



# New Mexico Law Review

## Aid in Dying Symposium Aids in Understanding

By: Kirsten Dick

Is there a fundamental right to die? If so, what role should state courts play in enshrining such a right? On Saturday, September 23, 2017 the New Mexico Law Review brought together legal scholars, medical practitioners, civil rights attorneys, and judges to pose answers to these questions. Upwards of 300 people packed the forum at the University of New Mexico School of Law to participate in the symposium titled “Establishing New Rights: A Look at Aid in Dying.” Multiple panels and presentations encompassed voices on both sides of the debate over physician-assisted suicide. The day centered around *Morris v. Brandenburg*, the 2016 New Mexico Supreme Court decision holding that physician aid in dying is not a fundamental right under the New Mexico state constitution.

Esteemed academic and Dean of the University of California, Berkeley School of Law, Erwin Chemerinsky, gave the keynote address. He began on a personal note, describing the final days of his father’s life and inability of doctors to make him comfortable. Dean Chemerinsky wished that his father had been offered the choice to end his life on his own terms, as opposed to spending his final days in tremendous pain.

Turning to the judiciary’s role on this issue, Dean Chemerinsky gave a brief synopsis of the extension of fundamental rights and liberties in the last century. With incredible ease, Dean Chemerinsky walked his audience through the seminal cases that expanded civil liberties in this country, starting with the Warren Court and ending with a prediction about the increasingly conservative Roberts Court. He prophesized that the Supreme Court will remain staunchly deferential to the legislature for the coming decades.

For that reason, he posited state high courts interpreting state constitutions are best situated to expand civil liberties, namely the right to die. Alluding to the Supreme Court’s decision in *Michigan v. Long*, Dean Chemerinsky emphasized the ability of state courts to offer more rights under their individual constitutions than under the federal constitution. He acknowledged that federal constitutional law has a great sway on state supreme courts, but insisted that federal constitutional jurisprudence should not confine state supreme courts when it comes to important individual rights.

So where does that leave the fight for physician aid in dying? Dean Chemerinsky was hopeful that years of data from states that have legalized physician aid in dying will serve to educate the public and correct misconceptions around the issue. He also issued a call to law schools and legal scholars to begin in earnest to teach and write about state constitutional law. He ended on a comparison made by many of the day’s speakers: when our pets are dying, we agree to put them down. He urged that we treat our loved ones as much or more humanely than we do our dogs and cats.

The call to state supreme courts did not go unanswered. New Mexico Supreme Court Justice Charles Daniels took the podium after Dean Chemerinsky to address the expansion of rights

under the New Mexico constitution. As a background, he explained that the state supreme court began to widen the scope of protection for civil liberties as the Burger Court moved farther away from the judicial philosophy of the Warren Court. Though he seemed to sympathize with right to die advocates, drawing on his experience with his own mother's illness and passing, he was adamant that it is the role of the legislature, not the judiciary, to lay out the steps for physician aid in dying. That, along with the precedential impact of the U.S. Supreme Court's decision in *Washington v. Glucksberg*, was the crux of the New Mexico Supreme Court's decision in *Morris*.

Turning to legislative solutions, Professor Thaddeus Pope of Mitchell Hamline School of Law, laid out several paths to legalizing physician aid in dying outside the courtroom, whether through ballot initiatives, state statutes, or state constitutional amendments. He pointed to the Oregon legislature's aid in dying statutes as a potential model for those looking to craft state laws. Professor Pope also gave a comprehensive overview of national and global efforts to legalize the right to die, and was especially complimentary of Canada's path to legalization through its courts.

Perhaps the most moving portion of the day occurred during Dr. Katherine Morris's presentation. Dr. Morris was the plaintiff in *Morris v. Brandenburg* who urged New Mexico state courts to find a state constitutional right for a physician to aid in ending a terminally ill patient's life. She told stories of her patients, some who wanted to die and others who wanted to fight their diseases until the end. Death is too complex an issue for the public to decide when a person has suffered too much, she said. She firmly believed that physician aid in dying is an issue for the judiciary, not the ballot box.

Picking up on the same themes as Dr. Morris was her attorney in the *Morris* decision, Kathryn Tucker, Executive Director of the End of Life Liberty Project. Ms. Tucker did not mince words when she said that the New Mexico Supreme Court failed when it said it felt bound by the *Glucksberg* decision of the U.S. Supreme Court. She said that the U.S. Supreme Court has identified a sphere of intensely private decision making that should be left solely to individuals, and that she believes aid in dying belongs squarely in that sphere.

The symposium also included two panels on the issues of aid in dying and the role of state constitutions and high courts in the provision of civil rights, respectively. New Mexico Court of Appeals Chief Judge Linda Vanzi and Judge Miles Hanisee, along with Professor Robert Schwartz of the UNM School of Law and former New Mexico assistant attorney general Scott Fuqua were led in a discussion of the right to die by UNM law professor Carol Suzuki. The judges discussed their opinions in the *Morris* case while Mr. Fuqua explained his perspective working in the state attorney general's office. Professor Schwartz agreed with Ms. Tucker that the New Mexico Supreme Court made the wrong decision in *Morris* and would have preferred the court take a similar path as the Canadian high court.

The second panel centered around the role of state supreme courts in interpreting their own state constitutions, moderated by distinguished UNM law professor Jim Ellis. Justice Charles Daniels, Chief Judge Linda Vanzi, and attorneys Andrews Schultz and Laura Schauer Ives participated in the discussion, which brought levity to a heavy emotional day. Deemed the "eat

your spinach” panel by Professor Ellis, topics ranged from the state’s unique method of judicial elections and ability of lawyers to bring state constitutional suits. The judges affirmed that, despite the electoral system, New Mexico judges are obedient to state laws and do not bend to public pressure. Mr. Schultz pointed out that the state does not have a realistic method by which attorneys can bring state constitutional claims for damages. Without a state civil rights act that would permit the grant of attorney’s fees, there are limited incentives for lawyers to sue for injunction or declaratory relief, according to Mr. Schultz. Ms. Schauer Ives explained that bringing such suits would force the state courts to address the originalist construction of the state constitution. Judge Vanzi encouraged this and made a plea to lawyers to bring state constitutional rights claims to educate the judiciary.

Perhaps the most striking aspect of the symposium was the cordial yet direct conversations between aid in dying advocates and members of the state judiciary. This back and forth is the goal of law reviews across the country, and it was fascinating to watch such interactions in real time through panels and presentations.

The New Mexico Law Review would like to thank Deans Sergio Pareja and Alfred Mathewson, President Chaouki Abdallah, and Professor Robert Schwartz for their support and assistance in hosting the symposium.