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Laura Schauer Ives

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## THE DECISIONS WE ARE (OR ARE NOT) FREE TO MAKE, FOR NOW

Laura Schauer Ives\*

My father and I would walk the block of my childhood home every night after dinner. Every night, we would stop to talk with Jim. Likely younger than I am now, he was vibrant, a health enthusiast before health enthusiasts were common, and the lovely but rare adult who was actually present for children. He listened and seriously engaged with everyone around him. I liked him very much.

Though my dad and I continued our walks, we stopped seeing Jim. I had overheard my parents vaguely mention “Lou Gehrig’s.” But I was ten, and it meant nothing until I saw Jim one last time. He was out in front of his home. This time, propped on both sides by caregivers. He was skeletal—his muscles severely wasted—and unable to walk or speak without assistance. We made eye-contact. He looked desperate. I have since seen many people before they have died, some of them at the end stage of disease, but I have never again seen a person in as grave of a condition as Jim.

As my dad and I walked away, I asked my dad what was going to happen to Jim. I knew, of course. One could not see a man so ravaged and not know, even as a child. The same wasting we could see on Jim’s face and body, my dad explained, was overtaking his organs as well. He would die soon. He, in fact, did die soon, within the week.

When I got home, I went to my room and wept. It was the first time I recall weeping for someone else, but as is always the case when we confront death, I also wept for my own mortality and fear of it. I did not want to die like Jim. Others may have seen Jim and thought him closer to God; others may have thought they would pursue the ends of the earth to find a cure. Still others, like me, would have seen Jim and thought they would do anything they could to avoid a prolonged and brutal dying process. The particulars of the varied reactions would, of course, be as different as the individuals themselves. Those differences and, more importantly, the ability to act on those differences make us free.

There are some decisions so personal, so central to how we define self and existence, that they should be spared from majority edict. It is the judiciary’s exclusive province to decree those choices that are beyond majority reach, the choices best left to the individual, informed by their most deeply held values, beliefs,

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\* Laura Schauer Ives is a partner at Kennedy, Kennedy, and Ives, in Albuquerque, New Mexico, where she exclusively practices civil rights law. She was the past Legal Director of the American Civil Liberties Union of New Mexico, where her litigation included the constitutionality of prohibiting same-sex marriage in *Griego v. Oliver*, 2014-NMSC-003, 316 P.3d 865, the constitutionality of halving veterans’ separation pay who had been discharged under Don’t Ask Don’t Tell, and *Morris v. Brandenburg*, 2016-NMSC-027, 376 P.3d 836, the subject of this essay.

and unique circumstances. In *Morris v. Brandenburg*, 2016-NMSC-027, 376 P.3d 836, I argued<sup>1</sup> to the New Mexico Supreme Court that, under the happiness and due process clauses of the New Mexico Constitution,<sup>2</sup> the decision of a terminally-ill, competent adult to end their suffering by taking a medication that would hasten their death should be one such decision. The Court disagreed. It did so despite being provided with the only trial record ever created that unequivocally established: (i) the intimate nature of the decision at issue, (ii) the safety of the practice, which is governed by a standard of care, and (iii) that the practice benefits, rather than harms, end-of-life care in general.<sup>3</sup>

In the New Mexico Supreme Court's Opinion finding a right to same-sex marriage under the New Mexico Constitution, Justice Chavez wrote:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.<sup>4</sup>

Still, wisdom on how to make a principled determination of which subjects should be impervious to a tallied raising of hands is as varied as people's core beliefs are. This is the nature of substantive due process rights: they are nebulous, but they are also the essence of our freedom and the only protection we have against giving up too much in the social contract, and courts have struggled to define them. This is what Plaintiffs faced in *Morris*.

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1. Endless thanks to my co-counsel, Kathryn Tucker and Alexandra Freedman-Smith, who tried the case with me in front of Judge Nan Nash of New Mexico's Second Judicial District and were with me on the briefs in the New Mexico Court of Appeals and the New Mexico Supreme Court. Though we ultimately lost, physician aid in dying was legal in Bernalillo County while the State of New Mexico appealed Judge Nash's decision, it will always be one of the most important cases that I have tried, and I am fortunate to have pursued it with dear friends. Additional thanks to my law partners, Joe and Shannon Kennedy, who gave and give full support to my continued and uncompensated pursuit of this right even though I am no longer with the ACLU of New Mexico. And thanks to Adam Flores, my associate at Kennedy, Kennedy, and Ives, and former judicial clerk to Judge Linda Vanzi, who authored the Dissent in *Morris v. Brandenburg*, 2015-NMCA-100, 356 P.3d 564, the Court of Appeals Opinion overturning Judge Nash, who has patiently entertained more than anyone's fair share of my thoughts on this issue and helped formulate what to say about it here.

2. N.M. CONST. art. II, §§ 4, 18.

3. In finding the criminal prohibition of assisted suicide unconstitutional as applied to aid in dying, Judge Nan Nash, the district court judge who heard all the evidence presented at trial, ultimately concluded:

This Court cannot envision a right more fundamental, more private or more integral to the liberty, safety and happiness of a New Mexican 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?

*Morris v. Brandenburg*, No. D-202-CV 2012-02909, 2014 WL 10672986, at \*7 (2d Jud. Dist. Ct. N.M. Jan. 13, 2014).

4. *Griego*, 2014-NMSC-003, ¶ 1 (quoting *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

Twenty years ago, in *Washington v. Glucksberg*, 521 U.S. 702 (1997), the majority of the United States Supreme Court had already refused to recognize the right to aid in dying by narrowing the issue before it and refusing to find a constitutionally protected right to suicide (not aid in dying) because it has not been long and historically protected. In that case, however, the Court did not have evidence of the open practice of aid in dying in front of it, and a majority of justices reserved judgment on whether aid in dying may be protected by the federal constitution in the future.<sup>5</sup> In addition, the Court has since rejected *Glucksberg*'s historically bound substantive due process analysis, embracing the constitution as a living document that is not temporally fixed.<sup>6</sup>

To overcome *Glucksberg*, the *Morris* Plaintiffs created the singular evidentiary record concerning practice of aid in dying ever established in the U.S. We pointed to the change in the United States Supreme Court's approach to substantive due process. And, we argued, even if the United States Supreme Court would not see Plaintiffs' claims differently seventeen years later, the New Mexico Supreme Court should.<sup>7</sup> But in an amalgamation of the most onerous federal burdens for plaintiffs seeking the shelter of our founders' guarantee of due process, the New Mexico Supreme Court denied our claims under the state constitution, refusing to depart from *Glucksberg*.

Federal courts have never been comfortable defining or limiting rights protected by the abstract doctrine of substantive due process. Two dominant approaches have emerged. The first, and more ridiculous approach, recasts an

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5. See *Washington v. Glucksberg*, 521 U.S. 702 (1997); see also Kathryn L. Tucker, *A Nadir of State Constitutional Jurisprudence: Failing to Protect Terminally Ill Patients' Choice for a More Peaceful Death In New Mexico*, 48 N.M. L. REV. 315 (2018). It is encouraging, yet confounding, that a right can gain "fundamental" status with time. A "fundamental" right, as it has developed, is essentially a right that a Court is willing to recognize and afford the strictest of a court's scrutiny to predictable outcome: protection. Arguably, however, it would have been more intellectually honest to acknowledge the plain fundamental nature of a decision like how we die while simultaneously finding that in this rare instance, and in absence of evidence related to a current practice, the state has credibly demonstrated its significant interest in preventing the practice.

6. See *Obergefell v. Hodges*, 135 S.Ct. 2584, 2602 (2015). The concurring *Glucksberg* minority, advocating for rejection of a rigid historical analysis of substantive due process rights, has prevailed subsequent to that decision. See *id.* The Court most recently made this plain in *Obergefell*, where in the context of same-sex marriage, the 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." *Id.* at 2598. In so doing, a court's duty cannot be "reduced to any formula." *Id.* (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)). Instead, courts must "exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect." *Id.* Though history informs that inquiry, it does "not set its outer boundaries," allowing us to learn from it without the past dictating the present. *Id.*

7. New Mexico courts do not follow federal analysis of parallel constitutional provisions in lock-step. See *State v. Gomez*, 1997-NMSC-006, ¶ 20, 932 P.2d 1. Instead, "New Mexico courts independently analyze 'state constitutional guarantees when federal law begins to encroach on the sanctity of those guarantees.'" *State v. Granville*, 2006-NMCA-098, ¶ 19, 142 P.3d 933 (quoting *State v. Gutierrez*, 1993-NMSC-062, ¶ 32, 863 P.2d 1052). Examples of cause to diverge from federal precedent include "a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics." *New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 28, 975 P.2d 841 (quoting *Gomez*, 1997-NMSC-006, ¶ 19).

asserted right at its most specific level.<sup>8</sup> The recast right is then held up against the Nation's history and legal tradition to determine whether it is "deeply rooted" therein and should enjoy constitutional protection.<sup>9</sup>

This is a rights-killing methodology that contravenes principles of analogy and distinction that are the essence of judicial decision-making. Applying this approach, for example, a plea to the courts to protect a familial or parental relationship, undoubtedly worthy of some protection from majority decree,<sup>10</sup> can be reduced to a level of abstraction that finds no precedent: an asserted right of unmarried fathers vis-à-vis children whose mothers are married to other men.<sup>11</sup> An assertion that a state has no business criminalizing private consensual intimate conduct in the home can be analyzed pejoratively by the courts as an asserted right "to engage in homosexual sodomy."<sup>12</sup> And the right to determine the time and manner of one's death<sup>13</sup> can become an asserted "right to commit suicide," and to demand a doctor's assistance in doing so.<sup>14</sup> Almost inevitably, such specifically-recast rights are never deeply rooted in the Nation's history or legal tradition, else they would already be protected by custom or statute, which would negate the need to bring the constitutional challenge in the first place. When a court chooses to apply this approach, it chooses to reject the plaintiff's claim.

The second, and currently prevailing, approach to substantive due process is a reaction against the strict historical analysis. In essence, the judiciary preempts the legislature in enacting social change by responding to recent changes in public opinion about the asserted right. For example, when there became an "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in manners pertaining to sex[.]"—who knew?—the United States Supreme Court overruled *Bowers v. Hardwick* and recognized a fundamental right to the same conduct that was politically unpopular when *Bowers* was decided.<sup>15</sup> And, more recently, the Supreme Court found a fundamental right to same sex marriage by following a path marked by changing attitudes, recently enacted state laws, and recently decided judicial opinions of state supreme courts and the lower federal courts favoring the right at issue.<sup>16</sup>

This "sea change" approach to constitutional law has its own problems. The judiciary is often criticized as a political institution staffed by unelected judges legislating from the bench. Judicial opinions resorting to public opinion are obviously subject to attack on that ground and on the related ground that the courts,

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8. See *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989).

9. *Id.* (quoting *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003)).

10. *E.g.*, *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (right of father to have custody of child born out of wedlock).

11. See *Michael H.*, 491 U.S. at 127 n.6.

12. *Bowers*, 478 U.S. at 191.

13. See *Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261 (1999).

14. *Washington v. Glucksberg*, 521 U.S. 702, 723 (1997).

15. *Lawrence*, 539 U.S. at 571–72.

16. *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

acting as a sort of super-legislature, are prematurely killing the ongoing public debate.<sup>17</sup>

But there is a more fundamental concern. By biding its time until the tide turns on politically unpopular rights-claims, the courts are abdicating their duty to “withdraw certain subjects from the vicissitudes of public controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”<sup>18</sup> Courts are not legislatures, and they’re not institutionally equipped to gauge public opinion; nor is it desirable that they do so. It is axiomatic that “fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.”<sup>19</sup> In fact, the greater the public’s animus toward particular groups or activities, the riper the case for constitutional review. In short, the rights asserted in cases like *Bowers*, *Glucksberg*, and *Obergefell* have always been fundamental, not because they’ve become (or may become) politically safe to protect, but for the opposite reason: the plaintiffs in these cases were subject to an invidious, democratically-sanctioned injustice that rejected their attempts at self-definition at every turn and without any legitimate reason for doing so. Sea change or not, the courts have a duty to step in.

Unfortunately, elements of both federal approaches are evident in our own supreme court’s review of physician aid in dying. The Court referred both to historical attitudes toward aid in dying, which, unlike marriage, had no “tradition to fall back on[.]”<sup>20</sup> and to the ongoing debate in state legislatures, unearthing only a “minor but growing trend”—rather than a sea change—recognizing the right through legislation.<sup>21</sup> At bottom, the Court was reluctant to intrude into an area, end-of-life medical care, which had no significant national consensus and which had been staked out over the years by a statutory scheme that protected certain forms of palliative care while criminalizing aid in dying.<sup>22</sup>

For the reasons discussed earlier, I believe both dominant federal approaches are flawed when applied by the United States Supreme Court. It’s even worse when state courts, applying their state constitutions, rely too heavily on the Nation’s history or on an irrelevant national consensus. Unlike the United States Supreme Court, which has to account for the fact that its constitutional rulings may affect the laws of fifty states, our state supreme court has far less reason to concern itself with practices nationwide. This is not to say that the experiences and lessons from aid in dying in states where it’s legal are not helpful. They are. They provide tremendous insight into developing standards of care that are necessary to keep the practice safe, and they are useful for evaluating the legitimacy of the state’s asserted concerns. However, in the basic determination of whether a right is a “fundamental” according to state law, our state supreme court is not well served when it proceeds lockstep with a Court that is primarily concerned with the balance of power between federal and state governments in a federalist system.<sup>23</sup>

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17. *See id.* at 2631 (Scalia, J., dissenting).

18. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943).

19. *Id.*

20. *Morris v. Brandenburg*, 2016-NMSC-027, ¶ 33.

21. *Id.* ¶ 5.

22. *See id.* ¶ 56.

23. *See Washington v. Glucksberg*, 521 U.S. 702, 735–36 (1997).

To be sure, the *Morris* Court briefly noted that it “might quarrel with the emphasis placed on history and tradition by the *Glucksberg* Court[.]”<sup>24</sup> but that was the extent of it, and the details of any such quarrel were never made express. This effectively left Plaintiffs’ claim unresolved. If the United States Supreme Court’s emphasis on history and tradition in *Glucksberg* was flawed, it would be absurd to follow it, and our interstitial approach to state constitutional review would justify departing from the federal precedent.<sup>25</sup>

Perhaps the strongest justification for departing from *Glucksberg* can be found in *Glucksberg* itself. By its own terms, the opinion was not intended to foreclose states from reconsidering the legality of aid in dying.<sup>26</sup> The Court expressly addressed only the particular challenge before it, and left open “the possibility that an individual plaintiff seeking to hasten her death, or a doctor whose assistance was sought, could prevail in a more particularized challenge[.]”<sup>27</sup> Thus, the Plaintiffs in *Morris*, who included a doctor and a dying a patient, did something that had not been previously been done. They created a record that specifically refuted all of the countervailing government interests that had been asserted in *Glucksberg*, including an unfounded slippery slope which alleged that providing physician aid in dying would inevitably lead to child euthanasia and the glorification of teenage suicide. Still, the *Morris* Court declined to depart from *Glucksberg*, citing only to the same statutes criminalizing the same conduct that the Court was asked to review.<sup>28</sup>

The inescapable conclusion is that there is no “more particularized” claim to aid in dying that can succeed in the New Mexico courts. That does not mean that the fight is over by any means. All efforts must be directed at the Legislature, or perhaps at building a national consensus significant enough for our supreme court to take notice. Those are the only options that remain for those trapped in an unbearable dying process in New Mexico.

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24. *Morris*, 2016-NMSC-027, ¶ 34.

25. *See* *State v. Gomez*, 1997-NMSC-006, ¶ 19, 932 P.2d 1.

26. *Glucksberg*, 521 U.S. at 735.

27. *Id.* at 735 n.24 (quoting *id.* at 750 (Stevens, J., concurring)).

28. *See Morris*, 2016-NMSC-027, ¶ 57.