information that no risk or harm arose in jurisdictions where aid in dying was openly available.

It would have been permissible for the New Mexico Supreme Court to look to *Glucksberg* to consider whether its reasoning was persuasive. If a State high court found *Glucksberg* persuasive, it would need to recognize that the United States Supreme Court left the door open to finding federal constitutional protection for the choice at issue. Further, it would need to take into account that the United States Supreme Court’s jurisprudential process for considering fundamental liberties has changed materially since *Glucksberg*, as reflected in *Lawrence v. Texas*<sup>37</sup> and *Obergefell v. Hodges*.<sup>38</sup> In those cases the Supreme Court recognizes that determining whether a right meriting protection as a matter of liberty or privacy exists calls for consideration of evolving societal views.<sup>39</sup>

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32. See generally *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

33. *Id.* at 2598.

34. *Id.*

35. *Id.*

36. *Id.*

37. 539 U.S. 558 (2003).

38. 135 S.Ct. 2584 (2015).

39. See *id.* at 2602 (“[Fundamental rights] rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.” Drafters of the constitution “did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.” *Id.* at 2598; see also *Lawrence*, 539 U.S. at 571–72 (“In all events we think that our laws and traditions in the past half century are of most relevance here.”)).



Plaintiffs in *Morris* adduced evidence showing that support for aid-in-dying was growing.<sup>40</sup> If the United States Supreme Court itself was faced today with the issues that were presented in *Glucksberg*, it would have the benefit of extensive evidence of this evolution. This evidence includes a growing number of states adopting statutes permitting aid in dying; polls showing growing public support for aid-in-dying; the adoption of policies by leading medical associations supportive of aid-in-dying; positive experience with aid-in-dying in states where it is practiced, and a body of data reflecting this experience; and developments in other countries that have recognized the right of a patient to aid-in-dying.<sup>41</sup> The record in *Morris* contained such evidence and it would have reflected no conflict, indeed would have been consonant, with the *Glucksberg* decision for the New Mexico Supreme Court to recognize this. Unfortunately for the jurisprudence of the State, and the plight of suffering dying patients in New Mexico, it failed to do so.

### CONCLUSION

The failure of the New Mexico Supreme Court to extend protection under the New Mexico Constitution to the choice of a competent dying patient for a more peaceful death via aid in dying is troubling. The decision is of concern because it rejects a right in an area of particular importance to liberty and may signal a retreat from more extensive protection of liberty under the New Mexico Constitution. At the very least, this ruling fails to live up to the broad interpretation of liberty under the New Mexico Constitution articulated in earlier opinions of the New Mexico Supreme Court. This is an important area of liberty—how much suffering to endure before death—where the New Mexico Supreme Court had the opportunity to be a national leader. The New Mexico Supreme Court could have found independent rights under the state Constitution’s more expansive provisions than those guaranteed by the United States Constitution. Unfortunately this did not occur. Instead, the New Mexico Supreme Court inappropriately deferred to the United States Supreme Court, misunderstood and misapplied the Supreme Court’s decision it was ostensibly deferring to, and ignored the fact that the jurisprudential approach utilized in *Glucksberg* has since been abandoned by the Supreme Court. The promise of liberty under the New Mexico Constitution was not realized in the context of end of life liberty, which undermines New Mexican constitutional jurisprudence and leaves suffering dying patients without the autonomy to decide the profoundly personal matter of how much suffering to endure before death. If there is any utility in this opinion perhaps it will serve as an example of failed jurisprudence, an example

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40. Evidence included various poll data. *See, e.g.*, Amicus Curiae Brief of American Medical Women’s Association, et al., *Morris v. Brandenburg*, 2016-NMSC-027, 376 P.3d 836, 2015 WL 13049932. Providing another illustrative example, a Gallup Poll conducted in 2015 asked: “When a person has a disease that cannot be cured and is living in severe pain, do you think doctors should or should not be allowed by law to assist the patient to commit suicide if the patient requests it?” and found that despite this pejorative characterization of aid-in-dying, 68% of the public supported it, and only 28% opposed. Andrew Dugan, *In U.S., Support Up for Doctor-Assisted Suicide*, GALLUP (May 27, 2015), <http://www.gallup.com/poll/183425/support-doctor-assisted-suicide.aspx>.

41. *See, e.g.*, *Carter v. Canada*, [2015] 1 S.C.R. 331, para. 147 (Can.) (striking down Canada’s assisted suicide statute as impinging on liberty).

which any sister court considering this issue under its own constitution would be wise to avoid.<sup>42</sup>

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42. Perhaps one or more of the New Mexico Supreme Court judges will publicly acknowledge the error of the decision, as retired United States Supreme Court Justice Lewis Powell did regarding his determinative vote in *Bowers v Hardwick*, 478 U.S. 186 (1986) upholding a Georgia statute criminalizing homosexual sodomy. See Linda Greenhouse, *Black Robes Don't Make the Justice, but the Rest of the Closet Just Might*, N.Y. TIMES (Dec. 4, 2002), <http://www.nytimes.com/2002/12/04/us/black-robres-dont-make-the-justice-but-the-rest-of-the-closet-just-might.html>. Such recognition of error can play an important role in allowing an erroneous ruling to be overcome. For example, noted Harvard Law School professor Laurence H. Tribe, who argued on behalf of Hardwick, has articulated in opinion that Powell's second thoughts could undercut the moral force of the opinion. Ruth Marcus, *Powell Regrets Backing Sodomy Law*, WASH. POST (Oct. 26, 1990), [https://www.washingtonpost.com/archive/politics/1990/10/26/powell-regrets-backing-sodomy-law/a1ae2efc-bec6-47ec-bfb6-1c098e610c5b/?utm\\_term=.dae1dd95e754](https://www.washingtonpost.com/archive/politics/1990/10/26/powell-regrets-backing-sodomy-law/a1ae2efc-bec6-47ec-bfb6-1c098e610c5b/?utm_term=.dae1dd95e754) ("The fact that a respected jurist who is indispensable to the majority conceded that on sober second thought he was probably wrong certainly will affect the way that future generations look at the decision[.]")