

# “How We Die” in New Mexico: A Judicial Prescription without Relief

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## Abstract

By some accounts, New Mexico Judge Nan Nash fashioned a landmark ruling in a civil dispute pitting two doctors and a cancer patient against the state. At issue, a statute making it unlawful to “deliberately aid[] another in the taking of his own life.” Plaintiffs in *Morris v. King* (2014) contended that for a “mentally-competent, terminally-ill individual” who sought a peaceful death over a painful life, a doctor prescribing lethal drugs for this purpose could not be prosecuted since physician aid in dying was not assisted suicide. While plaintiffs’ statutory claim was rejected, Judge Nash did hold that the statute as applied to physician aid in dying violated state constitutional guarantees safeguarding inalienable rights to “liberty, safety and happiness.” I argue that the interpretive path Judge Nash designed to justify her ruling is littered at critical junctures with strangely settled issues. For this reason, her judicial prescription legalizing this end-of-life choice wants the persuasive foundation that such a landmark holding deserves.

## Keywords

New Mexico, Aid in Dying, Belgium, Euthanasia, Children

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## 1. Introduction

On January 13, 2014, a New Mexico district court judge ruled that a mentally-competent, terminally-ill individual (MCTII) had a state constitutional right to die by self-administering a lethal drug prescribed by a physician (Morris, 2014). In addition to Oregon, Washington, Montana, and Vermont, New Mexico at that moment became the fifth state in the United States to legalize physician aid in dying (PAID).

In her written opinion for the court, Judge Nan G. Nash explained that the issues presented in *Morris v. King* (2014) orbited fundamentally around “the question of how we die” (Morris, 2014: p. 1). Plaintiff Katherine

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\*Dedicated to the memory of Bob Brutico—loving, kind, gentle, and content.

Morris, a New Mexican physician, contented that state law criminalizing assisted suicide—the act of “deliberately aiding another in the taking of his own life” (NMSA, 1978), a fourth degree felony—does not apply to a physician who aides in the death of a MCTII: guided by findings of the New Mexico Psychological Association, Morris reasoned that assisted suicide involved aiding in the death of a person suffering impaired cognition of a temporary and curable problem, while PAID involved a physician aiding in the death of a patient with an accurate cognition of a permanent and truly incurable physical condition (New Mexico Psychological Association, 2013). Judge Nash was asked for statutory clarification, namely, that the state’s ban on assisted suicide did not include PAID; that desired result would not only comfort MCTIIs that an alternative to unbearable suffering was available, but reassure physicians that they would not be prosecuted for hastening the death of a qualified patient. If Judge Nash conflated assisted suicide with PAID, thereby denying a statutory safe harbor for willing physicians, Morris also submitted a plethora of state constitutional claims each one designed to make the assisted suicide ban unconstitutional as applied to MCTIIs and their willing physicians.

Both statutory and constitutional arguments were raised and debated at a bench trial before Judge Nash in December 2013, followed within a month by her dramatic “findings of fact” and “conclusions of law.”

## 2. Statutory Resolution

Despite a statutory prohibition against assisted suicide dating back to 1963, forces seeking to legalize PAID in New Mexico explained that MCTIIs could already choose a hastened death without violating state law; several end-of-life choices legal in New Mexico suggested just that. MCTI New Mexicans could choose to remove life sustaining medical treatment (LSMT) and die; they could choose to refuse LSMT and die; or, to avoid unbearable physical suffering they could choose terminal sedation whereby, following drug-induced unconsciousness, death would result after food and water had been withheld. None of these choices were deemed suicide, and in each the cause of death was identified as the underlying disease, e.g., cancer or ALS among others. But for those whose pain could not be managed and who believed terminal sedation was objectionable by denying choice over the time, place, and manner of one’s death, PAID should be made the legal fourth option, indistinguishable in telling ways from those options that were legal: in each case, a MCTII chooses death over another day of unbearable suffering.

Trial transcripts revealed a wide range of variations on themes describing both the patients and conditions triggering PAID: a MCTI “patient,” “individual,” “person,” or “New Mexican” chooses PAID to end pain that was “excruciating,” “tortuous,” “untreatable,” “from hell,” “cruel,” “intractable,” “unrelenting,” “unbearable,” “unimaginable,” or “massive.” Judge Nash seemed sympathetic initially to the argument that assisted suicide and PAID were wholly distinct. New Mexico, she noted, had been the first state to pass legislation allowing “competent adults” the right to remove or refuse LSMT and die. She also noted that “[m]edical practices, medical treatment and medical ethics have changed radically over the past fifty years,” and during this time “New Mexico Courts and the New Mexico legislature have evidenced a desire to respect a terminally ill patient’s end of life choices” (Morris, 2014: p. 9).

Turning to the assisted suicide statute, the Judge declared that her construction of its prohibition would be governed by a mode of statutory interpretation that mandated giving effect to legislative intent; thus, if the law’s language “is truly clear—not vague, uncertain, ambiguous, or otherwise doubtful,” its provisions would be applied as written without exception unless, because of “beguiling simplicity ... the literal meaning of the statute would be absurd, unreasonable, or otherwise inappropriate in application” (Morris, 2014: pp. 7-8). Sounding a similar note of statutory caution decades earlier, the United States Supreme Court had famously held that the text of a federal law prohibiting “the immigration ... of foreigners ... to perform labor or services of any kind in the United States” if literally applied would achieve absurd consequences by banning all labor when only a prohibition against cheap, unskilled labor, not “brain toilers,” was intended (Holy Trinity, 1892: p. 464). For this reason, the Supreme Court announced—and in a tone that would surely resonate with Judge Nash—it is “a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers” (Holy Trinity, 1892: p. 459).

But as counsel for the state understood the statute, nothing “absurd, unreasonable, or otherwise inappropriate in application” lurked within its prohibition. Indeed, the only word in the statute requiring “any interpretation at all is ‘aiding’” (Defendants’ Motion to Dismiss, 2013: p. 4), and on that count, counsel opined, “[t]he common, ordinary meaning of ‘aid’ is not beyond the reach of a person of average intelligence. It means to help.” (De-

endants’ Motion to Dismiss, 2013: p. 5). Thus, if a physician’s “conduct is helping another person to end his or her life ... [the statute] prohibits it” (Defendants’ Motion to Dismiss, 2013: pp. 5-6).

Judge Nash’s resolution of this statutory debate was similarly matter-of-fact. New Mexico’s statute “is not ambiguous,” and its legislative history is silent about its purpose. Accordingly, the Judge concluded, “[d]istinguishing aid in dying from suicide does not remove aid in dying from the definition of assisting suicide found in [the statute]” (Morris, 2014: p. 9), making the ban “a basis for the prosecution of any physician providing aid in dying to a MCTI patient who seeks a peaceful death as an alternative to enduring a dying process the patient finds unbearable” (Morris, 2014: p. 10).

Having lost on matters of statutory interpretation, the debate then shifted to state constitutional guarantees: Is an otherwise valid exercise of state police power, namely New Mexico’s ban of assisted suicide, void on constitutional grounds as applied to a physician who assists in the suicide of a MCTII?

### 3. Constitutional Resolution

PAID proponents focused on a number of state constitutional guarantees that might plausibly immunize willing physicians from the state’s criminal code, and just as she had done in prefacing her reading of New Mexico’s statute, Judge Nash discussed the modes of constitutional interpretation that would guide her. Of paramount importance, she explained, state courts would yield to the rulings of the United States Supreme Court where state constitutional guarantees have federal analogues. In this way, for example, due process guarantees enumerated in New Mexico’s Constitution would be made to conform to the Supreme Court’s construction of the same guarantee in the United States Constitution.

In order to conform to federal jurisprudence, two material rulings of the Supreme Court would serve as bedrock constitutional foundations in Judge Nash’s reading of state constitutional law. First, in *Cruzan v. Director, Missouri Department of Health* (1990), the Supreme Court determined that a competent person enjoys a “liberty interest” to be free from unwanted medical treatment; and second, in *Washington v. Glucksberg* (1997), the Court rejected a reading of “liberty interest” that would embrace the right to PAID. Each case, anchored in the Due Process Clause of the Fourteenth Amendment, would serve Judge Nash as settled understandings of due process protections provided by the *New Mexico Constitution*.

But the federal conforming rule, Judge Nash announced, would not limit a state judge where the right asserted was tethered to state constitutional language without a federal analogue; as Judge Nash explained, “[w]hen, as here, the right being asserted is not protected under the federal constitution, the state constitution is examined” (Morris, 2014: p. 11). Thus, without even addressing free speech and equal protection claims raised by PAID proponents that paralleled federal protections, Judge Nash reduced the constitutional challenges to the state ban on PAID to the only enumerated state rights not duplicated in the United States Constitution, to wit, New Mexico’s guarantees that “[a]ll persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty ... and of seeking and obtaining safety and happiness” (*New Mexico Constitution*). For Judge Nash, “[t]hese guarantees are distinct additions to those found in the federal constitution, allowing the Court to diverge from federal precedent” (Morris, 2014: p. 12).

But what effect would such “majestic generalities” in New Mexico’s Constitution have for those who claimed that PAID is a fundamental right not subject to the state criminal code? After noting that these state guarantees have “not been fully defined by New Mexico Courts,” Judge Nash then delivered her seismic reading of them, and in two distinctly different appeals to legitimacy: first, “[t]his 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”; and second, “[i]f 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, than [*sic*] what decision are” (Morris, 2014: pp. 12-13)?

Still, Judge Nash’s elevation of PAID to the status of a fundamental right ended only part one of any such debate, since, informed by a long train of fundamental rights/equal protection cases resolved by the United States Supreme Court, fundamental rights can be regulated if a state advances justifications that are narrowly tailored to achieve compelling governmental interests. The Supreme Court’s *Glucksberg* opinion identified four such interests and challenged state governments to manufacture laws legalizing PAID that satisfied each. Can PAID be legalized 1) without compromising the state’s “unqualified interest in the preservation of human life”; 2) without undermining “the integrity and ethics of the medical profession”; 3) without untoward “coercion and

undue influence” threatening “vulnerable groups—including the poor, the elderly, and disabled persons”; and 4) without legitimizing end-of-life options beyond PAID, including but not limited to “voluntary and perhaps even involuntary euthanasia” (Glucksberg, 1997: pp. 728-732). Measured against such challenges, however, the Glucksberg Court, while declining to nationalize a right to PAID, did applaud the “earnest and profound debate about the morality, the legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.” (Glucksberg, 1997: p. 735). Said Justice O’Connor, approvingly in a concurring opinion, the “challenging task of crafting appropriate procedures for safeguarding ... liberty interests is entrusted to the ‘laboratory’ of the states ... in the first instance” (Glucksberg, 1997: p. 737).

The critical issue of regulating PAID in a fashion that effectively addressed Glucksberg’s array of compelling state interests was thoroughly vetted at trial before Judge Nash. The facts seemed incontrovertible. Settled at the ballot box by a voter-approved initiative—first in 1994, then again in 1997 and by an even wider margin—the state of Oregon became the first to legalize PAID ([Oregon Death With Dignity Act](#)) and with it a rigorously crafted set of safeguards codified to guarantee that the practice of PAID would not be abused as opponents of Oregon’s law feared. Oregon’s Death with Dignity Act (DWDA) established strict qualification requirements, among them: the patient must be an “adult,” fully “informed” about the diagnosis and prognosis, “capable” of making and communicating health-care decisions, and suffering from a terminal illness which, in the judgments of attending and consulting physicians, will lead to death within six months. Moreover, if mental fitness is doubted, professional “psychiatric or psychological” intervention is mandated. To prove that a patient’s decision to die with dignity is voluntary, two oral requests separated by fifteen days, as well as a signed, dated and witnessed written request are required. Finally, the prescription, once filled, must be self-administered.

In the years following Oregon’s path-setting legislation, what has been learned from this “laboratory”: Is PAID, as Oregon designed it, “safe, legal, and rare” in practice ([International Task Force on Euthanasia and Assisted Suicide et al., 2009: p. 8](#))? Counsel defending PAID left no doubt: guided by a “landscape rich with data about how an open practice of aid in dying impacts patients and physicians” ([Opposition to Defendants’ Motion to Dismiss, 2013: p. 29](#)), details gathered by Oregon’s Public Health Division were advanced to quiet the fears of PAID opponents: vulnerable populations were not targeted; most PAID patients were educated, insured, and enrolled in hospice; physicians worked to improve pain-management skills and to recognize signs of depression and psychological disorders more effectively; deaths attributed to PAID were rare, and of those who had filled lethal prescriptions, a considerable number of them chose not to self-administer the drug; and finally, the survivors of PAID patients “suffer[ed] none of the adverse mental health impacts” associated with suicide ([Tucker Remarks, 2013](#)).

The Oregon data had an even larger appeal for PAID advocates in New Mexico: the standard of care or best practices established in Oregon would govern physician practices in those states that, following Oregon’s lead, legalized PAID, an especially comforting reckoning for any judge who would legalize this end-of-life choice in court. Thus, unlike the popular referendum in Washington or the state legislative enactment in Vermont where virtually identical regulatory schemes parroting Oregon’s were adopted, Judge Nash could legalize PAID from the bench confident in knowing Oregon’s safeguards would be understood and binding—in New Mexico!

Judge Nash did precisely that. As one of her stipulated “findings of fact,” the judge asserted that in states where “explicit statutory authorization” has legalized PAID, “there is no uncertainty in the law and the practice has developed as one of the standard of care options for MCTI patients at the end of life” (Morris, 2014: p. 4). As if emphasis were necessary, Judge Nash rephrased: “A standard of care for physician aid in dying, informed by clinical practices and authoritative literature, including Clinical Practice Guidelines, has developed” (Morris, 2014: p. 5). Thus, compelling governmental interests effectively abated by Oregon regulations, Judge Nash announced the following conclusion of law: “[a]bsent a compelling state interest, [New Mexico’s assisted suicide ban] unduly burdens the exercise of a MCTI New Mexican patient to choose aid in dying ... [and] therefore violates our State constitution when applied to aid in dying” (Morris, 2014: p. 13). As for the physician, as if this particular matter were in doubt, Judge Nash also affirmed that the state “shall be permanently enjoined from prosecuting any physician for providing aid in dying to a MCTI” (Morris, 2014: p. 14).

#### 4. Issues Strangely Settled

Framed by state statutory and constitutional law, Judge Nash discovered then announced a fundamental right to PAID, protective of both MCTIs and their willing physicians. But the interpretive path she designed to justify

these results, I argue, is littered at critical junctures with strangely settled issues, and this because the very modes of statutory and constitutional interpretation she pledged to apply are puzzlingly discarded. For this reason, then, her judicial prescription legalizing PAID wants the persuasive, convincing foundation that such a discovery deserves to gain legitimacy. In New Mexico, accordingly, green has become the new red: Judge Nash's green light for PAID erects a red light for physicians who choose to assist in the death of a MCTI New Mexican. Strangely settled—unpersuasive and unconvincing—in what ways?

First, on statutory grounds, Judge Nash describes then applies “the plain meaning rule” to guide her construction of state law that criminalizes “deliberately aiding another in the taking of his own life”: thus, “if the meaning of the statute is clear ... apply the statute as written.” Her cautionary reservation? If a statute’s “beguiling simplicity” generates an “absurd, unreasonable, or otherwise inappropriate ... application,” then “practical implications” in addition to “plain language” must guide a judge’s interpretive hand. But Judge Nash contradicts this very interpretive principle when, after announcing that the criminal code “continues to provide a basis for the prosecution of any physician providing aid in dying,” a fourth degree felony, that very conduct morphs into the most fundamental of the state’s fundamental rights, and, shockingly, stripped of compelling governmental interests to justify its regulation. “Beguiling simplicity” begetting an “otherwise inappropriate ... application”? A reasonable physician might pause to wonder whether Judge Nash’s strangely settled foundational construction of this fundamental right is not felonious behavior at its statutory core when exercised.

Second, Judge Nash’s interpretation of New Mexico’s constitutional language is indistinguishable from one of the most vilified, ill-starred of all opinions delivered by the United States Supreme Court, in that group of the worst three decisions in history occupied by none other than *Dred Scott v. Sandford* (1857)—African-Americans are not persons but property, and *Plessy v. Ferguson* (1896)—countenancing the discriminatory “separate but equal” treatment of African-Americans (Schwartz, 1997: p. 69). The vilified opinion—the third worst—was Justice Peckham’s in *Lochner v. New York* (1905).

At issue in *Lochner* was a New York law that, after considerable legislative debate and discussion, limited the number of hours a baker could work as a measure to promote the state’s legitimate interest in the health and welfare of a class of workers. The challenge to New York’s law focused on the Due Process Clause of the Fourteenth Amendment commanding that no state shall “deprive any person of life, liberty, or property, without due process of law.” In Justice Peckham’s hand the Due Process Clause embraced 1) the economic theory of *laissez-faire* capitalism, including 2) the “right to make a contract ... [as a] part of the liberty of the individual protected by the Fourteenth Amendment” (*Lochner*, 1905: p. 53), making 3) New York’s law unconstitutional as an “unreasonable, unnecessary and arbitrary interference” with contractual liberty (*Lochner*, 1905: p. 56). Denying that his opinion was “a question of substituting the judgment of the court for that of the legislature” silenced the criticisms of few, then or since (*Lochner*, 1905, pp. 56-57). Peckham’s opinion has become the classic example of judicial activism at its worst, advancing unenumerated constitutional principles as if they were enumerated, and this to void the considered judgment of the people’s representatives. Justice Holmes’s now vindicated *Lochner* dissent—among the most consequential ever written—demanded deference to “the right of the majority to embody their opinions in law” (*Lochner*, 1905: p. 75), unless according to “a reasonable man” the statute “would infringe fundamental principles as they have been understood by the traditions of our people and our law” (*Lochner*, 1905: p. 76).

Judge Nash noted that as “a separate sovereign in our federalist system,” state judges can advance new principles of state constitutional law if state constitutional language is not controlled by the Supreme Court’s interpretation of federal analogues. In point of fact, the “inalienable rights” Judge Nash employed to birth the fundamental state constitutional right to PAID have no federal analogue, allowing, as Judge Nash announced, “greater rights to New Mexico defendants than those rights provided in the federal constitution” (Morris, 2014: p. 11). While on this count word-for-word comparisons between federal and state constitutions do isolate “distinctive state characteristics,” telling similarities between federal due process and New Mexico’s inalienable rights provisions are plainly apparent, and in the service of limiting not liberating the discretion of a state judge.

Due process and inalienable rights, cavernous in breadth, could plausibly serve as constitutional homes for a disparate and seemingly endless collection of rights; “few phrases of the law are so elusive of exact apprehension as [due process],” the Supreme Court lamented in 1908 (Twining, 1908: pp. 99-100)—a lamentation equally apt with respect to New Mexico’s “natural, inherent and inalienable” guarantees of liberty/safety/happiness. A surprise innovation to many, also, that *Lochner* even managed to create a substantive understanding of due process when, just five years after the ratification of the Fourteenth Amendment, the Supreme Court had limited

its prophylactic reach to procedural limits on how state governments constitutionally separate a person from life, liberty, or property (*Slaughterhouse Cases*, 1873). As for the liberty/safety/happiness guarantees, while Judge Nash claimed that the contours of these protections had “not been fully defined,” counsel for the state turned “not [] fully defined” into a quick summary of the only two happiness cases resolved by the New Mexico Supreme Court, and this to demonstrate what the happiness provision did not mean: happiness would not 1) void a university policy banning “intervisitation of men and women in a dormitory room”; nor would happiness 2) trump New Mexico’s sovereign immunity in a civil suit brought by a survivor of a police shooting, i.e., recovering amounts beyond those permitted by state law was not the happiness intended by its framers (*Defendants’ Motion to Dismiss*, 2013: p. 10).

Ambiguity, and more. In both *Lochner* and *Morris*, evidence that unreasonable, arbitrary, or capricious behavior infected the legislative process was utterly absent. In fact, Judge Nash recounted state legislative adoptions of two health care laws demonstrating the care lawmakers showered on statutory language to clarify that PAID would not represent an exception to the state’s ban on assisted suicide; incomprehensibly, however, the very exception that the legislature took pains to eliminate is reconstructed by Judge Nash as the most fundamental of New Mexico’s fundamental rights.

True, then, in both Peckham’s and Nash’s interpretive world, constitutional ambiguity invited constitutional lawmaking to void reasonable legislative enactments.

*Morris v. King* (2014)—strangely settled for a third reason. Judge Nash discovered and announced a state constitutional right confident that its practice would be governed by Oregon standards of care, codified then proven effective based on fifteen years of data collection and analysis. Recall, the Supreme Court in *Glucksberg* identified a number of compelling state interests that could sustain state legislative bans on assisted suicide, including PAID. Oregon’s standard of care, most agree, advances simultaneously both compelling state interests and the right to PAID as an end-of-life choice. But *Glucksberg* concludes by inviting and encouraging states to continue to debate “the morality, legality, and practicality of physician-assisted suicide.” Judge Nash all but silences *Glucksberg*’s call to debate: in her hands, the very opinion intended to fuel state legislative experimentation reads Oregon safeguards not as a standard one among others but as the nationalized gold standard by which all experiments with legalizing PAID are governed—New Mexico’s included.

But one might ask, has Oregon exhausted all reasonable options governing the practice of PAID? Is the search for reasonable rules and regulations different than those codified in Oregon an exercise in futility? Perhaps not. After all, in *Holmes*’s vindicated dissent in *Lochner* the “reasonable man” occupies the interpretive center stage, and is asked whether she “might think [the law] a proper measure on the score of health.” Might a physician in New Mexico differently understand what constitutes a reasonable medical and ethical response to a MCTII who chooses death over a life plagued by “untreatable” and “cruel” suffering? In addition to, by comparison, more trivial matters over which reasonable physicians might disagree, such as residency requirements, waiting period lengths, the number of oral requests, and those who qualify as witnesses, is it reasonable to think a willing physician might honor a request to euthanize an otherwise qualified PAID patient because of that patient’s inability to self-administer a lethal prescription? Might a reasonable physician reject as medically and ethically meaningless the distinction between MCTIIs who can or cannot self-administer relief from unbearable suffering? Considering again the world that Judge Nash describes, where “[m]edical practices, medical treatment and medical ethics have changed radically over the past fifty years” (*Morris*, 2014: p. 9), could the next generation of physicians set aside the self-administration rule as an “unreasonable, unnecessary and arbitrary” barrier for MCTIIs otherwise similarly situated?

In this light, consider again Vermont’s legalization of PAID in 2013 (*Vermont Patient Choice and Control at the End of Life Act*). The Vermont legislature legalized PAID with Oregon safeguards attached; on July 1, 2016, however, those very safeguards are automatically eliminated. Why? Leading PAID advocates believe physicians will have incorporated Oregon standards of care by the 2016 date, making those regulations in Vermont no longer necessary. Sharing that sentiment in closing remarks at the *Morris* trial, counsel defending PAID argued that “virtually, no medicine is governed by statute. Medicine is governed by professional practice standards, also referred to as ‘best practices’ standards of care. It is highly aberrant for medicine to be covered by a statute” (*Transcript of Proceedings*, 2013: p. 109). Then, to explain Vermont’s dramatic legislative sunset on July 1, 2016, *Morris* attorneys imagined Vermont legislators agreeing that “[w]e are going to follow the tried-and-true method and model in Oregon for a couple of years, but then all of those statutory provisions evaporate and what is left is best practices” (*Transcript of Proceedings*, 2013: p. 109).

But a more detailed parsing of Vermont’s legislative debate uncovers a plausible different take on legislative intent, namely, that after a few years governed by Oregon safeguards they will be lifted to prevent “undue governmental intervention in what should be a sacred exchanged between doctor and patient” (Hirschfeld, 2013). Said one Vermont legislator, “[Vermont’s DWDA] is a choice bill. You don’t need a second opinion. As soon as you get to a second opinion, the choice is gone” (Dillon, 2013). In point of fact, after July 1, 2016, Vermont’s DWDA grants full immunity from criminal and civil penalties in addition to professional disciplinary action for physicians who practice PAID, as well as family and friends who are present at a loved one’s death. Seen from this perspective, then, Vermont seems to have chartered a separate and distinct understanding of standards of care quite unlike Oregon’s—and inspired, one could argue, by Glucksberg’s call for experimentation among states.

But like Vermont, Judge Nash—perhaps unknowingly—has also chartered a separate and distinct understanding of standards of care quite unlike Oregon’s. In yet another issue strangely settled—and here with the gravest of consequence—Judge Nash understood that MCTIs triggered requests for PAID and that Oregon safeguards would serve as barriers against abuse. But in those very safeguards that Oregon had specifically enumerated, the trigger mechanism was a MCTI adult, “an individual who is 18 years of age or older.” With rare and scattered exceptions that prove the rule, both in motions filed and testimony transcribed, the term individual, or patient, or person, or New Mexican is employed, not adult; and in not a single instance does Judge Nash reference a MCTI adult in her written opinion. Could reasonable physicians believe a MCTI child, equipped “with a capacity for discernment,” qualifies for PAID in New Mexico (Higgins, 2013)? Did Judge Nash intend not to apply a benchmark Oregon safeguard, choosing instead to follow Belgium’s 2014 determination that unbearable suffering dissolves any compelling distinction between an adult and a child (Schultz, 2014)? And if judge Nash did not intend the strangely settled trigger mechanism she enumerated, then results unintended only undergird the argument against “legislating from the bench,” since, as here, what the judge’s law becomes is no longer within that judge’s control. Thus, New Mexico confidence in Oregon standards of care may disappear now that one of the most elemental units of Oregon’s foundational regulatory scheme has been judicially jettisoned—intentionally or not.

## 5. A Judicial Prescription without Relief

As Judge Nash introduced matters in *Morris v. King* (2014), “the question of how we die” was central to the statutory and constitutional challenges presented to her. While New Mexicans may welcome her “conclusions of law,” comforted by the end-of-life choice she discovered, the “question of how we die” has pivoted in *Morris* to the reasons that justify “how we die.” On this count, for issues strangely settled, Judge Nash’s *Morris* opinion amounts to a judicial prescription without relief.

Pledging to avoid statutory interpretations that generate inappropriate applications, a statutory ban on assisted suicide as applied to PAID is conceived both as a fourth degree felony and as the most fundamental of state constitutional rights. Pledging to follow applicable federal judicial teachings, *Lochner*’s lesson about what judging should avoid—employing capacious, undefined constitutional language to void reasonable legislative enactments—is wholly neglected. Pledging to represent New Mexico as a “separate sovereign in our federalist system,” sovereign control over the practice of PAID is surrendered to rules popularly codified in another state. Pledging that Oregon standards of care will apply and prevent abuse in New Mexico’s practice of PAID, a crowning component of Oregon’s scheme is ruled not applicable.

Indeed, the *Morris* issues are strangely settled—unpersuasive and unconvincing in many ways. For this reason, having showered Oregon’s Death With Dignity Act and regulatory scheme with the applause it arguably deserves, perhaps PAID proponents should rethink their strategy of forging end-of-life guarantees in the courtroom instead of the ballot box.

## References

- Cruzan v. Director, Missouri Department of Health* (1990). 497 U.S. 261.  
 Defendants’ Motion to Dismiss (2013). Case No. D-202-CV-2012-2909.  
 Dillon, J. (2013). With Senate Divided, Supporters Struggle to Find Deal on End-of-life. *VPR*.  
*Dred Scott v. Sandford* (1857). 60 U.S. 393.

- Higgins, A. (2013). Belgian Senate Votes to Allow Euthanasia for Terminally Ill Children. *New York Times*.
- Hirschfeld, P. (2013). Dramatic Vote in Senate Proves Game-Changer for Death with Dignity. *Vermont Press Bureau*.
- Holy Trinity v. United States (1892). 143 U.S. 457.
- International Task Force on Euthanasia and Assisted Suicide et al. (2009). Brief *Amicus Curiae* for Montana. DA 09-0051.
- Lochner v. New York (1905). 198 U.S. 45.
- Morris v. King (2014). Case No. D-202-CV 2012-2909.
- New Mexico Constitution, Article II, Section 4.
- New Mexico Psychological Association (2013). Brief of *Amicus* in Support of Plaintiffs. No. CV-2012-2902.
- New Mexico Statutes Annotated (1978). Sec. 30-2-4.
- Opposition to Defendants' Motion to Dismiss (2013). Case No. D-202-CV-2012-2902.
- Oregon Death with Dignity Act (1997). Or. Rev. Stat. Sections 127.800-127.897.
- Plessy v. Ferguson (1896). 163 U.S. 537.
- Schultz, T. (2014). Belgian Proposal: Terminally Ill Kids Could Choose Euthanasia. *NPR*.
- Schwartz, B. (1997). *A Book of Legal Lists: The Best and Worst in American Law*. Oxford: Oxford University Press.
- Slaughterhouse Cases (1873). 83 U.S. 36.
- Transcript of Proceedings, Morris v. King. (2013). Case No. D-202-CV 2012-2909.
- Tucker, K. L. (2013). Remarks before Interim Legislative Health and Human Services Committee Informational Hearing on Morris v. NM and Aid in Dying in NM.
- Twining v. New Jersey (1908). 211 U.S. 78.
- Vermont Patient Choice and Control at the End of Life Act (2013). No. 39, 18 V.S.A., Chapter 113.
- Washington v. Glucksberg (1997). 521 U.S. 702.