My job

No legal arguments
No policy arguments
Just legal history

Objective in Morris:
Clarify legality of MAID in New Mexico

Who else?
Where?
How?

Roadmap

Thank you
Assisted suicide
criminal statutes
Right to refuse treatment

**Paths** to MAID
legalization

---

**Statutory Approaches**
- Ballot initiatives
- Legislation

**Litigation Approaches**
- Federal constitution
- State constitution
- Statutory interp.

**Other Approaches**
- Limit prosecutorial discretion
- Jury nullification

---

**Not** covering “all” law re MAID

Only **affirmative** efforts to permit

---

**Criminal Assisted Suicide**

Advocate & innovator
>20 years
Across USA, since 1800s, helping someone commit suicide is a crime.

“assisted suicide prohibitions are deeply rooted in our nation’s legal history.”

NMSA § 30-2-4

“Assisting suicide consists of . . . aiding another in the taking of his own life . . . fourth degree felony.”

Right to die
### 1950s & 1960s
- Mechanical ventilators
- Dialysis
- Feeding tubes

### >100 appellate cases
Right to refuse treatment even if life-sustaining

1977 RTDA
1995 UHCDMA

Is this “assisted suicide”?
Chill from NMSA § 30-2-4

NMSA § 24-7A-13(B)(1)
“Death resulting from the withholding or withdrawal of health care . . . does not . . . constitute a suicide . . .”

MAID = AS
AS = felony
MAID = felony

No such clarity re MAID

Pathway 1
Litigation
US Constitution

Enough background onto the pathways

Due process
Equal protection
1st Amendment

Welcome to Washington
THE EVERGREEN STATE
1994
Harold Glucksberg
D. Ore. (1994) \( Y \)
9th Cir. (1995) \( N \)
9th Cir. EB (1996) \( Y \)
SCOTUS (1997) \( N \)

Tim Quill
NDNY (1994) \( N \)
2d Cir. (1996) \( Y \)
SCOTUS (1997) \( N \)

>15 appellate judges

1997: no US Const. right

Federal constitutional rights in other countries

1997: no US Const. right
BUT

No federal constitutional right
Focus to states

Pathways 2 & 3
State statutes

Ballot initiatives
Legislation
Ballot initiatives

Early failures
1988 California
1991 Washington
1992 California
1994 Michigan

Problem
Legalize both euthanasia and medical aid in dying

MAID
Self ingestion
Patient takes the final overt act

Injunction 1994 to 1997

Oregon Death with Dignity Act
Data summary 2016
Track record
Documented
Solid

Legislation
May 2013
Enacted
3 initiatives
3 bills

6 statutes
~20% population

Statutes in other countries

Australian Government

1997

1995

2017

ONE WAY
2014
Quebec

Ongoing

Bills ~25 states (2017)

Passed 1 chamber

2014

Welcome to NEW MEXICO
Land of Enchantment

Pathway 4
Litigation
state constitution

>15 cases

Tuesday 9/26

9/22/2017
No “lasting” success

Trial court win

Appellate loss

3

McIver wins FL DCT
Reversed FL SCT

Baxter wins MT DCT
Not reached MT SCT

Trial court loss

Appellate loss

>10

1992
Most recently

Robert Sanderson
Colo. 2000

No CA right

Kevin Sampson
2001

Alaska

Christie White

Christie O’Donnell

John Jay Hooker

Sara Myers
State constitutional right

App. courts 0
Trial courts 3

Active cases

John Radcliffe
HI

Roger Kligler
MA

Jennifer Holm
Iowa

Pathway 5
Litigation
State statute

Assisted suicide

Aid in Dying

George Bailey

Aja Riggs
MAID is different
But still legally “assisted suicide”

Often included with state con. law claims (e.g. NM, NY)
But never accepted

Blick
CT

Lucretia Seales
June 2015

BUT

Mont. Code Ann. 45-2-211
“consent of the victim to conduct charged . . . is a defense”
AS statute not apply

Trial court 0
Appellate 1

Pathway 6
Limit prosecutorial discretion

Not decriminalized
But guidance on MAID without penalty

Netherlands
Before 2002

Debbie Purdy

CPS

Factors that will influence whether or not someone is prosecuted for assisting suicide

Comfort to travel, not to MAID in UK
“urges prosecutorial discretion by the Cochise County Attorney in de-prioritizing cases . . . imminent death . . . intolerable suffering.”

Not decriminalized
But *de facto* immunity

Pathway 7
Jury nullification

Conclusion
7 pathways
Set aside 3 pathways

No ex ante guidance
Prosecutorial discretion
Jury nullification

<table>
<thead>
<tr>
<th></th>
<th>Succeed</th>
<th>Fail</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ballot</td>
<td>3</td>
<td>&gt;7</td>
</tr>
<tr>
<td>Bill</td>
<td>3</td>
<td>&gt;200</td>
</tr>
<tr>
<td>AS not apply</td>
<td>1</td>
<td>&gt;5</td>
</tr>
<tr>
<td>State const.</td>
<td>0</td>
<td>15</td>
</tr>
</tbody>
</table>

Thaddeus Mason Pope, JD, PhD
Director, Health Law Institute
Mitchell Hamline School of Law
875 Summit Avenue
Saint Paul, Minnesota 55105
T 651-695-7661
C 310-270-3618
E Thaddeus.Pope@mitchellhamline.edu
W www.thaddeuspope.com
B medicalfutility.blogspot.com