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DOCTRINE OF DIGNITY: MAKING A CASE FOR THE RIGHT TO DIE WITH DIGNITY IN FLORIDA POST-*OBERGEFELL*

*Carita Skinner**

INTRODUCTION

Charles Edward Hall was thirty-six years old when he died in his sleep from complications related to AIDS.[1] Mr. Hall had acquired the disease four years prior after a blood transfusion during back surgery and had suffered terribly since; the last months of his life were

* Carita Skinner is an associate at Cole, Scott & Kisane, P.A., where she concentrates her practice in the areas of general and complex civil litigation. She received her J.D., *magna cum laude*, from Florida A&M University College of Law. At Florida A&M, she served as Associate Articles Editor for the Florida A&M University *Law Review* and chair of the Advocacy Board. Prior to law school, she worked in the medical field and holds a bachelor's degree in molecular biology and microbiology from the University of Central Florida.

1. *C.E. Hall, 36, AIDS Patient Who Sued to Die,* N.Y. TIMES (Mar. 12, 1998), https://www.nytimes.com/1998/03/12/us/c-e-hall-36-aids-patient-who-sued-to-die.html.

spent bedridden.[2] "The sadness of [his] death . . . is that he died in the very way he was trying to avoid."[3] Mr. Hall spent the last two years of his life fighting to end his life on his own terms – by a physician-administered dosage of morphine – only to be denied this basic dignity by the Florida Supreme Court.[4]

Unfortunately, Mr. Hall's uncomfortable passing from a terminal disease is not uncommon. Florida has the highest rates of new HIV cases in the United States,[5] and Florida is home to nearly half of the 1.1 million people living with HIV in the United States.[6] In Florida alone, it is estimated that just over 120,000 people will be diagnosed with cancer in 2019, and approximately twenty-three percent will die from a form of the disease.[7] Further, it was estimated that over 1.5 million people in the United States would be diagnosed with cancer, and over thirty percent of those diagnosed would die from the disease.[8] Yet, in Florida and most states, individuals who face inevitable suffering and pain are not afforded the option of ending their lives comfortably and in a dignified manner.[9] Instead, end-of-life decisions – an utmost private decision primarily made between an individual and his or her physician – is a decision left to the state.

2. *Id.*

3. *Id.*

4. *See Krischer*, 697 So. 2d at 104. During the trial, Mr. Hall told a local newspaper that despite his physical ailments, it was important to him to make it to the courtroom to testify, with the "hope [that] the judge sees this is a matter between me and my doctor, not between me and the state." Diane C. Lade, *Man Sues for Right to Die on His Terms*, SUN SENTINEL (Jan. 7, 1997), https://www.sun-sentinel.com/news/fl-xpm-1997-01-07-9701060315-story.html.

5. Sammy Mack, *South Florida Continues to Have Highest Rates of New HIV Cases in the Country,* WLRN (Jul. 10, 2018), https://www.wlrn.org/post/south-florida-continues-have-highest-rates-new-hiv-cases-country.

6. Jon Cohen, *'We're in a Mess.' Why Florida is Struggling with an Unusually Severe HIV/AIDS Problem*, SCIENCE (June 13, 2018), https://www.sciencemag.org/news/2018/06/we-re-mess-why-florida-struggling-unusually-severe-hivaids-problem.

7. *See Florida*, AM. CANCER SOC'Y CANCER STATISTICS CTR., https://cancerstatistics center.cancer.org/#!/state/Florida (last visited Jan. 30, 2019).

8. NATIONAL CANCER INST., https://www.cancer.gov/about-cancer/understanding/statistics (last updated April 27, 2018).

9. In a study focusing on opinions about end-of-life treatment, the Pew Research Center found that fifty-six percent of adults in the United States think there is a moral right to suicide when someone has an incurable disease. *Views on End of Life Treatments*, PEW MED. CTR. RELIGION & PUB. LIFE (Nov. 21, 2013), http://www.pewforum.org/2013/11/21/views-on-end-of-life-medical-treatments/. However, only forty-seven percent of adults in the United Sates approve of laws allowing for physician-assisted suicide for terminally ill patients. *Id.*

Since 1868, a Florida statute has made physician-assisted suicide equivalent to "assist[ed] self-murder."[10] To "deliberately" assist in "self-murder," one would be held guilty of manslaughter and punished accordingly.[11] The last time the Florida Supreme Court reviewed a case pertaining to physician-assisted suicide was in Mr. Hall's case more than twenty years ago in *Krischer v. McIver.*[12] To challenge the constitutionality of Florida's physician-assisted-suicide statute, Mr. Hall contended that it violated both the Florida Constitution and the United States Constitution.[13]

Only one month prior to the Florida Supreme Court's rejection of Mr. Hall's argument in *Krischer*, the United States Supreme Court had handed down landmark decisions regarding physician-assisted suicide in *Washington v. Glucksberg*[14] and the lesser-known *Vacco v. Quill.*[15] In deciding *Krischer*, the Florida Supreme Court looked to the holdings of *Glucksberg* and *Vacco* to evaluate whether Florida had a compelling interest in preventing assisted suicide. However, since *Krischer*, Florida legislators and jurisprudence have been remarkably quiet on the issue of physician-assisted suicide, while other states have taken to the polls and to the courtrooms to effect considerable change.[16] Such silence begs curiosity considering Florida's demographics show a high percentage of elderly and retired residents — a population whose opinions and interest in end-of-life decisions should be imperative.[17]

The discussions about the right to privacy have evolved, and the national landscape on physician-assisted suicide has changed since *Krischer.*[18] Surely, it is time Floridian citizens are given the opportunity to decide whether the right to privacy guaranteed by the Florida constitution includes the right to die with dignity. Numerous states across the nation have adopted legislative provisions which afford those within that state's borders the ability to die with dignity through

10. Fla. Stat. § 782.08 (2018).

11. *Id.*

12. 697 So. 2d 97 (Fla. 1997).

13. *Id.* at 104.

14. 521 U.S. 702 (1997).

15. 117 S. Ct. 2293 (1997).

16. *See* CAL. HEALTH & SAFETY CODE §§ 443–444.12 (West 2016); COLO. REV. STAT §§ 25-48-101–25-48-123 (2016); D.C. CODE §§ 7-661.01-.17 (2017); OR. REV. STAT. §§ 127.800–.897 (2017); VT. STAT. ANN. tit. 18, §§ 5281–5293 (2013); WASH. REV. CODE §§ 70.245.10–.904 (2009); *see also* Baxter v. Montana, 224 P.3d 1211 (Mont. 2009).

17. *See Florida Population by Age Group*, OFFICE OF ECON. & DEMOGRAPHIC RESEARCH, http://edr.state.fl.us/Content/population-demographics/data/Pop_Census_Day.pdf (last visited Mar. 9, 2019).

18. *See Views on End of Life Treatments*, *supra* note 9.

physician-assisted suicide.[19] In addition, the seemingly unrelated decision of the United States Supreme Court in *Obergefell v. Hodges*[20] has reopened the discussion of *Glucksberg* and its holding.[21] In *Obergefell*, Justice Anthony Kennedy's majority opinion emphasizes that the right to marry – specifically, gay marriage – is inherent in a person's right to privacy because it is part of his or her dignity.[22] Accordingly, this decision effectively overruled *Glucksberg's* analysis and implicated a change in the evaluation of the constitutional right to privacy. Since the Florida Supreme Court leaned heavily on *Glucksberg* to decide *Krischer,* the stagnant conversation in Florida regarding physician-assisted suicide deserves to be renewed under today's national and local sociopolitical climate with *Obergefell* in mind.

Part I will examine developments in state legislations regarding physician-assisted suicide and the history of physician-assisted suicide in Florida. Part II of this note will analyze the Court's decisions in *Glucksberg* and *Obergefell*, as well as the hypothesized implications of *Obergefell* on *Glucksberg*. Finally, this Note argues that Florida's discussions about physician-assisted suicide are outdated. Therefore, new legislation or jurisprudence should be put forth regarding physician-assisted suicide in light of, amongst other things, the renewed evaluation of *Glucksberg* after the decision in *Obergefell*.

I. WHERE PHYSICIAN-ASSISTED SUICIDE CURRENTLY STANDS IN THE UNITED STATES

Since *Krischer*, the conversation on legalizing physician-assisted suicide has grown louder. States have taken notice of the concerns and wishes of their citizens regarding physician-assisted suicide and passed legislation accordingly. Though no fundamental right has been declared by any superior state court, a discussion of the national legislative landscape on the legality of physician-assisted suicide is pertinent to a holistic and comprehensive view of the topic.

19. For an in-depth discussion on the changing legal landscape of physician-assisted suicide in the context of medical ethics, see Lois Snyder Sulmasy & Paul S. Mueller, *Ethics and the Legalization of Physician-Assisted Suicide: An American College of Physicians Position Paper*, AM. COLL. OF PHYSICIANS (Oct. 17, 2017) (available at https://annals.org/aim/fullarticle/2654458/ethics-legalization-physician-assisted-suicide-american-college-physicians-position-paper).

20. 135 S. Ct. 2584 (2015).

21. *See* Susan Stefan, *What Does Assisted Suicide Have to Do with Gay Marriage?,* OXFORD UNIV. PRESS BLOG (June 30, 2016), https://blog.oup.com/2016/06/assisted-suicide-gay-marriage-constitutional-rights/.

22. *See Obergefell*, 135 S. Ct. at 2584.

A. Where States Stand on Physician-Assisted Suicide

1. Oregon

Oregon was the first state to make physician-assisted suicide legal in 1997, the same year *Krischer*, *Glucksberg*, and *Vacco* were decided.[23] The Death with Dignity Act[24] gives those who are both terminally ill and mentally competent the choice to end their lives with legal prescription medication prescribed by a physician.[25] In its almost twenty years in practice, the Death with Dignity Act "has been a leader in the practice of physician-assisted suicide with respect to the standard of care and guidelines, the medical and psychiatric research, and physician-to-physician education."[26] In addition to the Act's regulations and parameters, Oregon is fully transparent with its thorough records of how many people utilize the right to die with dignity under the Act. Between 1997 and 2017, 1,967 people were prescribed prescriptions pursuant to the Act, with only 1,275 ultimately choosing to take the prescriptions to end their lives.[27] The Act is not likely to be repealed anytime soon and has even withstood a United States Supreme Court challenge, with the Court ruling in 2006 that the Controlled Substances Act[28] did not allow the Attorney General to prohibit doctors from prescribing drugs for use in physician-assisted suicide.[29]

2. Washington

The Washington Death with Dignity Act was enacted on March 5, 2009, after receiving almost sixty percent of the popular vote.[30] Since 2009, 938 terminally ill patients have received prescriptions

23. *See Oregon*, DEATH WITH DIGNITY, https://www.deathwithdignity.org/states/oregon/ (last visited Mar. 9, 2019).

24. OR. REV. STAT. ANN. §§ 127.800-897 (2017).

25. *See Oregon's Death with Dignity Act*, OR. HEALTH AUTH., https://www.oregon.gov/oha/PH/PROVIDERPARTNERRESOURCES/EVALUATIONRESEARCH/DEATHWITHDIGNITYACT/Pages/index.aspx (last visited Mar. 9, 2019).

26. Paola V. Jaime Saenz, Professional Article, *Morris v. Brandenburg: Departing from Federal Precedent to Declare Physician Assisted Suicide a Fundamental Right Under New Mexico's Constitution*, 48 N.M. L. REV. 233 (2018).

27. *Id.*

28. 21 U.S.C. §§ 801 *et seq.* (2018).

29. Gonzales v. Oregon, 546 U.S. 243, 274-75 (2006).

30. *Washington*, DEATH WITH DIGNITY, https://www.deathwithdignity.org/states/Washington (last visited Mar 9, 2019); *see also* END OF LIFE WASH., https://endoflifewa.org/ (last visited Mar. 9, 2019).

under the Act, and 651 of those patients have passed away after ingesting the medication.[31] The Act is modeled after the Oregon legislation, and a program, End of Life Washington, offers free end-of-life counseling and client support services to help, amongst other things, facilitate conversations with patients and their families.[32]

3. Vermont

After a ten-years of lobbying and efforts, Vermont enacted the Vermont Patient Choice and Control at the End of Life Act on May 20, 2013.[33] At the time it was enacted, it was the first act of its kind to be passed through state legislation.[34] Since the Act's enactment, there have been fifty-two patients that have used or applied for the Act, but only twenty-nine patients ultimately utilized the medication prescribed.[35] At the time the Act was passed, the president of Compassion & Choices stated "[t]his historic legislative victory proves that the aid-in-dying issue is no longer the third rail of politics."[36]

4. California

California's End of Life Option Act took effect on June 9, 2016.[37] This Act is generally modeled after the Oregon Death with Dignity Act by allowing mentally competent adults that have been diagnosed with a terminal illness with a six-months or less prognosis to ask a physician for prescription medication to "hasten their inevitable, imminent death."[38] The Act requires two physicians to confirm the patient's di-

31. *Id.*

32. END OF LIFE WASH., *supra* note 30.

33. *Vermont*, DEATH WITH DIGNITY, https://www.deathwithdignity.org/states/vermont/ (last visited Mar. 9, 2019). Of the fifty-two patients, 83% had terminal cancer, 14% had amyotrophic lateral sclerosis (ALS), and three percent were unknown diagnoses. *Id.*

34. Kathryn L. Tucker, *Vermont's Patient Choice at End of Life Act: A Historic "Next Generation" Law Governing Aid is Dying*, 38 VT. L. REV. 687, 688 (2014) (citing Kevin Liptak, Vermont Moves to Pass End-of-Life Choice Law, CNN.COM BLOGS (May 14, 2013, 8:13 AM), http://politicalticker.blogs.cnn.com/2013/05/14/vermont-moves-to-pass-end-oflife-choice-law/)).

35. David C. Englander, *Report Concerning Patient Choice at the End of Life*, VT. AGENCY OF HUMAN SERVS. DEP'T OF HEALTH (Vt. Dep't of Health, Burlington, Vt.), Jan. 15, 2018, at 4.

36. Liptak, *supra* note 34.

37. *California*, DEATH WITH DIGNITY, https://www.deathwithdignity.org/states/california/ (last visited Jan. 30, 2019); *see also* CAL. HEALTH & SAFETY CODE §§ 443–444.12 (West 2016).

38. *The California End of Life Option Act and Death with Dignity*, DEATH WITH DIGNITY (Jan. 22, 2016), https://www.deathwithdignity.org/news/2016/01/california-end-of-life-option-act/.

agnosis and eligibility, and two waiting periods are required between the patient asking the doctors and the actual writing of the prescription.[39] The patients are required to administer the medication themselves.[40] The Act received overwhelming support from California residents, with a Stanford University Poll finding that 72.5 percent of the residents supporting the law just prior to its enactment.[41] The Act is currently being challenged in the California courts by a group of anti-choice physicians but is still in effect.[42]

5. Hawaii

Hawaii is the most recent state in the United States to pass legislation allowing for physician-assisted suicide.[43] Hawaii's Our Care, Our Choice Act[44] was signed into effect on April 5, 2018, and allows individuals who are "mentally capable" but "terminally ill . . . with six months or less to live" the choice to take prescription medication to end their lives peacefully.[45] The bill was modeled after Oregon's Death with Dignity Act,[46] and contains safeguards to ensure the practice is regulated and safely practiced. Such safeguards include but are not limited to: requiring the patient to give themselves their medication; ensuring the accuracy of the terminal diagnosis, with two or more doctors required to confirm the six-month prognosis; comprehensive physician discussions regarding end-of-life options; and verification of mental capacity by mental health professionals.[47] The Act is the culmination of nearly two decades of efforts, with bills hav-

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* Explaining his reasoning for supporting the bill, then-Governor of California, Jerry Brown, stated "[i]n the end, I was left to reflect on what I would want in the face of my own death. I do not know what I would do if I were dying in prolonged and excruciating pain. I am certain, however, that it would be a comfort to be able to consider the options afforded by this bill. And I wouldn't deny that right to others." *Id.*

43. *See Hawaii Becomes the Seventh Jurisdiction to Enact a Death with Dignity* Law, DEATH WITH DIGNITY (Apr. 5, 2018), https://www.deathwithdignity.org/news/2018/04/hawaii-becomes-seventh-jurisdiction-with-death-with-dignity-law/.

44. H.B. 2739, 29th Leg., Act 2 (Haw. 2018).

45. *Office of the Governor – News Release – Governor Signs Our Care, Our Choice Act, Allowing End of Life choice for Terminally Ill*, GOVERNOR OF HAW. (Apr. 5, 2018), https://governor.hawaii.gov/newsroom/latest-news/office-of-the-governor-news-release-governor-signs-our-care-our-choice-act-allowing-end-of-life-choices-for-terminally-ill.

46. OR. REV. STAT. ANN. §§ 127.800-897 (2017).

47. H.B. 2739, 29th Leg., Act 2 (Haw. 2018).

ing been proposed and considered almost yearly since 1999.[48] Physician-assisted dying was a favorable end-of-life option for many Hawaiian residents, with reputable polls from 2015 through 2018 showing between 63% to 80% favorability for the option.[49] Our Care, Our Choice Act became effective on January 1, 2019.[50]

B. Where Physician-Assisted Suicide Stands in Florida

1. Florida Constitution

The fundamental right to privacy enshrined in the Florida Constitution states that "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life."[51] This right was approved pursuant to the Privacy Amendment, which passed by a sixty percent vote from Florida voters in 1980.[52] In comparison to the right to privacy under the United States Constitution, which extends only to certain "zones of privacy,"[53] the right to privacy under the Florida Constitution is considered broader as it "extends to all aspects of an individual's private life . . . and it ensures that the state cannot intrude into an individual's private life absent a compelling interest."[54] However, this fundamental right is not absolute. The courts will weigh governmental intrusions into one's privacy

48. *See Hawaii*, DEATH WITH DIGNITY, https://www.deathwithdignity.org/states/hawaii/ (last visited Mar. 9, 2019).

49. *Id.* An October 2015 Stanford University Poll found Hawaiian residents were 76.5% in favor of assisted dying. Vyjeyanthi s. Periyakoil, Helena Kraemer & Eric Neri, *Multi-Ethnic Attitudes Toward Physician-Assisted Death in California and Hawaii*, 19 J. of Palliative Med. 1062 (2016). A 2018 poll by Mason-Dixon Polling & Strategy found 71% of Hawaiian residents in support of an assisted dying bill. Nanea Kalani, Medical-Aid-in-Dying Bill Up for Final Senate Vote, HONOLULU STAR ADVERTISER (Mar. 28, 2018), http://www.staradvertiser.com/2018/03/28/breaking-news/medical-aid-in-dying-bill-up-for-final-senate-vote/. In an article covering how the Act is being received by terminally ill Hawaiian residents and its medical professionals, the Hawaii Business Magazine wrote "[e]ven among those with reservations about Our Care, Our Choice, many say they respect the decision of those who want to die, especially those who have thought long and hard about the decision." *Dying is Now a Choice*, HAW. BUS. MAGAZINE (Nov. 6, 2018), https://www.hawaiibusiness.com/dying-is-now-a-choice/.

50. *Hawaii*, *supra* note 48.

51. FLA. CONST. art. I, § 23.

52. Jon Mills, *Privacy in Florida: Personal Autonomy and* Liberty, AM. CIV. LIBERTIES UNION (Jan. 24, 2018) (available at https://www.aclufl.org/sites/default/files/2018-1-24_privacypaper.pdf).

53. *See* Roe v. Wade, 410 U.S. 113, 152 (1973).

54. *See* Gainesville Woman Care, LLC v. State, 210 So. 3d 1243, 1246 (Fla. 2017); State v. J.P., 907 So. 2d 1101, 1110 (Fla. 2004); Hon. Ben F. Overton & Katherine E. Giddings, *The Right of Privacy in the Age of Technology and the Twenty-First Century: A Need for Protection from Private and Commercial Intrusion*, 25 FLA. ST. U. L. REV. 25, 40–41 (1997).

with: (1) the compelling state interest in that intrusion; and (2) whether the intrusion is the least restrictive means of accomplishing the compelling state interest.[55]

2. Florida Statutes

Over 150 years ago, Florida added a statute criminalizing physician-assisted suicide. The statute holds that "every person deliberately assisting another in the commission of self-murder shall be guilty of manslaughter, a felony of the second degree."[56] In 1992, Florida's civil code also introduced language prohibiting physician-assisted suicide in a house bill related to advance directives.[57] The statute states, in pertinent part, that "[n]othing in this chapter shall be construed to condone, authorize, or approve mercy killings or euthanasia, or to permit any affirmative or deliberate act or omission to end life other than to permit the natural process of dying."[58] However, consistent with the United States Supreme Court's stance on the right to refuse medical treatment,[59] the statute also states that "withholding or withdrawal of life-prolonging procedures from a patient . . . does not, for any purpose, constitute a suicide."[60]

3. Florida Case Law

In the only case on physician-assisted suicide to ever be heard by the Florida Supreme Court, Florida's assisted-suicide statute was upheld as constitutional under the Due Process Clause[61] and Equal Protection Clause of the Fourteenth Amendment[62], as well as the Privacy Clause of the Florida Constitution.[63] In *Krischer v. McIver*, the

55. Mills, *supra* note 52.

56. Fla. Stat. § 782.08 (2018).

57. Fla. Stat. § 765.309 (2018).

58. Fla. Stat. § 765.309(1) (2018).

59. *See* Cruzan v. Med. Dir., 497 U.S. 261 (1990).

60. Fla. Stat. § 765.309(2) (2018).

61. U.S. CONST. amend. 14 § 1.

62. *Id.*

63. *See Krischer*, 697 So. 2d at 100; *see also* FLA. CONST. art. 1, § 23 ("Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except or otherwise provided herein."). As of 2018, only eleven states, including Florida, have explicit provisions providing the right to privacy for its citizens. *Privacy Protections in State Constitutions*, NAT'L CONFERENCE OF STATE LEGS. (Nov. 7, 2018), http://www.ncsl.org/research/telecommunications-and-information-technology/privacy-protections-in-state-constitutions.aspx.

plaintiff, Mr. Charles Hall, had AIDS.[64] Wishing to end his suffering with the assistance of his physician, but unable to do so based on Florida's prohibition on assisted suicide,[65] Mr. Hall challenged the statute and claimed it violated the Privacy Clause of the Florida Constitution, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.[66] In its analysis, the Court looked at decisions from other states,[67] task force reports,[68] health care providers stances,[69] and more.

Ultimately, it found several compelling interests (the interest in preserving life, preventing suicide, maintaining the integrity of the medical profession) that it felt outweighed Mr. Hall's wishes to conduct the "affirmative destructive act" of hastening his imminent death.[70] The Court thought that "construing the privacy amendment to include assisted right to suicide" could put the Court at risk of assigning itself the "powers to make social policy that as a constitutional matter belong[s] only to the legislature."[71] Interestingly, the Court also stated that it did "not hold that a carefully crafted statute authorizing assisted suicide would be unconstitutional."[72]

In a lengthy dissent, Justice Kogan disagreed with the majority opinion, emphatically stating that the court was looking at suicide from an antiquated perspective:

> The notion of "dying by natural causes" contrasts neatly with the word "suicide," suggesting two categories readily distinguishable from one another. How nice it would be if today's reality were so simple. No doubt there once was a time when, for all practical purposes, the distinction was clear enough to all. But that was a time before today, before technology had crept into medicine, when dying

64. *Krischer*, 697 So. 2d at 99. The Court also acknowledged that Mr. Hall "was in obviously deteriorating health, clearly suffering, and terminally ill." *Id.*

65. Fla. Stat. § 782.08.

66. *Krischer*, 697 So. 2d at 99.

67. Donaldson v. Lungren, 2 Cal. App. 4th 1614, 1622 (Cal. Ct. App. 1992) (holding that assisted suicide is not a right protected under the California privacy provision because "[i]n such a case, the state has a legitimate competing interest in protecting society against abuses . . . more significant than merely the abstract interest in preserving life no matter what the quality of that life is . . . it is the interest of the state to maintain social order.").

68. *Krischer*, 697 So. 2d at 11-13.

69. *Id.* at 103 (stating that, as of 1996, the American Medical Association opposed physician-assisted suicide). As of June 2018, this position remains unchanged. *See* Kathleen Fifield, *American Medical Association Votes on Doctor-Assisted Suicide*, AARP (June 12, 2018), https://www.aarp.org/health/conditions-treatments/info-2018/physician-assisted-suicide-terminally-ill.html.

70. *Krischer*, 697 So. 2d at 103.

71. *Id.* at 104.

72. *Id.*

> was a far more inexorable process. Medicine now has pulled the aperture separating life and death far enough apart to expose a limbo unthinkable fifty years ago, for which the law has no easy description. *Dying no longer falls into the neat categories our ancestors knew. In today's world, we demean the hard reality of terminal illness to say otherwise . . .*
>
> *I cannot in good conscience say that the state's interest is compelling, given the fact that Mr. Hall's life no longer can be saved. Here, the state is vouchsafing nothing but indignity and suffering – hardly 'compelling' interests.* I further believe that the rule established by the majority is not merely unworkable but rests on concerns of an era that, however much we may regret it, no longer exists. A sharp dividing line once separated life from death. Today there stretches a chasm of ambiguities.[73]

To Justice Kogan, the right of privacy necessarily attaches upon receiving a terminal diagnosis based on the imminence of death and the traditional privacy society affords those facing death."[74] The dissenting Justice also did not agree with the majority's statement that the issue of physician-assisted suicide was one best left for the legislature.[75] To do so "ignores fundamental tenets of our law," as "constitutional rights must be enforced by courts . . . and privacy in particular must be enforced *even against majoritarian sentiment*."[76]

II. JUSTICE KENNEDY'S "DOCTRINE OF DIGNITY"

A. Washington v. Glucksberg *and* Obergefell v. Hodges

Washington v. Glucksberg was a case heard by the United States Supreme Court in 1997.[77] The Washington state statute that was challenged in that case made it a felony for individuals to knowingly cause or aide another person to attempt suicide.[78] Terminally ill patients and their physicians brought suit against the state, arguing

73. *Id.* at 109 (Kogan, J., dissenting) (emphasis added).

74. *Id.* ("What possible interest does society have in saving life when there is nothing of life to save but a final convulsion of agony? The state has no business in this arena. Terminal illness is not a portrait in blacks and whites, but unending shades of gray, involving the most profound of personal, moral, and religious questions.").

75. *Id.*

76. *Krischer*, 697 So. 2d at 109 (emphasis added) ("The overarching purpose of the Florida Declaration of Rights along with its privacy provision is to 'protect each individual within our borders from the unjust encroachment of state authority—from whatever official source—into his or her life.'") (citing Traylor v. State, 596 So. 2d 957, 963 (Fla. 1992)).

77. *See Glucksberg*, 521 U.S. at 705-36.

78. *Id.* at 705-07.

that the statute violated patients' liberty interests under the Fourteenth Amendment of the United States Constitution.[79] In an opinion drafted by Justice Rehnquist, the Court held that the right "to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause."[80] The Court refused to use substantive due process analysis for this asserted "right" because, the Court stated, it reserves such analysis for "those fundamental rights and liberties which are, objectively, *deeply rooted in this Nation's history and tradition.*"[81]

Almost twenty years later, the Court's analysis in *Obergefell v. Hodges*[82] has created serious questions about whether the due process analysis of *Glucksberg* should still be applicable, particularly for physician-assisted suicide.[83] In *Obergefell*, several same-sex couples brought suit challenging the constitutionality of statutes that defined marriage as between a man and a woman in Michigan, Kentucky, and Ohio.[84] The Court held that, under the Due Process Clause and the Equal Protection clauses of the Fourteenth Amendment, same-sex couples had the fundamental right to marry.[85]

In the majority opinion, Justice Kennedy took an expansive view of the fundamental liberties protected by the Fourteenth Amendment Due Process Clause. *Obergefell* held that same-sex marriage was a fundamental right based on the fact that *marriage itself* is deeply rooted in United States history.[86] The fact that same-sex marriage was not specifically recognized or "deeply rooted" in the tradition of the United States was non-dispositive.[87] "If rights were defined by who

79. *Id.* at 708.

80. *Id.* at 728.

81. *Id.* at 720-21 (emphasis added).

82. See *Obergefell*, 135 S. Ct. at 2593-2608.

83. *See* Mark Joseph Stern, *The Liberty to End One's* Life, SLATE (Aug. 19, 2015), https://slate.com/news-and-politics/2015/08/death-with-dignity-and-gay-marriage-liberty-arguments-support-physician-assisted-suicide.html (noting that the *Glucksberg* opinion, written by Justice Sandra Day O'Connor, was "a paradoxical ruling that . . . stood on extremely shaky constitutional grounds," and that the Court's ruling in *Obergefell* "seriously dented the validity of *Glucksberg* by replacing its crabbed logic with a more modern, expansive definition of 'liberty.'").

84. *Obergefell*, 135 S. Ct. at 2593.

85. *Id.* at 2604-05.

86. *Id.* at 2599 ("the right to personal choice regarding marriage is inherent in the concept of individual autonomy . . . There is dignity in the bond between two men or two women who seek to marry and, in their autonomy, to make such profound choices.").

87. *Id.* at 2602 ("The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better-informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."); *see also Glucksberg*, 521 U.S. at 721.

exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied," Justice Kennedy reasoned.[88] "The limitation of marriage to opposite-sex couples may long have seemed natural and just," Justice Kennedy noted, "but its inconsistency with the central meaning of the fundamental right to marry is now manifest."[89] The right to privacy, as defined by Justice Kennedy, extends to "certain personal choices central to individual dignity and autonomy."[90] Additionally, the opinion sets forth the proposition that it is the province of the judicial system to address fundamental rights such as those related to personal autonomy – not the legislative system.[91]

In dissent, Chief Justice Roberts found the majority opinion to veer too far out of the realm of *Glucksberg*'s "careful approach" to fundamental rights using history and tradition.[92] To Chief Justice Roberts, *Glucksberg* was the "leading modern case setting the bounds of substantive due process."[93] The Chief Justice even went as far as to say that Justice Kennedy's majority opinion "requires it to *effectively overrule Glucksberg*," particularly since same-sex marriage is not part of history and tradition.[94]

1. *Obergefell's* unexpected implications for Glucksberg

In the fallout since *Obergefell*, many have analyzed Justice Kennedy's opinion, and Chief Justice Roberts's dissent, and taken note of its implications on substantive due process analysis.[95] In addition, many have taken note of Justice Kennedy's emphasis on dignity as inherent to the right to privacy; interestingly, Justice Kennedy's opinions addressing the right to privacy all have the so-called "doctrine of dig-

88. *Obergefell*, 135 S. Ct. at 2602.

89. *Id.* at 2590.

90. *Id.* at 2597.

91. *Id.* at 2606 ("fundamental rights may not be submitted to a vote; they depend on the outcome of no elections") (quoting West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 638 (1943)).

92. *Id.* at 2620-21 (Roberts, Chief J. dissenting).

93. *Id.*

94. *Obergefell*, 135 S. Ct. at 2621-23 (emphasis added).

95. *See* Stern, *supra* note 83 ("Chief Justice John Roberts accused the *Obergefell* majority of 'effectively overruling' *Glucksbert* –as though that's a bad thing."); *see also* Richard S. Myers, Obergefell *and the Future of Substantive Due Process*, 14 Ave Maria L. Rev. 54, 64 (2016) ("*Obergefell* seems to be an effort to cement the Court's broad approach to substantive due process. The Court's analysis is unconstrained by history or a careful description of the assert right or even an assessment of emerging trends.").

nity" threaded through them.[96] Putting the pieces together, if *Obergefell* implicitly overrules *Glucksberg*, then the argument for physician-assisted suicide has been given new life.[97]

III. FLORIDA'S BAN ON PHYSICIAN-ASSISTED SUICIDE POST-*OBERGEFELL*

In Florida, the conversation surrounding physician-assisted suicide is mounting.[98] Physician-assisted suicide has historically been considered morally unacceptable, but a Gallup poll conducted in 2015 found that over sixty percent of Americans agree that terminally ill patients should have the option of having his or her physician assist them in ending their life.[99] In 2018, approximately twenty-five states considered physician-assisted suicide legislation,[100] and New Mexico recently heard a constitutional challenge to its ban on physician-assisted suicide using the precedent from *Obergefell*.[101] Though the court in New Mexico declined to find any constitutional violations in its state statute, the developments are a promising and insightful shift from the

96. Jeffrey Rosen, *The Dangers of a Constitutional 'Right to Dignity'*, ATLANTIC (Apr. 29, 2015), https://www.theatlantic.com/politics/archive/2015/04/the-dangerous-doctrine-of-dignity/391796 (noting that Justice Kennedy has referred to "dignity" in cases ranging from partial-birth abortions to prisons,"); Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 21 (2015) ("For nearly twenty-five years, Justice Kennedy has been pushing 'dignity' closers to the center of American constitutional law and discourse"); Liz Halloran, *Explaining Justice Kennedy: The Dignity Factor*, NAT'L PUB. RADIO (June 28, 2013), https://www.npr.org/sections/thetwo-way/2013/06/27/196280855/explaining-justice-kennedy-the-d.ignity-factor (describing dignity as a "concept" that Justice Kennedy began referring to has far back at his Senate confirmation hearing for the Supreme Court).

97. *See* Stern, *supra* note 83; Myers, *supra* note 95, Saenz, *supra* note 26; *see also* Susan Stefan, *What Does Assisted Suicide Have to Do with Gay Marriage?*, OXFORD UNIV. PRESS BLOG (June 30, 2016), https://blog.oup.com/2016/06/assisted-suicide-gay-marriage-constitutional-rights/.

98. *See Florida Should Pursue 'Death with Dignity'*, S. FLA. SUN SENTINEL (Oct. 12, 2015); https://www.sun-sentinel.com/opinion/editorials/fl-editorial-death-dignity-gs1012-20151012-story.html; Marvin Newman, *Our State Must Legalize Physician-Assisted Suicide: My Word*, ORLANDO SENTINEL (Oct. 18, 2015), https://www.orlandosentinel.com/opinion/os-ed-assisted-suicide-myword-101815-20151016-story.html.

99. Andrew Dugan, *Once Taboo, Some Behaviors Now More Acceptable in U.S.*, GALLUP (June 1, 2015), https://news.gallup.com/poll/183455/once-taboo-behaviorsacceptable.aspx.

100. *Make Death with Dignity an Option in Florida*, FLA. DEATH WITH DIGNITY, Floridadeathwithdignity.org (last visited Mar. 9, 2019).

101. Morris v. Brandenburg, 376 P.3d 826, 847-48 (N.M. 2016) (noting that the petitioners in that case "correctly noted that *Obergefell* majority took the *Glucksberg* Court to task . . . because the analysis was inconsistent with how other fundamental rights had been defined by the Court," but that "[d]espite the Court's criticism of itself, we conclude that the *Glucksberg* approach with respect to physician aid in dying is not flawed.").

judicial stagnancy which has surrounded the issue of physician-assisted suicide for the last twenty years.[102]

In *Krischer*, the Florida Supreme Court relied heavily on the history and tradition analysis of *Glucksberg* in determining that a ban on physician-assisted suicide did not violate a patient's right to privacy. But this analysis is surely flawed in light of *Obergefell's* holding that same-sex marriage is a fundamental right, regardless of its specific roots in history and tradition. If the constitutionality of Florida's statute were challenged again, the Florida Supreme Court would surely have to acknowledge the shift in the due process analysis created by *Obergefell*.

When combined with the plethora of Supreme Court acknowledgment that an individual's dignity is inherent to his or her right to privacy, as Justice Kennedy has conceded again and again, and the great strides society has made in destigmatizing other similarly controversial subjects, the outcome of a case like *Krischer* would surely be different. Put another way, *Obergefell* found that same-sex marriage, though not neatly in line with history and tradition, necessarily entails an individual's dignity. Therefore, it was a right implied under the fundamental rights to privacy and marriage.

Applying this logic, physician-assisted suicide is not in "history and tradition," but it should be implied under the fundamental rights to privacy as it necessarily entails an individual's dignity. Thus, applying Justice Kennedy's doctrine of dignity, the ability to end one's life with dignity should be a substantive right under Florida's constitutional right to privacy. Further, the Florida Supreme Court should not be allowed to "pass the buck," so to speak, on the issue of physician-assisted suicide by stating that the decision on physician-assisted suicide must be left to the legislators, as it essentially did in *Krischer*. How would the Court reconcile this position with Justice Kennedy's statements that the "[n]ation's courts are open to injured individuals who come to vindicate their direct, personal stake in our basic charter."?[103] Additionally, it seems that the Court should invite a case on the issue from a policy perspective, considering Florida has the largest prevalence of individuals with HIV, as well as one of the largest per capita population of elderly residents in the nation.[104] These residents

102. *See id.*

103. *Obergefell*, 135 S. Ct. at 2605.

104. In a 2003 survey ranking the states by "oldest" in population, Florida ranked number one with 17.6 percent of the Floridian population over the age of 65. Christine L. Himes, *Which U.S. States Are the 'Oldest'?*, POPULATION REFERENCE BUREAU (Apr. 3, 2003), https://www.prb.org/whichusstatesaretheoldest/.

should have the freedom to exercise their right to end their lives with dignity if they so choose to do so when terminally ill.

CONCLUSION

The right to live with dignity necessarily implies the right to die with dignity, and Floridians deserve an opportunity to have its judicial and legislative branches recognize and protect the right. The time has come for Florida to re-evaluate the legal landscape surrounding physician-assisted suicide in light of the modern, evolved due process analysis of *Obergefell* that has effectively replaced the substantive due process analysis of *Glucksberg*. I hypothesize that a case challenging the constitutionality of Florida's physician-assisted suicide criminal statute is imminent. When a case does come before the Florida Supreme Court, the Court should not shy away from hearing the case. Rather, the Court should accept it and tackle the new substantive due process analysis of *Obergefell* to find physician-assisted suicide is a right necessarily implied under Florida's constitutional right to privacy.