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## CRIMINAL LAW—WORDS MATTER: DISCOURAGING SUICIDE THROUGH THE AID OF LEGISLATION

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### CRIMINAL LAW—WORDS MATTER: DISCOURAGING SUICIDE THROUGH THE AID OF LEGISLATION

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*Scholars criticized the manslaughter conviction of Michelle Carter almost as soon as the case was decided. Much of the criticism surrounding the case called for legislative action as the appropriate course of action. Fast forward a few years and Massachusetts is prosecuting another girlfriend for encouraging her boyfriend to kill himself. In response, Massachusetts has proposed legislation during the 2021 session aimed at criminalizing encouraging or assisting suicide, seeking to join several states that already have taken this approach. This Article considers the cause of suicide, recognizing it as a mental illness, and examines the societal harm associated with suicide. Then, this Article reviews the facts in four modern cases where the defendants were charged with encouraging another's suicide and finds punishment was justified based on common theories of punishment. Lastly, this Article turns to the construction and validity of statutes criminalizing, encouraging, or assisting suicide. This Article will draw parallels with existing anti-hazing laws and highlight the problem with using the term "assisting" in these statutes before finally examining the likely effectiveness of Massachusetts's proposed legislation.*

#### INTRODUCTION

"Encouragement"—which can be traced back to the fifteenth century—means "inspiring with courage, spirit, or hope."<sup>1</sup> When we think of encouraging others in our day-to-day lives, we think of doing so for the betterment of that person, such as cheering them on for taking the

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\* Nicole Belbin, Interim Director, Western New England University School of Law Library. I am eternally grateful to Pat Newcombe, Professor of Law, for her continued support, guidance, and thoughtful feedback in writing this Article and throughout my career. I would also like to thank the amazing staff of the *Western New England Law Review*.

1. *Encouragement*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2019).

necessary steps to reach a goal, or perhaps helping them research ways to achieve the goal. In criminal law, to encourage takes on a darker tone, meaning to instigate, to incite to action, to embolden, and to help.<sup>2</sup> What if the encouragement took a deadly turn and the person's goal was to end their own life? Should it be legally permissible to encourage someone's suicidal thoughts, help them research the best way to do it, tell them to "get back in the car" when their courage waivers?

Views on suicide and whether it is a choice a person makes have changed over the years as society's understanding of mental health has developed. Anxiety and depression, key factors in suicidal thoughts, are now seen as treatable conditions. Thoughtful discussions about substituting the phrases "killed themselves" or "committed suicide" with "died by suicide" signals a shift in thinking about suicidal ideation as a condition that individuals do not have control over, like cancer, except they are depressive thoughts that invade a person's mind instead of malignant tumors.<sup>3</sup>

While suicide has been legal in the United States since 1911, an increasing number of states prohibit encouraging suicide. As recently as thirty years ago, only a minority of states had promulgated statutes against suicide assistance.<sup>4</sup> The criminality of encouraging suicide is fraught with slippery slopes and constitutional challenges. On the one hand, punishing an individual for encouraging someone else to do something that is not illegal is troublesome. On the other hand, the states have a well-established interest in preserving life. Beyond states' interest, American society's perspective on the value of life is reflected in the great lengths often undertaken to keep someone alive. In the wake of criticisms of the *Commonwealth v. Carter* case—in which seventeen-year-old Michelle Carter was convicted of involuntary manslaughter based on text messages she sent her boyfriend encouraging him to commit suicide<sup>5</sup>—Massachusetts seeks to join the majority of states enacting laws against encouraging suicide.

Part I of this Article examines the causes of suicide—especially in

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2. *Encourage*, BLACK'S LAW DICTIONARY (11th ed. 2019).

3. Nicole Spector, *Mental Health: How We've Improved and Where We Need to Do Better in 2020*, NBC NEWS: BETTER BY TODAY (Jan. 10, 2020, 3:53 PM), <https://www.nbcnews.com/better/lifestyle/mental-health-how-we-ve-improved-where-we-need-do-ncna1108721> [<https://perma.cc/3BTT-XAC5>].

4. Catherine D. Shaffer, Note, *Criminal Liability for Assisting Suicide*, 86 COLUM. L. REV. 348, 350–53 (1986).

5. *Commonwealth v. Carter*, 115 N.E.3d 559, 561–62 (Mass. 2019) (*Carter II*), *aff'g* 52 N.E.3d 1054 (Mass. 2016) (*Carter I*); *see* *Commonwealth v. Hinckley*, 294 N.E.2d 562, 565 (Mass. App. Ct. 1973) (characterizing involuntary manslaughter "as 'an unlawful homicide, unintentionally caused . . . by an act which constitutes such a disregard of probable harmful consequences to another as to constitute wanton or reckless conduct'" (quoting *Commonwealth v. Campbell*, 226 N.E.2d 211, 218 (Mass. 1967))).

light of recent emphasis on mental health due to the strain the COVID-19 lockdowns placed on so many people—and analyzes its societal costs. Part II applies leading theories of punishment through the lens of four recent cases in which the defendants actively encouraged suicide. Part III reviews the various terminology states employ when enacting anti-encouraging statutes. Part IV explores the rationale for why criminalizing assisted suicide is problematic. Part V analyzes Massachusetts’s proposed anti-encouraging legislation. Finally, Part VI draws parallels between anti-encouraging and anti-hazing legislation. While this Article examines the defense of consent, it does not address the impact the encourager’s mental state has on guilt,<sup>6</sup> instead leaving that for another discussion. Additionally, because the focus of this Article is the criminalization of encouraging suicide, it does not address civil remedies available to families.

### I. EVOLUTION OF SUICIDE FROM CRIME TO MENTAL HEALTH CONDITION

The term “suicide” can be traced back to the mid-seventeenth century.<sup>7</sup> The stigma surrounding suicide can be traced back to the spread of Christianity, which condemns suicide.<sup>8</sup> Suicide has come a long way from the days when attempting suicide could brand you as a criminal to today’s legislation aimed at suicide prevention.<sup>9</sup> In fact, September has been designated as Suicide Prevention Month with national efforts to educate Americans on the causes and treatments for suicide.<sup>10</sup>

Accurate statistics on the rate of suicides are difficult to obtain due to factors such as inconsistent terminology and inaccurate reporting, but the World Health Organization (WHO) estimated the rate at over 700,000 deaths in 2019.<sup>11</sup> In the United States, suicide is one of the leading causes of death in teenagers ages fifteen to nineteen.<sup>12</sup> While the United States

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6. Some jurisdictions allow evidence of a defendant’s diminished capacity or responsibility as a result of a mental illness to show lack of “capacity to achieve the *mens rea* or intent required for commission of the offense charged.” 21 AM. JUR. 2D *Criminal Law* § 36, Westlaw (database updated Nov. 2021).

7. Malcolm P. Cutchin & Robert R. Churchill, *Scale, Context, and Causes of Suicide in the United States*, 80 SOC. SCI. Q. 97, 98 (1999).

8. Helen Y. Chang, *A Brief History of Anglo-Western Suicide: From Legal Wrong to Civil Right*, 46 S.U. L. REV. 150, 159–62 (2018).

9. 42 U.S.C. § 290bb-43. *But see* State v. Willis, 121 S.E.2d 854, 856 (N.C. 1961) (reasoning that “[s]uicide is none the less criminal because no punishment can be inflicted” due to the defendant’s death). Arguably, someone could be charged for attempted suicide.

10. *Suicide Prevention Awareness Month*, NAT’L ALL. ON MENTAL ILLNESS, <https://www.nami.org/get-involved/awareness-events/suicide-prevention-awareness-month> [<https://perma.cc/4FNR-X7CG>].

11. WHO, *SUICIDE WORLDWIDE IN 2019* 4 (2021).

12. *Adolescent Health*, CDC: NAT’L CTR. FOR HEALTH STATS. (Oct. 20, 2021),

saw an overall drop in suicide deaths in 2020 compared to the same period in 2019, ages ten to thirty-four saw an increase.<sup>13</sup> As disheartening as these statistics are, not apparent is the fact that only ten percent of those who attempt suicide ever succeed in taking their lives.<sup>14</sup> This supports the majority of Americans' views that suicidality is a treatable condition and that, once treated, individuals can go on to lead successful lives.<sup>15</sup> A troubling study in Britain found that the age group that accounts for the highest rate of suicide—those aged sixteen to thirty-four—is also the least tolerant and least supportive of community care for those suffering from mental illness.<sup>16</sup> This indicates they would also be least likely to seek traditional treatment and instead turn to a trusted friend to discuss their struggles.

### A. *Causes of Suicide*

The reasons people commit suicide are vast and cannot be fully addressed in one law review article. There is growing evidence that leading causes of suicide include depression and other mental health issues.<sup>17</sup> During the COVID-19 lockdowns, civil unrest and economic uncertainty have brought stressors and social strains to epic levels, resulting in an elevated suicide rate for some age groups.<sup>18</sup> If there are

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<https://www.cdc.gov/nchs/fastats/adolescent-health.htm> [https://perma.cc/RCX5-W38F].

13. Kaitlin Sullivan, *Suicide Rates Declined Again in 2020, but Not for All Groups*, *CDC Report Shows*, NBC NEWS: MENTAL HEALTH (Nov. 3, 2021, 9:19 AM), <https://www.nbcnews.com/health/mental-health/suicide-rates-declined-2020-not-groups-cdc-report-shows-rcna4363> [https://perma.cc/P8EK-7N8K].

14. *Suicide*, in *ETHICAL ISSUES IN DEATH AND DYING* 101 (Tom L. Beauchamp & Robert M. Veatch eds., 1996).

15. Ninety-one percent of Americans believe people who are suicidal can be treated and go on to live successful lives. *Survey: Americans Becoming More Open About Mental Health*, AM. PSYCH. ASS'N (May 1, 2019), <https://www.apa.org/news/press/releases/2019/05/mental-health-survey> [https://perma.cc/Z6GV-7NEN].

16. Based on the Health Survey for England 2014 study, participants between sixteen and thirty-four had the least positive attitudes relating to tolerance and support for community care. NEVENA ILIC ET AL., HEALTH & SOC. CARE INFO. CTR., HEALTH SURVEY FOR ENGLAND, 2014: ATTITUDES TOWARDS MENTAL ILLNESS 1 (2015) <https://files.digital.nhs.uk/publicationimport/pub19xxx/pub19295/hse2014-ch3-mh-att.pdf> [https://perma.cc/GRG4-XBMA].

17. “[Forty-six percent] of people who die by suicide have a diagnosed mental health condition.” *It’s Okay to Talk About Suicide*, NAT’L ALL. ON MENTAL ILLNESS, [https://www.nami.org/NAMI/media/NAMI-Media/Infographics/NAMI\\_Suicide\\_2020\\_FINAL.pdf](https://www.nami.org/NAMI/media/NAMI-Media/Infographics/NAMI_Suicide_2020_FINAL.pdf) [https://perma.cc/Z6BF-S4PC]. DSM-5 introduced Suicide Behavior Disorder as a “condition for further study.” Kara B. Fehling & Edward A. Selby, *Suicide in DSM-5: Current Evidence for the Proposed Suicide Behavior Disorder and Other Possible Improvements*, FRONTIERS IN PSYCHIATRY (Feb. 4, 2021), <https://www.frontiersin.org/articles/10.3389/fpsyt.2020.499980/full> [https://perma.cc/9W3A-T9FC].

18. Sally Spencer-Thomas, *Language Matters: Why We Don’t Say “Committed Suicide”*, INT’L RISK MGMT. INST. (Sept. 2021), <https://www.irmi.com/articles/expert-commentary/language-matters-committed-suicide> [https://perma.cc/FLT4-XL33]. The recent

any positive outcomes from the recent pandemic, one is certainly the drive to normalize talking about mental health struggles and different avenues for treatment.

For many years, suicide was addressed on a purely sociological level.<sup>19</sup> Emile Durkheim's 1897 study was the first to examine suicide in terms of social causes as opposed to an individual's temperament.<sup>20</sup> Since Durkheim's early work, various suicidologists have developed theories expanding on his study illuminating the complexity of the issue.<sup>21</sup> These studies show that suicide can result from several mental health conditions or even the medication prescribed to address them.<sup>22</sup> Overall, suicide is the tenth leading cause of death in the United States, with rates nearly the same as those reported thirty years ago.<sup>23</sup> Given the many causes of suicide, it should not be so readily accepted that someone who chooses to commit suicide is doing so voluntarily. Professionals working in suicide prevention stress that "free will" is not a good word choice.<sup>24</sup> Instead, the narrative should be changed to reflect the impact that depression, addiction, or other mental health conditions have on an individual's ability to realize there may be alternative solutions to their problems.<sup>25</sup>

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troop withdrawal from Afghanistan is likely to result in an increase in PTSD diagnosis among servicemen and women returning home. PTSD is linked to an increased suicide risk. Brian J. Albanese et al., *Diminished Responses to External Threat as a Possible Link Between Chronic/Severe Posttraumatic Stress Disorder and Suicide*, PSYCH. TRAUMA: THEORY, RESEARCH, PRAC., AND POL'Y, Sept. 2021, at 783.

19. See Cutchin & Churchill, *supra* note 7, at 98.

20. Ashley Crossman, *The Study of Suicide by Emile Durkheim: A Brief Overview*, THOUGHTCO., (Jan. 6, 2020), <https://www.thoughtco.com/study-of-suicide-by-emile-durkheim-3026758> [<https://perma.cc/AC6H-Q994>].

21. Modern approaches include sociological, psychological, and neurobiological causes of suicide. See, e.g., CHERYL L. MEYER ET AL., EXPLAINING SUICIDE: PATTERNS, MOTIVATIONS, AND WHAT NOTES REVEAL 16 (2017).

22. While no clear relationship has been established between Selective Serotonin Reuptake Inhibitors (SSRIs) and their association with suicidality in adults, there may be an increased risk of suicidal ideations and attempts in children and adolescents. SSRIs are one of the most commonly prescribed medications to combat depression. Some patients might experience an increased risk of suicide. Anil Nischal et al., *Suicide and Antidepressants: What Current Evidence Indicates*, MENS SANA MONOGRAPHS (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3353604/?report=printable> [<https://perma.cc/5ZSZ-MR4Q>].

23. See Kristen Weir, *Worrying Trends in U.S. Suicide Rates*, MONITOR ON PSYCH., (Mar. 2019), at 24, 24, [<https://perma.cc/PC6R-BMSM>]. Historically, suicide rates increased until the 1980s and 1990s. *Id.* Since then, rates have remained relatively stable, and, in fact, early reporting for 2019 and 2020 indicates a slight drop for some age groups. Becky Sullivan, *Suicide Rates Fall Again—But Not For Young Adults and Some People of Color*, NPR (Nov. 3, 2021, 7:06 PM), <https://www.npr.org/2021/11/03/1052075961/suicide-rates-fall-in-2020-for-second-straight-year> [<https://perma.cc/H2BK-GWL6>].

24. Spencer-Thomas, *supra* note 18.

25. *Id.*

## B. *Societal Costs*

“The person who completes suicide, dies once. Those left behind die a thousand deaths, trying to relive those terrible moments and understand . . . [why]?”<sup>26</sup> Loved ones left behind often face the stigma of the suicide, making dealing with their grief that much harder because they do not feel comfortable speaking truthfully about the circumstances of the person’s death.<sup>27</sup> Suicides have a financial cost as well.

According to one estimate, suicide and suicide attempts cost nearly \$95 billion annually.<sup>28</sup> The death of a seemingly healthy teenager or young adult often means there was not a life insurance policy to help cover expenses. Even when there is a policy in place, many life insurance companies refuse to pay death benefits when the cause of death is suicide.<sup>29</sup> Whether based on preservation of life or cost effectiveness, states have an interest in suicide prevention, employing varied means of addressing it, including educating the public, funding research and treatment, and punishing those who encourage others to commit suicide.

## II. ' CASES AND JUSTIFICATIONS OF PUNISHMENT

This Part focuses on four cases where the behavior of the individual encouraging the suicide (the “encourager”) was particularly reprehensible. Few proponents of free speech would jump to defend a person who fraudulently portrays himself to be a suicidal nurse in order to encourage depressed and suicidal individuals to hang themselves so that he could watch it.<sup>30</sup>

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26. SURVIVOR PACKET: FOR SURVIVORS OF A LOVED ONE’S SUICIDE, SUICIDE PREVENTION COAL. OF YELLOWSTONE VALLEY, [https://riverstonehealth.org/wp-content/uploads/2015/04/survivor\\_packet.pdf](https://riverstonehealth.org/wp-content/uploads/2015/04/survivor_packet.pdf) [<https://perma.cc/3BC3-WGTU>].

27. “[Thirty percent] of people said they would keep quiet about the cause of death if their own loved one died by suicide . . .” *Survey: Americans Becoming More Open About Mental Health*, *supra* note 15. Suicide is classified as an unnatural death, and a police investigation is often required during which time personal belongings, such as letters, may be taken. *Practical Information for Immediately After a Loss*, AM. FOUND. FOR SUICIDE PREVENTION, <https://afsp.org/practical-information-for-immediately-after-a-loss> [<https://perma.cc/4XDJ-MUA3>].

28. *Costs of Suicide*, SUICIDE PREVENTION RES. CTR., <https://www.sprc.org/about-suicide/costs> [<https://perma.cc/3X7T-VDCB>].

29. 31 N.Y. PRAC. *New York Insurance Law* § 24:25 (2020–2021), Westlaw (database updated Dec. 2020). Contrast this with policies excluding from these carveouts accidental overdoses, which themselves are viewed as a symptom of an untreated mental illness. Some states limit the period of time a suicide exception is in effect to one or two years. *See, e.g.*, VA. CODE ANN. § 38.2-3106(B) (West, Westlaw through end of the 2021 Reg. Sess. and 2021 Spec. Sess. I and includes 2021 Spec. Sess. II, c. 1) (limiting effect of such provisions to within two years from the date of the policy).

30. *See Minnesota Supreme Court Determines that False Claims Used to Advise or Encourage Suicide Do Not Fall Within the Alvarez Fraud Exception*, 128 HARV. L. REV. 1280,

In 2011, William Melchert-Dinkel communicated with at least two individuals on a suicide website.<sup>31</sup> He pretended to be a suicidal nurse offering advice on how to hang oneself.<sup>32</sup> One of his victims hanged himself,<sup>33</sup> while another victim carried out her original plan to jump off a bridge.<sup>34</sup> He was convicted under a Minnesota law that criminalized advising, encouraging, or assisting another in committing suicide.<sup>35</sup> Minnesota's Supreme Court reviewed the constitutionality of the statute and reversed the conviction, holding "that the terms 'advises' and 'encourages' were" not narrowly tailored to prevent suicide.<sup>36</sup> On remand, he was convicted of "assisting" suicide because he provided information that resulted in at least one hanging.<sup>37</sup>

In 2016, Michelle Carter, a seventeen-year-old Massachusetts resident, was convicted of involuntary manslaughter for her part in her boyfriend's suicide.<sup>38</sup> This case has garnered much attention because Carter was not physically present when her boyfriend, Conrad Roy, ended his own life by sitting in his truck while it filled with carbon monoxide from the generator he purchased as a result of his research with Carter on death by suicide.<sup>39</sup> At the time, Massachusetts did not have a statute criminalizing aiding or encouraging suicide. The Commonwealth successfully argued that Roy broke the causal chain by getting out of the truck when he became afraid and Carter's statement to him to "get back in" his truck was wanton or reckless conduct.<sup>40</sup>

In 2017, Tyerell Przybycien, a nineteen-year-old Utah resident, purchased rope, fashioned a noose, and videotaped sixteen-year-old Jchandra Brown in the act of hanging herself.<sup>41</sup> Just a few weeks prior,

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1284 (2015) [hereinafter *False Claims Used to Advise or Encourage Suicide*].

31. State v. Melchert-Dinkel, 816 N.W.2d 703, 705 (Minn. Ct. App. 2012), *aff'g* State v. Melchert-Dinkel, No. 66-CR10-1193, 2011 WL 893506 (Minn. Dist. Ct. Mar. 15, 2011).

32. *Id.* at 706. An investigation based on a tip led police to link Melchert-Dinkel's online aliases with his email. *False Claims Used to Advise or Encourage Suicide*, *supra* note 30, at 1281.

33. *Melchert-Dinkel*, 816 N.W.2d at 707.

34. *Id.* at 709, 711.

35. *Id.* at 720; MINN. STAT. ANN. § 609.215.

36. State v. Melchert-Dinkel, 844 N.W.2d 12, 23–24 (Minn. 2014), *rev'g* 816 N.W.2d 703 (Minn. Ct. App. 2012); MINN. STAT. ANN. § 609.215 (West, Westlaw through 2021 Reg. Sess. and 1st Spec. Sess.), *held unconstitutional* by State v. Melchert-Dinkel, 844 N.W.2d 12 (Minn. 2014).

37. State v. Melchert-Dinkel, No. A15–0073, 2015 WL 9437531, at \*5–9 (Minn. Ct. App. Dec. 28, 2015).

38. Commonwealth v. Carter, 52 N.E.3d 1054, 1064–65 (Mass. 2016), *aff'd*, 115 N.E.3d 559 (Mass. 2019).

39. *See id.* at 1057.

40. *Id.* at 1062–65.

41. Jessica Miller, *Utah Teen Accused of Filming Friend's Suicide Pleads Guilty to Child*

Brown had confided in Przybycien that she was suicidal.<sup>42</sup> Evidence at Przybycien's murder trial revealed text messages between him and another friend asking what he should do.<sup>43</sup> Instead of taking that friend's advice to "talk them out of it," Przybycien responded, "I wanna help kill them. It be [sic] awesome. Seriously im [sic] going to help her. Its [sic] like getting away with murder! . . . I'm seriously not joking. It's going down in about a week or two."<sup>44</sup> Utah did not have a statute criminalizing assisting or encouraging suicide at the time. Przybycien pled guilty to child abuse homicide.<sup>45</sup>

In 2019, Inyoung You, a Boston College student, drove to a parking garage where her boyfriend, Alexander Urtula, subsequently jumped from the garage, resulting in his death.<sup>46</sup> The prosecutor argued Urtula's suicide was due in part to an abusive relationship in which You texted him repeatedly that he should kill himself.<sup>47</sup> You was charged with manslaughter based on the theory that her words *caused* Urtula to kill himself, and alternatively, that she did not summon help.<sup>48</sup> The judge denied her motion to dismiss the case based on her words causing the suicide, and she is currently on trial for encouraging Urtula's suicide.<sup>49</sup>

A true definition of punishment has eluded scholars, but many have tried to place conditions on what constitutes punishment.<sup>50</sup> One such view, and one most agree with, is that punishment should only be for actions that are unlawful. Herein lies the heart of the problem with criminalizing the encouragement or assistance of suicide: suicide is itself not illegal. Why should encouraging an act that is not itself illegal be

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*Abuse Homicide*, SALT LAKE TRIB. (Oct. 24, 2018, 3:48 PM), <https://www.sltrib.com/news/2018/10/23/utah-teen-accused-filming/> [<https://perma.cc/U8H8-2NQY>].

42. Aaron Rasmussen, *Teen Pleads Guilty to Child Abuse Homicide for Planning & Videoing Friend's Suicide*, DISCOVERY: ID CRIMEFEED (Oct. 25, 2018), <https://www.investigationdiscovery.com/crimefeed/murder/teen-pleads-guilty-child-abuse-homicide-plan-video-friend-suicide> [<https://perma.cc/M5BX-W3K7>]. Utah now includes aiding suicide in its definition of manslaughter, effective May 8, 2018. UTAH CODE ANN. § 76-5-205(2)(b) (West, Westlaw through 2021 1st Spec. Sess.).

43. Rasmussen, *supra* note 42.

44. *Id.*

45. *Id.*

46. Megan Kelly, *Inyoung You's Case to Proceed to Trial*, THE HEIGHTS (Jan. 29, 2021, 3:43 PM), <https://www.bcheights.com/2021/01/17/inyoung-you-trial-will-proceed-to-trial> [<https://perma.cc/P5EJ-N722>].

47. *Id.*

48. *Id.*

49. *See id.* While You faces the same charge as Carter, You's defense argues that she tried to discourage Urtula from killing himself. *Id.*

50. Mitchell N. Berman, *The Justification of Punishment*, in THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 141, 142 (Andrei Marmor ed., 2012).

criminalized?<sup>51</sup> Not only must the action be unlawful, but it must also be intentionally performed by human beings other than the victim. This is problematic in suicides because the victim performs the act that ends his life. So, criminalizing assisting or encouraging suicide is the necessary first step to justifying punishment.<sup>52</sup>

Punishment theories seek to justify punishment of unlawful conduct based on the objective of the punishment and include prevention, restraint, deterrence, rehabilitation, retribution, and restoration.<sup>53</sup> Prevention, or specific deterrence, seeks to stop the offender from committing future crimes,<sup>54</sup> while deterrence in general is aimed at preventing others from committing similar crimes by showing how severe the consequences will be.<sup>55</sup> Retribution theorists maintain that offenders deserve to suffer because of their actions.<sup>56</sup> Punishments that restrain the offender, such as incarceration, aim to keep society safe by removing those who break the law.<sup>57</sup> Rehabilitation focuses on treating the offender so they will not want to commit future crimes.<sup>58</sup> Restorative punishment seeks to involve the victim in the process, thereby humanizing the consequences of the offender's conduct.<sup>59</sup>

Few theorists today adhere to the belief that the state has an absolute duty to punish all wrongdoers.<sup>60</sup> However, when punishment is viewed through the lens of prevention, deterrence, or retribution, one can see a strong argument for punishing encouragers like those outlined in the above cases. In the case of Przybycien, incapacitation seems appropriate in light of the fact that he saw his actions as "getting away with murder."<sup>61</sup> Scenarios where punishment is harder to justify include situations where the encouragement comes from someone who wishes to end a loved one's suffering or when the encouragers themselves are suicidal and truly

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51. An interesting comparison could be drawn if states were to try to criminalize the act of encouraging individuals to not get vaccinated against COVID-19 because individuals were choosing to not get vaccinated and were dying from the resulting illness.

52. *See id.*

53. 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIM. L. § 1.5(a)–(a)(7) (3d ed. 2020), Westlaw (database updated Oct. 2020).

54. *Id.* § 1.5(a)(1).

55. *Id.* § 1.5(a)(4).

56. Berman, *supra* note 50, at 144.

57. LAFAVE, *supra* note 53, § 1.5(a)(2).

58. *Id.* § 1.5(a)(3).

59. *Id.* § 1.5(a)(7).

60. Berman, *supra* note 50, at 153.

61. Luke Ramseth, 'Like Getting Away with Murder': Man Charged with Murder in Spanish Fork Girl's Hanging He Allegedly Filmed, SALT LAKE TRIB. (May 12, 2017, 12:06 PM), <https://archive.sltrib.com/article.php?id=5280899&itype=CMSID> [<https://perma.cc/9WUU-X4P8>].

believe suicide is the best option.<sup>62</sup> A “tailored” approach to punishment is necessary to avoid punishing when the encourager is not acting with ill intent. One way to eliminate this situation is to require a specific level of intent, such as acting knowingly or intentionally. Often, the defendant’s own words after the fact prove they knew the extent of their wrongdoing. In Carter’s case, she called Roy’s family pretending to look for him, all the while knowing what he was doing.<sup>63</sup> Afterwards, Carter confided in a friend that she herself was the reason Roy died.<sup>64</sup>

Discussions of crime and punishment are not complete without discussing the relationship between the wrongness of an act and its criminalization.<sup>65</sup> Criminal conduct can be categorized as either *mala in se*, conduct that is morally prohibited, such as murder, or *mala prohibita*, conduct that is criminal only because of a statute categorizing it as such.<sup>66</sup> Criminalizing this conduct is an indication of the values of a community. What a community values changes over time, as can be seen with the criminalization of hazing and bullying, both once seen as simply a part of life that one had to endure. By criminalizing hazing and bullying, our society acknowledges the harm suffered by individuals who endure this behavior. In the case of encouraging or assisting suicide, if we take the view that encouragers are only encouraging behavior that the suicidal individual would ultimately carry out, this conduct may not warrant criminalization under the principle that state intervention is dependent on the level of harm the conduct caused to others.<sup>67</sup> However, this narrow view neglects to take into account the loved ones left behind who are undoubtedly affected by the encouragers’ behavior.

### III. CURRENT LEGISLATIVE APPROACHES AND CONSTITUTIONAL CHALLENGES

Despite the national effort to prevent suicide, related attempts to enact federal legislation criminalizing encouraging suicide have been unsuccessful to date.<sup>68</sup> A majority of states now have enacted some type

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62. This scenario is often seen in suicide pacts. When one person survives, he could face prosecution for assisting or encouraging the one who died.

63. *Commonwealth v. Carter*, 115 N.E.3d 559, 564 n.6, 565 n.7 (Mass. 2019).

64. *Id.* at 565.

65. Victor Tadros, *Wrongness and Criminalization*, in *THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW* 157, 157 (Andrei Marmor ed., 2012).

66. ELLEN S. PODGOR ET AL., *MASTERING CRIMINAL LAW* 11 (2d ed. 2015).

67. The view that legislation is valid if it would probably be effective in preventing or reducing harm to persons other than the actor. *Harm Principle*, *BLACK’S LAW DICTIONARY* (11th ed. 2019).

68. See Ellen Luu, Note, *Web-Assisted Suicide and the First Amendment*, 36 *HASTINGS CONST. L.Q.* 307, 309 (2009).

of law criminalizing encouraging suicide.<sup>69</sup> States either include assisting or encouraging suicide in the definition of manslaughter or create a specific statute criminalizing the behavior. While state approaches fall into these two broad categories, there is considerable variation in the specific terminology used to achieve this. This Section aims to provide a cross-section of typical approaches, as opposed to a comprehensive detailing of every state's approach, highlighting unique approaches when warranted.

#### A. *Manslaughter Approach*

Current legislation reveals some support for the manslaughter approach employed by the *Carter* court. New York, Colorado, and Utah include some degree of involvement in a suicide in their definition of manslaughter, whether it be assisting, encouraging, or aiding, thereby taking a view that this conduct is a form of homicide.<sup>70</sup>

Although a rare instance, New Jersey convicted an encourager for murder, opting to seek conviction under the more serious crime even though aiding suicide has been a crime there since 1979.<sup>71</sup> This aligns with several other states where “force, duress, or deception” warrant the harsher homicide charge.<sup>72</sup> Maine prohibits “aiding” or “soliciting” suicide in one statute<sup>73</sup> and includes “intentionally or knowingly causes another human being to commit suicide by the use of force, duress or deception” in its definition of murder.<sup>74</sup> Oregon takes a different approach. While not including suicide in its criminal homicide statute, it states that encouragers not using duress or deception have a defense to

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69. The states that have adopted such legislation are New York, Minnesota, Oklahoma, Alabama, Arizona, Nebraska, New Mexico, Texas, South Dakota, New Jersey, Maine, Wisconsin, California, and Colorado. The U.S. Virgin Islands have also adopted such legislation. Terms used to express prohibited conduct include causing, aiding, assisting, promoting, and encouraging.

70. *See, e.g.*, COLO. REV. STAT. ANN. § 18-3-104 (West, Westlaw through 1st Reg. Sess. of the 73rd Gen. Assemb. 2021). This could be a strategic approach to avoid Free Speech implications. *See* Sean Sweeney, Note, *Deadly Speech: Encouraging Suicide and Problematic Prosecutions*, 67 CASE W. RES. L. REV. 941 (2017); UTAH CODE ANN. § 76-5-205(2)(b) (West, Westlaw through 2021 1st Spec. Sess.); *see, e.g.*, N.Y. PENAL LAW § 125.15 (McKinney, Westlaw through L.2021, chs. 1 to 440).

71. *See* *New Jersey v. Lassiter*, 484 A.2d 13, 19 (N.J. Super. Ct. App. Div. 1984) (finding the suicide was wholly caused by the violent beating by the defendant); N.J. STAT. ANN. § 2C:11-6 (West, Westlaw through L.2021, c. 221 and J.R. No. 3).

72. 18 PA. STAT. AND CONS. STAT. ANN. § 2505 (West, Westlaw through 2021 Reg. Sess. Act 880).

73. ME REV. STAT. ANN. tit 17-A, § 204 (West, Westlaw through the 2021 1st Reg. Sess. and 2021 1st Spec. Sess. of the 130th Leg.).

74. *Id.* § 201. A person is guilty of aiding or soliciting suicide if he intentionally aids or solicits another to commit suicide, and the other commits or attempts suicide. *Id.*

murder.<sup>75</sup> It would follow, then, that encouragers using duress or deception could be convicted of criminal homicide in that state.

### B. *Different Terminology Used by States*

Some state courts differentiate “assisting” from “causing.” Causing involves actively participating in the act that results in the death of an individual who commits suicide, and it is usually charged as murder. One example of this includes a case in Kansas where a friend administered two syringes of cocaine to another and then shot them when they started convulsing.<sup>76</sup> Many scholars present good arguments for the requirement of the physical presence of the defendant in these cases, but most encouraging statutes are silent on this matter.<sup>77</sup> Georgia is an exception.

The Georgia legislature tried to narrow the scope of its statute by including the definition of assisting to mean “the act of *physically* helping or *physically* providing the means” to commit suicide.<sup>78</sup> Similarly, Michigan prohibits providing the *physical* means or participating in a *physical* act by which an individual attempts or commits suicide.<sup>79</sup> This requirement ignores the constant role technology plays in our lives, and would exclude circumstances like those in the *Melchert-Dinkel* case, where the encourager communicated with suicidal individuals over the internet to provide methods on hanging oneself.<sup>80</sup>

The definition of encourage leads some scholars to focus on the emotional aspect of the encouragers’ actions, as opposed to the common

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75. OR. REV. STAT. ANN. § 163.117 (West, Westlaw through 2021 Reg. Sess. and 2021 1st Spec. Sess. of the 81st Legis. Assemb.).

It is a defense to a charge of murder that the defendant’s conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this section shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter or any other crime.

*Id.*

76. *State v. Cobb*, 625 P.2d 1133, 1134–35 (Kan. 1981).

77. Charles Adside, *The Innocent Villain: Involuntary Manslaughter by Text*, 52 U. MICH. J.L. REFORM 731 (2019). Adside’s model statute suggests that one can act recklessly only when physically present. *Id.* at 761. States’ adoption of cyberbullying legislation shows a recognition of the impact technological advances have had on our lives. Cyberbullying is generally defined “as the abuse, coercion, harassment, or threatening of another person through electronic media, such as computer websites, e-mail, and text messages.” George L. Blum, Annotation, *Validity, Construction, and Application of State and Municipal Criminal and Civil Cyberbullying Laws*, 26 A.L.R. 7th § 1 (2017).

78. GA. CODE ANN. § 16-5-5 (West, Westlaw through 2021 Reg. Sess. of the Ga. Gen. Assemb.) (emphasis added).

79. MICH. COMP. LAWS ANN. § 752.1027 (West, Westlaw through P.A.2021, No. 9197, of the 2021 Reg. Sess., 101st Leg.).

80. *See State v. Melchert-Dinkel*, 844 N.W.2d 13, 15 (Minn. 2014).

definition of assist, which speaks to the physical action.<sup>81</sup> While it is true that encouraging, in the general sense, means providing emotional support, in criminal law it is the equivalent of aiding and abetting and warrants being charged as an accomplice or principal.<sup>82</sup>

Arkansas attempts to aid its citizens in determining what conduct is prohibited by defining encouraging as “to persuade, incite, or urge.”<sup>83</sup> While far from providing a clear line of what behavior is prohibited, this definition does provide some guidance as to what does not rise to the level of encouraging. For instance, a person only providing information, such as methods of suicide, would probably fall outside the meaning of encourage in that state. The most practical solution is to include a non-exhaustive list of unacceptable behavior. The simple addition of a few words goes far in removing the act from the realm of homicide. Conversely, specific clauses excluding acts help narrow the scope of such a law. The least desirable approach to these issues is letting the court interpret the statute, running the risk that the court will find it unconstitutional.<sup>84</sup>

Prohibiting conduct in broad terms encourages constitutional challenges. These challenges typically involve Fifth and Fourteenth Amendment due process or First Amendment free speech claims.<sup>85</sup> Of importance to due process is vagueness in the content of the law caused by ambiguous terms. Laws need to be written so that a person of ordinary intelligence has warning that his behavior will get him in trouble. “Statutory language is sufficiently definite to satisfy due process requirements so long as it has a commonly understood meaning.”<sup>86</sup> Many laws prohibiting the encouragement of suicide fail in this respect. What conduct rises to the level of encouragement? Not surprisingly, South Dakota courts have grappled with the statute’s use of “in any manner.”<sup>87</sup>

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81. Niko Dimopoulos, Note, *Cause of Death? Speech: The Problems with Criminalizing the “Encouragement” of Suicide*, 24 QUINNIPIAC HEALTH L.J. 211, 229 (2021).

82. See *State v. Richardson*, 923 S.W.2d 301, 317 (Mo. 1996) (holding that aiding and abetting also encompasses acts of encouragement). The word “abet” appearing in section 619.02 has not been included since it is not believed to add anything to the meaning of provisions already contained in the recommended section. MINN. STAT. ANN. § 609.215 cmt. subdiv. 2 (West, Westlaw through 2021 Reg. Sess. and 1st Spec. Sess.), held unconstitutional by *State v. Melchert-Dinkel*, 844 N.W.2d 13 (Minn. 2014).

83. ARK. CODE ANN. § 5-10-107(a) (West, Westlaw through 2021 Reg. Sess. and the 2021 1st Extraordinary Sess. of the 93rd Ark. Gen. Assemb.).

84. *Commonwealth v. Crawford*, 722 N.E.2d 960, 966 (Mass. 2000).

85. 16B AM. JUR. 2D *Constitutional Law* § 962, Westlaw (database updated Aug. 2021).

86. See, e.g., *Lindsey v. State*, 596 S.E.2d 140, 141 (Ga. 2004).

87. “Any person who intentionally in any manner advises, encourages, abets, or assists another person in taking or in attempting to take his or her own life is guilty of a Class [six] felony.” S.D. CODIFIED LAWS § 22-16-37 (West, Westlaw through 2021 Sess. Laws, Executive Order 2021-05 and Supreme Court Rule 21-12).

Arguments that a statute is overly broad implicate the First Amendment right to free speech.<sup>88</sup> While not all laws regulating speech are subject to strict scrutiny, laws based on specific content, such as anti-encouraging statutes, are subject to strict scrutiny by courts and are presumed unconstitutional.<sup>89</sup> When statutes are challenged on grounds of being overbroad, courts must analyze the wording of the statutes.<sup>90</sup> Many states take the same better-safe-than-sorry approach as Minnesota and include both “assisting” and “encouraging” in their statutory language. Melchert-Dinkel’s conviction was ultimately upheld because the court severed the overly broad “encouraging,” reasoning that “aiding and assisting” gave sufficient notice of prohibited conduct.<sup>91</sup> However, not all courts agree on severing overbroad language.<sup>92</sup>

The few cases reviewing the constitutionality of either “assisting” or “encouraging” offer little guidance. In Minnesota, the *Melchert-Dinkel* court found that including “encouraging” in the statute was overly broad because it could encompass general discussions on suicide, but “assisting” narrowed the scope of Minnesota’s statute because any speech had to reach the level of assistance and be causally linked to the suicide.<sup>93</sup> In a 1992 California case, the court found its state’s statute criminalizing aiding, advising, or encouraging another to commit suicide did not violate free speech of individuals discussing suicide with terminally ill individuals, pointing to previous cases that interpreted “deliberately aids, or advises, or encourages” to mean affirmative and direct conduct, not merely discussing the option with others.<sup>94</sup> Conversely, Georgia held that “assist[ance] in the commission of suicide” was not narrowly tailored to prevent suicide when it found in favor of an assisted suicide

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88. U.S. CONST. amend. I; 16B AM. JUR. 2D *Constitutional Law* § 421, Westlaw (database updated Aug. 2021).

89. “The most exacting scrutiny test is applied to regulations that suppress, disadvantage, or impose different burdens upon speech on the basis of its content, and to laws that compel speakers to utter or distribute speech bearing a particular message.” 16A AM. JUR. 2D *Constitutional Law* § 480, Westlaw (database updated Aug. 2021); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991)).

90. Blum, *supra* note 77, § 3.

91. *State v. Melchert-Dinkel*, 844 N.W.2d 13, 16 (Minn. 2014) (holding that Melchert-Dinkel may be prosecuted “for assisting another in committing suicide, but not for encouraging or advising another to commit suicide”).

92. See *People v. Marquan M.*, 19 N.E.3d 480, 487 (N.Y. 2014) (holding that severing “any minor or person” was abuse of judicial authority).

93. *Minnesota Supreme Court Determines that False Claims Used to Advise or Encourage Suicide Do Not Fall Within the Alvarez Fraud Exception*, 128 HARV. L. REV. 1280, 1283 (2015).

94. *Donaldson v. Lungren*, 4 Cal. Rptr. 2d 59, 64–65 (Cal. Ct. App. 1992) (quoting CAL. PENAL CODE § 401 (West, Westlaw through ch. 770 of 2021 Reg. Sess.)).

organization.<sup>95</sup>

While not all speech is protected under the Constitution, topics of public concern are.<sup>96</sup> Proponents of the right-to-die movement condemn these statutes as infringing on their First Amendment right to free speech. The right-to-die movement in the United States can be traced back to 1980 when Derek Humphry founded the Hemlock Society, an organization that advocates for physician assistance for terminally ill individuals wanting to end their lives at a point they decide, as opposed to experiencing a natural death associated with long, drawn-out suffering.<sup>97</sup> First Amendment protection extends to viewpoints that are more than just unpopular, but that many find reprehensible, such as falsely claiming to be a war hero.<sup>98</sup>

This is a common argument among members of suicide forums who claim that, although an unpopular view, suicide is a legal option that Americans are free to discuss.<sup>99</sup> Even with all the advances in mental health and the growing view that people with suicidal thoughts can be successfully treated, it is not a settled point, and discussing suicide is still valued by our society.<sup>100</sup> Courts have made it clear that talking about suicide is protected by the First Amendment.<sup>101</sup> In reversing Melchert-Dinkel's conviction based on the unconstitutionality of the underlying statute, Minnesota's Supreme Court confirmed that the topic of suicide is indeed protected speech.<sup>102</sup>

It does not appear that courts are eager to add categories of unprotected speech, so narrowly drafting legislation that can withstand strict scrutiny review of content-based restrictions seems like the only viable option for this type of legislation. Other ways to overcome First Amendment challenges include expanding the scope of *Brandenburg v.*

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95. *Final Exit Network, Inc. v. State*, 722 S.E.2d 722, 724 (Ga. 2012).

96. To date, the argument that one person encouraging another person to commit suicide is a private matter has not succeeded in court. Even if it managed to persuade a judge, circumstances such as those involving suicide forums would not fit this mold either.

97. See generally Sarah Childress, *The Evolution of America's Right-to-Die Movement*, FRONTLINE (Nov. 13, 2012), <https://www.pbs.org/wgbh/frontline/article/the-evolution-of-americas-right-to-die-movement> [<https://perma.cc/NA45-9NU4>].

98. See generally *United States v. Alvarez*, 567 U.S. 709 (2012).

99. See, e.g., *Peer Support for Anyone Struggling with Suicidal Thoughts*, REDDIT, <https://www.reddit.com/r/SuicideWatch/> [<https://perma.cc/Y9RK-Y28H>]; *Suicide & Self Harm*, SF (2016), <https://www.suicideforum.com/category/suicide-self-harm/> [<https://perma.cc/6UAW-BXHG>].

100. Guyora Binder & Luis Chiesa, *The Puzzle of Inciting Suicide*, 56 AM. CRIM. L. REV. 65, 128 (2019).

101. See, e.g., *Final Exit Network, Inc.*, 722 S.E.2d at 723–24.

102. *State v. Melchert-Dinkel*, 844 N.W.2d 13, 16 (Minn. 2014) (holding that Melchert-Dinkel may be prosecuted “for assisting another in committing suicide, but not for encouraging or advising another to commit suicide”).

*Ohio*.<sup>103</sup> But until that happens, inciting someone to commit suicide is not the same as inciting lawlessness.<sup>104</sup>

An issue that often prevents successful prosecution of these cases is the causation requirement. One view is that the act of committing suicide is a superseding, intervening act that breaks the causal chain.<sup>105</sup> Adding a physical requirement to the statute could help with causation, as could extending the application of pre-existing weakness to include mental health conditions.<sup>106</sup> Some jurisdictions—those that still find causation in cases where the injury suffered was unforeseeable because it was exacerbated by a pre-existing condition—have extended causation to situations where the victim would have died sooner or later anyway from the disease or other condition.<sup>107</sup>

Some scholars suggest borrowing a comparative fault model from tort law.<sup>108</sup> Individuals with a history of suicide attempts or other evidence of suicidal ideations prior to the defendant's encouragement fail the but-for cause-in-fact test. If we take a page from tort law, this issue is easily overcome. By applying a substantial factor test, prosecutors can show that the defendant's encouragement was a substantial factor in the victim's death. This approach is already being applied in hazing cases.<sup>109</sup> Additionally, by charging the act of encouraging or enticing suicide as manslaughter instead of homicide, it follows that the defendant's act was not an "overt act" directly causing death.<sup>110</sup> Encouraging contemplates

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103. *Brandenburg v. Ohio*, 395 US 444, 447–48 (1969) (establishing a two-part test to determine when speech advocating illegal conduct can be restricted). The speech must be "directed to inciting or producing imminent lawless action," and the speech must be "likely to incite or produce such action." *Id.*

104. Clay Calvert, *The First Amendment and Speech Urging Suicide: Lessons from the Case of Michelle Carter and the Need to Expand Brandenburg's Application*, 94 TUL. L. REV. 79, 89 (2019). Calvert argues that "inciting or producing imminent lawless action" includes when the speech urges another person to commit an act and the words serve as the criminal act itself. *Id.*

105. The traditional view on causation is that the intervening force must be unforeseeable. When the encourager has knowledge of previous suicide attempts or suicidal inclinations, there is no argument of unforeseeability. Nicholas LaPalme, Note, *Michelle Carter and the Curious Case of Causation: How to Respond to a Newly Emerging Class of Suicide-Related Proceedings*, 98 B.U. L. REV. 1443, 1447–48 (2018).

106. *Id.* at 1466.

107. LAFAVE, *supra* note 53, § 6.4(f)(2).

108. Binder & Chiesa, *supra* note 100, at 82.

109. The court found that a university's failure to monitor a fraternity was a "precipitating or contributing factor which made it possible for [the student] to be physically hazed . . ." Susan S. Bendlin, *Cocktails on Campus: Are Libations a Liability?*, 48 SUFFOLK U. L. REV. 67, 90–91 (2015). *But see* Doull v. Foster, 163 N.E.3d 976, 990 (Mass. 2021) (abandoning the substantial factor test in most negligence cases).

110. *See* State v. Bouse, 264 P.2d 800, 812 (Or. 1953), *overruled in part by* State v. Fischer, 376 P.2d 418 (Or. 1962), and *overruled in part by* State v. Brewton, 395 P.2d 874 (Or.

some participation in the events leading up to the commission of the final overt act, such as furnishing the means used by the other person who commits the final act.<sup>111</sup>

Another obstacle that needs to be addressed is that of consent. There is a strong argument that a victim who had already planned on taking their life would have done it regardless of the encouragement. The few times courts have discounted the suicidal person's desire to end his life, it was presupposed that the suicidal plan originated with the victim and required that the act of suicide or, the attempt thereof, was volitional on the victim's part.<sup>112</sup> A well-established legal foundation has already been set when it comes to vulnerable populations and the issue of consent. The Supreme Court itself has acknowledged a state's interest in protecting people from pressure to end their lives.<sup>113</sup> Courts that have ruled on the issue of consent in criminal assault or battery generally do not allow consent as a defense.<sup>114</sup> Consensual harm is usually limited to injuries sustained by participants during sporting events and patients during surgeries and turns on the amount of injury expected compared to the injury suffered.<sup>115</sup>

#### IV. CRIMINALIZING ASSISTING SUICIDE IS PROBLEMATIC

This Part examines how criminalizing "assisting" suicide in anti-encouraging legislation is problematic because of its potential for confusion with the term "assisted" in the "physician-assisted suicide" legislation that exists in some states and that several other state legislatures have proposed. "Physician-assisted suicide" generally refers to a physician facilitating the death of a patient (who has a terminal illness and has been given a prognosis of six or fewer months to live) by providing the means necessary to enable the patient to perform the life-ending act.<sup>116</sup> In *Washington v. Glucksberg*, the Supreme Court held that

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1964) (relating to voluntariness of a confession).

111. *Id.* (distinguishing encouraging suicide from murder, where the person performs the overt act that causes the death).

112. *See, e.g.*, *State v. Goulding*, 799 N.W.2d 412, 416 (S.D. 2011).

113. *Vacco v. Quill*, 521 U.S. 793, 794 (1997).

114. Gregory S. Parks & Tiffany F. Southerland, *The Psychology and Law of Hazing Consent*, 97 MARQ. L. REV. 1, 8 (2013); *see Helton v. State*, 624 N.E.2d 499, 515 (Ind. Ct. App. 1993) (holding that gang member's consent to being struck in the head as part of a gang initiation was not a defense); *see also People v. Samuels*, 250 Cal. App. 2d 501, 513–14 (1967) (rejecting consent as an absolute defense because "[i]t is a matter of common knowledge that a normal person in full possession of his mental faculties does not freely consent to the use, upon himself, of force likely to produce great bodily injury").

115. Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. 165, 179 (2007).

116. *Physician-Assisted Suicide*, ETHICS: AMA, <https://www.ama-assn.org/delivering-care/ethics/physician-assisted-suicide> [<https://perma.cc/K6Q7-E6P7>]; *Physician-Assisted Suicide Fast Facts*, CNN (June 1, 2021, 9:00 AM), <https://www.cnn.com/2014/11/>

there is a fundamental right to refuse life-sustaining treatment, but there is no corresponding right to assistance in dying.<sup>117</sup> Just one year prior to *Glucksberg*, California had taken the opposite stance.<sup>118</sup> When Dr. Kevorkian, a.k.a. “Dr. Death,” and others challenged California’s statute prohibiting assisting in suicide, the court reasoned that California citizens had a fundamental right to seek physician-assisted suicide; therefore, the statute was unconstitutional on Due Process grounds.<sup>119</sup> This struggle early on with the Supreme Court’s reluctance to identify a fundamental right to die supports<sup>120</sup> the argument that adding “assisting” language to anti-encouraging statutes meant to prevent suicide is problematic.

Notwithstanding the Supreme Court’s unwillingness to find a right to assistance in dying, states are free to recognize this as a right. Recognized today as two separate movements, the right-to-die and assistance-in-dying movements started in earnest in 1980 when Derek Humphry started Hemlock Society, an organization that advocates for terminally ill individuals to have the choice to end their lives with the aid of physician-prescribed medication.<sup>121</sup> Oregon became the first state to consider an “aid-in-dying” bill as far back as 1991, ultimately becoming the first state to legalize aid-in-dying in 1994.<sup>122</sup> In 2008, Washington became the second state to approve physician-assisted suicide.<sup>123</sup> Currently, nine states and the District of Columbia have laws permitting terminally ill patients to request life-ending medication, seven of which were enacted in the last five years.<sup>124</sup> Massachusetts is among fourteen states with bills proposing assisted suicide before its state legislature in the 2021 legislative session.<sup>125</sup>

Most states avoid potential conflicts between a physician

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26/us/physician-assisted-suicide-fast-facts/index.html [https://perma.cc/BJ5D-T4WB].

117. *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997).

118. *Kevorkian v. Arnett*, 939 F. Supp. 725, 731 (C.D. Cal. 1996), *opinion vacated, appeal dismissed*, 136 F.3d 1360 (9th Cir. 1998) (dismissing the appeal in light of the holdings in *Vacco* and *Glucksberg*, both decided in 1997).

119. *Id.*

120. Although used interchangeably by the general public, “right to die” and “assisted suicide” are legally distinct. The term “right to die” refers to a patient’s right to refuse unwanted medical treatment or to have ongoing care withdrawn even though the patient will die if treatment is terminated. Interestingly, right-to-die organizations do not recognize this formal distinction. Note, *Physician-Assisted Suicide and the Right to Die with Assistance*, 105 HARV. L. REV. 2021, 2021 (1992).

121. Childress, *supra* note 97.

122. *Id.* The bill drafted by the terminally ill husband of Senator Barbara Coombs Lee was ultimately defeated in 1991. *Id.* Revisited in 1994, the bill was voted into law. *Id.*

123. *Id.*

124. *State Statute Navigator*, DEATH WITH DIGNITY, <https://deathwithdignity.org/state-statute-navigator> [https://perma.cc/4K8R-8F2B].

125. *Id.*

intentionally ending a patient's life and the Hippocratic Oath to "do no harm" by allowing the physician to prescribe the medication, but not administer it.<sup>126</sup> These statutes usually require a confirmed diagnosis, reducing the likelihood that an otherwise healthy person with suicidal ideations could use this method to commit suicide.<sup>127</sup> Minnesota, like many other states, identifies actions not considered to be aiding suicide, like administering medication to hasten death, but this only covers those actors defined as health care providers.<sup>128</sup> Hawaii's "Our Care, Our Choice Act" defines "self-administer" as "an affirmative, conscious, voluntary act to take into the individual's body," which seemingly excludes assistance by another.<sup>129</sup>

Many scholars discuss the practice of assisting suicide to include physicians prescribing medication for terminally ill patients. Curiously, statutes legalizing these acts are careful to avoid the term "suicide" in the text, instead referring to the patient bringing about his own death (which is ironically how many encouraging statutes define suicide).<sup>130</sup> If that is the case, then it follows that legislatures are targeting a different action when "assisting" is included in or in place of "encouraging" in the anti-encouraging statutes. Self-administering prescribed medication is never referred to as committing suicide. In fact, the cause of death is listed as the underlying illness.<sup>131</sup>

However, despite the careful avoidance of "suicide" and requiring the patient to "self-administer" the lethal medication, courts have consistently held that the act of prescribing lethal medication is criminal under assisting suicide statutes absent some explicit exception.<sup>132</sup> Kentucky currently includes a section that specifically allows for the revocation of a

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126. California defines self-administer to mean "a qualified individual's affirmative, conscious, and physical act of administering and ingesting the aid-in-dying drug to bring about his or her own death." CAL. HEALTH & SAFETY CODE § 443.1(p) (West, Westlaw through ch. 770 of 2021 Reg. Sess.).

127. See, e.g., *id.* § 443.11.

128. Minnesota permits a health care provider to administer, prescribe, or dispense medications or procedures to relieve pain or discomfort, but not if it is done to cause death. MINN. STAT. ANN. § 609.215 (West, Westlaw through 2021 Reg. Sess. and 1st Spec. Sess.).

129. HAW. REV. STAT. ANN. § 327L-1 (West, Westlaw through the end of the 2021 Spec. Sess., pending text revision by the revisor of statutes). Hawaii does not have a law criminalizing the encouragement of suicide.

130. See, e.g., CAL. HEALTH & SAFETY CODE § 443 (West, Westlaw through ch. 770 of 2021 Reg. Sess.).

131. COLO. REV. STAT. ANN. § 25-48-109 (West, Westlaw through the end of the 1st Reg. Sess. of the 73rd Gen. Assemb.).

132. See *Kliger v. Healey*, No. SUCV201603254F, 2020 WL 736968, at \*3–4 (Mass. Super. Jan. 14, 2020) (holding that medical aid in dying can constitute involuntary manslaughter); *Donorovich-Odonnell v. Harris*, 194 Cal. Rptr. 3d 579 (Cal. Ct. App. 2015) (holding that prescribing medication, whether the patient had decided to end his life or not, served as active participation in the events leading to the suicide).

license if a health care professional assists a patient in ending his life.<sup>133</sup> Likewise, Alabama took the extraordinary step to include “aid-in-dying” language, specifically prohibiting such acts in its assisting suicide statute.<sup>134</sup> These two states seem to be in the minority, with a significant number of states looking to allow certain forms of assisted suicide in 2021.

Examples of states that have both anti-encouraging and aid-in-dying statutes include New Jersey,<sup>135</sup> California, Colorado, Maine, and most recently New Mexico. Most of these states specifically state in both statutes that actions taken in accordance with the “aid in dying” statute do not constitute assisted suicide.<sup>136</sup> Maine includes language exempting physicians by providing them with an affirmative defense to its statute criminalizing aiding or soliciting suicide.<sup>137</sup>

New Mexico grappled with reconciling its statutes in *Morris v. Brandenburg*.<sup>138</sup> This case examined a new “aid in dying” statute in light of a criminal statute that had been in existence since 1963.<sup>139</sup> The Court held “assisting suicide,” defined as “deliberately aiding another in the taking of his own life,” prohibited physician aid in dying.<sup>140</sup> This remained the case until the 2021 revision that added an exception for acts pursuant to the End-of-Life Options Act, which was enacted in 2021.<sup>141</sup>

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133. KY. REV. STAT. ANN. § 216.308 (West, Westlaw through the end of the 2021 Reg. and Spec. Sess.).

134. “Any physician or health care provider who prescribes any drug, compound, or substance to a patient deliberately to aid in dying or assists or performs any medical procedure deliberately to aid in dying is guilty of a Class C felony.” ALA. CODE § 22-8B-4(b) (West, Westlaw through the end of the 2021 Reg. Sess., and the end of the 2021 1st Spec. Sess.).

135. N.J. STAT. ANN. § 2C:11-6 (West, Westlaw through L.2021, c. 221 and J.R. No. 3).

A person who purposely aids another to commit suicide is guilty of a crime of the second degree if his conduct causes such suicide or an attempted suicide, and otherwise of a crime of the fourth degree. Any action taken in accordance with the provisions of P.L.2019, c. 59 (C.26:16-1 et al.) shall not constitute suicide or assisted suicide.

*Id.*

136. See, e.g., COLO. REV. STAT. ANN. § 25-48-121 (West, Westlaw through the end of the 1st Reg. Sess. of the 73rd Gen. Assemb.).

137. “It is an affirmative defense to prosecution under subsection 1 that the person’s conduct was expressly authorized by Title 22, chapter 418.” ME. REV. STAT. ANN. tit. 17-A, § 204(3) (West, Westlaw through 2021 1st Reg. Sess. and 2021 1st Spec. Sess. of the 130th Leg.).

138. Petitioner doctor unconvincingly argued that the statute criminalizing assisting suicide did not apply to physicians aiding patients in dying. *Morris v. Brandenburg*, 376 P.3d 836, 841 (N.M. 2016). This led to the 2021 amendment that added, “unless the person aiding another in the taking of the person’s own life is a person acting in accordance with the provisions of the End-of-Life Options Act.” N.M. STAT. ANN. § 30-2-4 (West, Westlaw current through the end of the 1st Reg. Sess. and 1st Spec. Sess., 55th Leg.).

139. *Morris*, 376 P.3d at 842.

140. *Id.* (quoting N.M. STAT. ANN. § 30-2-4).

141. N.M. STAT. ANN. § 24-7C-8 (West, Westlaw through the end of the 1st Reg. Sess.).

This conflict is likely to arise again in other states that add an end-of-life option without addressing existing laws criminalizing assisting suicide.

While a number of states see value in giving terminally ill residents the option to forgo prolonged suffering, the issue is far from settled. New Jersey has proposed legislation attempting to repeal its Medical Aid in Dying for the Terminally Ill Act.<sup>142</sup> This is in stark contrast to the many states considering legalizing an end-of-life option in 2021. If New Jersey's efforts are successful, physicians will no longer be allowed to prescribe end-of-life medications. Currently, Massachusetts has proposed bills addressing both issues.<sup>143</sup> The end-of-life options bill states that “[s]tate regulations, documents and reports shall not refer to the practice of aid in dying under this chapter as ‘suicide’ or ‘assisted suicide.’”<sup>144</sup> Georgia has taken steps to include the actions of loved ones assisting terminally ill individuals with hastening their death.<sup>145</sup> In fact, Georgia outlines in detail to whom the law does not apply, and the bill is longer than the one sentence detailing the acts that are criminalized.<sup>146</sup>

Absent clear exceptions in these circumstances, the use of “assisting” should be avoided in the text of anti-encouraging statutes. This would then leave “encouraging” as the main action prohibited by the statutes. As the Minnesota courts have shown, choosing the word “encourage” to illustrate what action is prohibited will likely fail for vagueness, seemingly leaving legislatures with little chance for these statutes to survive constitutional attacks. However, anti-hazing laws can provide lessons in how to ensure that these statutes withstand constitutional

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and 1st Spec. Sess., 55th Leg.).

142. Assemb. 577, 2020 Leg., 219th 1st Ann. Sess. (N.J. 2020).

143. S. 1032, 192d Gen. Ct. (Mass. 2021) (addressing the prevention of suicide by criminalizing encouraging, aiding, or assisting suicide); S. 1384, 192d Gen. Ct. (Mass. 2021); H. 2381, 192d Gen. Ct. (Mass. 2021). The Senate and House of Representatives proposed identical bills establishing a legal right for terminally ill individuals to request medication to end their lives. Mass. S. 1384; Mass. H. 2381.

144. Mass. S. 1384; Mass. H. 2381.

145. GA. CODE ANN. § 16-5-5(c)(1) (West, Westlaw through legislation passed at the 2021 Reg. Sess. of the Ga. Gen. Assemb.).

Pursuant to a patient's consent, any person prescribing, dispensing, or administering medications or medical procedures when such actions are calculated or intended to relieve or prevent such patient's pain or discomfort but are not calculated or intended to cause such patient's death, even if the medication or medical procedure may have the effect of hastening or increasing the risk of death.

*Id.*

146. *Id.* § 16-5-5(b).

Any person with actual knowledge that a person intends to commit suicide who knowingly and willfully assists such person in the commission of such person's suicide shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than ten years.

*Id.*

challenges.

#### V. PARALLELS WITH ANTI-HAZING LAWS AND LESSONS LEARNED

Many parallels exist between anti-encouraging-suicide and anti-hazing efforts. One of the early explanations of suicide, egoism, can be analogized with the root cause of hazing. It was thought that a lack of integration into society, not belonging to the group, caused people to view life as having less meaning, thus leading to suicide.<sup>147</sup> Anti-hazing laws have been around since the 1800s,<sup>148</sup> so there is much history to examine and apply to anti-encouraging-suicide legislation. Additionally, the breadth of anti-hazing legislation offers many examples of statutes that would withstand constitutional challenges.<sup>149</sup>

Both types of laws seek to criminalize actions only in this narrow, specific context. Hazing consists of activities that include embarrassing, humiliating, and excessive drinking—all activities that are not in themselves illegal. As varied as the terminology is in states' approaches to anti-encouraging legislation, so are the approaches to ending hazing.<sup>150</sup> Many states, including Ohio and Massachusetts, define hazing as including activities that endanger the victims' mental health.<sup>151</sup> Florida's Chad Meredith Act makes it illegal to “[p]ressure[] or coerce[] students into violating the law, committing or being subject to violence, exposing themselves to the elements, or consuming any food, drug, liquor, or other substance.”<sup>152</sup>

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147. Cutchin & Churchill, *supra* note 7, at 99.

148. Karrie Gurbacki, *Hazed and Confused: The Roehm Incident and the Necessity of Hazing Legislation*, 4 BERKELEY J. ENT. & SPORTS L. 1, 2–3 (2015).

149. Gregory L. Acquaviva, *Protecting Students from the Wrongs of Hazing Rites: A Proposal for Strengthening New Jersey's Anti-Hazing Act*, 26 QUINNIPIAC L. REV. 305, 313 (2008).

150. Compare DEL. CODE ANN. tit. 14, § 9302 (West, Westlaw through ch. 237 of the 151st Gen. Assemb.), with OHIO REV. CODE ANN. § 2903.31 (West, Westlaw through File 48 of the 134th Gen. Assemb.). Ohio takes a strict liability approach, criminalizing any actor “coercing another . . . that causes or creates a substantial risk of causing mental or physical harm to any person . . .” *Id.*; see also Justin M. Burns, Comment, *Covering Up an Infection with a Bandage: A Call to Action to Address Flaws in Ohio's Anti-Hazing Legislation*, 48 AKRON L. REV. 91 (2015).

151. Most state definitions of hazing include “some variation of the following: intentionally, knowingly, or recklessly engaging in or participating in acts, which endanger another for the purpose of initiation into, admission into, affiliation with, holding office in, or as a condition for membership in a school or school sponsored team, organization, program, club, or event.” Angela Tylock, *A 50-State Summary of Hazing Laws*, SUNY: STUDENT CONDUCT INST. (Apr. 21, 2021), <https://system.suny.edu/sci/news/4-21-21-hazing/index.html> [https://perma.cc/8XC4-RECE].

152. *Nationwide Hazing Laws*, STEWART, TILGHMAN, FOX, BIANCHI, & CAIN, P.A., <https://www.stflaw.com/hazing-lawyers/nationwide-hazing-laws> [https://perma.cc/2RYB-QPE5].

Both crimes are difficult to define. Discussed at length above, definitions of “encourage” often include the term “assist” and vice versa. Looking to hazing laws can help refine our definitions. For starters, explicitly excluding some activities from prosecution will address concerns regarding vagueness and overbreadth. For instance, Utah prohibits “demeaning or assaultive behavior, whether consensual or not.”<sup>153</sup> This removes consent as a viable defense. Similarly, Florida specifies that consent is not a defense even if the actual consent of the victim had been obtained.<sup>154</sup> Texas uses language similar to that in its anti-encouraging statutes, prohibiting anyone from soliciting, encouraging, directing, aiding, or attempting to aid another in engaging in hazing.<sup>155</sup> Not surprisingly, this statute has faced constitutional challenges for vagueness and was found unconstitutional.<sup>156</sup>

The issue of consent needs to be addressed in both categories of statutes. Realizing we are dealing with a vulnerable population is a step toward justifying punishing encouragers and seeing that the concept of consent in these situations is not possible. In both hazing and encouraging suicide cases, the victims can be viewed as being forced or coerced into participation.<sup>157</sup> In both instances, the defendant is not the sole cause of the harm, but a substantial factor in it.

Another common thread between encouraging suicide and hazing is that both activities fall under many states’ definitions of bullying.<sup>158</sup> Similar to today’s encouragers where digital media is the preferred means, modern day bullies are less likely to resort to physical violence and instead rely on digital media.<sup>159</sup> Most disheartening is the fact that bullying is increasingly leading to suicide for young victims.<sup>160</sup> Unfortunately, most encouragers’ actions do not occur within the boundaries of a school, and therefore fall outside the protection of anti-bullying statutes. For example, in the case of Michelle Carter, she and her boyfriend Conrad Roy did not

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153. David S. Doty, *No More Hazing: Eradication Through Law and Education*, 10-NOV UTAH B.J. 18, 19 (1997) (quoting UTAH CODE ANN. § 53A-11-908(2)(b)(iii)).

154. FLA. STAT. ANN. § 1006.63(5)(a) (West, Westlaw through the 2021 1st Reg. Sess. and Spec. “A” Sess. of the Twenty-Seventh Leg.).

155. TEX. EDUC. CODE ANN. § 37.152(a)(2) (West, Westlaw through the end of the 2021 Reg. and 2nd Called Sess. of the 87th Leg.).

156. *State v. Zascavage*, 216 S.W.3d 495, 499 (Tex. App. 2007).

157. According to Tom Beauchamp, these actions cannot be included in the definition of suicide. Manuel G. Velasquez, *Defining Suicide*, in *ETHICAL ISSUES IN DEATH AND DYING* 106, 107 (Tom L. Beauchamp & Robert M. Veatch eds., 1996).

158. See Samantha Neiman et al., *Bullying: A State of Affairs*, 41 J.L. & EDUC. 603, 614 (2012).

159. Of respondents to a 2007 self-reported survey on bullying, only eleven percent reported physical violence in the form of pushing, shoving, tripping, and being spit on. *Id.* at 605.

160. *Id.* at 614.

go to the same school and therefore Massachusetts's bullying prevention statute was not a viable option for prosecuting Carter when she encouraged Roy to commit suicide.<sup>161</sup>

Unfortunately, hazing and bullying typically stem from school activities which, for better or worse, enjoy different standards. One common criticism of anti-hazing legislation is that it is too narrow in scope and only deals with limited situations, such as activities during initiation into a social organization.<sup>162</sup>

A discussion of the similarities between encouraging suicide and hazing is incomplete without acknowledging the difficulty in prosecuting both crimes. Perhaps the somewhat surprising lack of cases interpreting what acts are included in the scope of encouraging is a clear indication that neither encouraging suicide nor preventing hazing are actually prosecuted on a regular basis. Encouraging suicide may be especially difficult to uncover because the victim is dead. Absent witnesses or evidence, such as text messages, it might be impossible to know someone was encouraging another's suicidal actions.<sup>163</sup> This is where hazing prosecutions have an advantage. There are multiple witnesses who can come forward and detail the actual events that took place.

The best approach to enacting hazing statutes includes some level of defining "hazing."<sup>164</sup> For example, Massachusetts defines hazing as

conduct or method of initiation into any student organization, whether on public or private property, which wilfully or recklessly endangers the physical or mental health of any student or other person. Such conduct shall include whipping, beating, branding, forced calisthenics, exposure to the weather, forced consumption of any food, liquor, beverage, drug or other substance, or any other brutal treatment or forced physical activity which is likely to adversely affect the physical health or safety of any such student or other person, or which subjects such student or other person to extreme mental stress, including extended deprivation of sleep or rest or extended isolation. Notwithstanding any other provisions of this section to the contrary, consent shall not be available as a defense to any prosecution under

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161. MASS. GEN. LAWS ANN. ch.71 § 37O (West, Westlaw through Chapter 55 of the 2021 1st Ann. Sess.).

162. Burns, *supra* note 150, at 95, 108–09.

163. Police investigated Michelle Carter only after she had bragged to a friend that she was the reason her boyfriend died. *See* Commonwealth v. Carter, 52 N.E.3d 1054, 1059 (Mass. 2016) (Carter I), *aff'd*, 115 N.E.3d 559 (Mass. 2019) (Carter II).

164. Compare this with New York which has proposed legislation to combine the two degrees into one crime, defining hazing as any intentional, knowing, or reckless act committed by a person. Assemb. 3443, 2021 Leg., 244th Sess. (N.Y. 2021).

this action.<sup>165</sup>

Currently, New York divides hazing into first- and second-degree crimes, but proposed legislation would combine the two and encompass intentional, knowing, or reckless acts, including “activity adversely affecting the mental health or dignity of the minor or student, sleep deprivation, exclusion from social contact or conduct that could result in extreme embarrassment or . . . threats of such conduct that results in verifiable mental or physical harm.”<sup>166</sup>

## VI. MASSACHUSETTS’S PROPOSED LEGISLATION

When Michelle Carter was convicted of involuntary manslaughter, Massachusetts did not have a statute prohibiting encouraging or assisting suicide.<sup>167</sup> The court found that Carter telling Roy to “get back in” the car amounted to wanton or reckless behavior.<sup>168</sup> Clearly, as a result of the criticism of the *Carter* holding and rationale, and the ongoing You trial<sup>169</sup>—a similar case currently being decided—Massachusetts’s legislature drafted “An Act relative to preventing suicide”<sup>170</sup>:

Chapter 265 of the General Laws is hereby amended by inserting after section 16 the following section:

Section 16A. (a) For the purposes of this section, the following words shall have the following meanings: “Suicide”, death caused by self-directed injurious behavior with intent to die as a result of the behavior. “Suicide attempt”, a non-fatal, self-directed, potentially injurious behavior with intent to die as a result of the behavior, regardless of whether the behavior actually results in physical injury. “Suicidal ideation”, thinking about, considering, or planning suicide. “Knowledge of suicidal ideation”, actual knowledge of prior attempts to die from suicide; of a person’s planned methods to die from suicide; that a person intends to die from or attempt to die from suicide; or that a person has expressed such suicidal inclinations.

(b) A person shall be punished by imprisonment in the state prison for not more than 5 years if they know of another person’s propensity for

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165. MASS. GEN. LAWS ANN. ch. 269 § 17 (West, Westlaw through Chapter 55 of the 2021 1st Ann. Sess.).

166. Assemb. 3443, 2021 Leg., 244th Sess. (N.Y. 2021); N.Y. PENAL LAW § 120.16 (McKinney, Westlaw through L.2021, chapters 1 to 673) (hazing in the first degree); N.Y. PENAL LAW § 120.17 (McKinney, Westlaw through L.2021, chapters 1 to 673) (hazing in the second degree).

167. See generally *Carter*, 52 N.E.3d at 1056–65.

168. *Id.* at 1063.

169. Kelly, *supra* note 46.

170. S. 1032, 192d Gen. Ct. (Mass. 2021).

suicidal ideation and either:

- (1) (i) Exercise substantial control over the other person through control of the other person's physical location or circumstances; deceptive or fraudulent manipulation of the other person's fears, affections, or sympathies; or undue influence whereby the will of 1 person is substituted for the wishes of another;
- (ii) intentionally coerces or encourages that person to commit or attempt to commit suicide; and
- (iii) as a result of the coercion or encouragement, in whole or in part, that other person commits or attempts to commit suicide; or
- (2) (i) Intentionally provides the physical means, or knowledge of such means, to the other person for the purpose of enabling that other person to commit or attempt to commit suicide and, as a result, the other person commits or attempts to commit suicide; or
- (ii) participates in a physical act which causes, aids, encourages or assists the other person in committing or attempting to commit suicide.
- (c) This section shall not apply to a medical treatment lawfully administered by, or in a manner prescribed by, a licensed physician.<sup>171</sup>

Section 16A defines several terms, such as “suicide,” “suicide attempt,” and “suicidal ideation,” but ignores some terms that need defining in order to avoid constitutional challenges, such as “encourages.”<sup>172</sup> Equally troublesome is the language “provides the physical means, or knowledge of such means,” as this second part clearly falls within the realm of suicide forums.<sup>173</sup> Minnesota has already determined that there is a distinction between prohibiting detailed instructions on how to commit suicide and prohibiting “advocacy for the right to die” or speech that provides “emotional support” to those seeking to end their life.<sup>174</sup> Subsection (2)(ii) may cause more harm than good with “causes, aids, encourages or assists.”<sup>175</sup>

The proposed Massachusetts legislation provides much more clarity and specificity than many other states but does not go far enough in many aspects. By being so detailed, it actually leaves more questions than answers. According to the language of the statute, encouraging does not equal providing the physical means, or knowledge of such means.

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171. *Id.* Legislators make the effort to define certain terms, such as “suicide,” but neglect to define other important terms, like “encourages.”

172. *Id.*

173. *Id.*

174. *State v. Final Exit Network, Inc.*, 889 N.W.2d 296, 307 (Minn. Ct. App. 2016).

175. S. 1032.

Perhaps addressing broad categories does not accomplish the goal of narrowing the scope of the statute to survive strict scrutiny review. Instead, it leaves one wondering what acts could possibly constitute “encouraging.” Given its use in criminal law already, “aiding” will have an existing definition in many jurisdictions and will not be considered too vague.

Massachusetts’s proposed legislation has its positives. Subsection (c) carves out the new proposed End-of-Life Option Act exempting “medical treatment lawfully administered by, or in a manner prescribed by, a licensed physician.”<sup>176</sup> It will be interesting to see if this subsection survives if the proposed End-of-Life Option Act does not get enacted.<sup>177</sup>

#### CONCLUSION

Watching those left behind trying to navigate life after a loved one’s suicide surely points to suicide prevention as a worthy endeavor for states to pursue. Even so, arguably there are situations when suicide is the best option for someone diagnosed with a terminal illness, which adds to the complexity of this issue. Based on the language of many anti-encouraging laws as written today, these loved ones would be breaking the law if they were to administer life-ending medication. Even if the assister is not convicted, he may still be subjected to a drawn-out legal battle, perhaps even bankrupting him.<sup>178</sup> While courts seem willing to aid in interpreting these statutes to survive constitutional challenges, precise language and specificity remains the best option to discourage this behavior.

For all of the criticism the *Carter* court faced for its First Amendment implications, statutes criminalizing encouraging suicide have not generated much actual litigation. Under the First Amendment, the Supreme Court already acknowledged the power words have and has balanced the need to protect some speech while withholding protection in other contexts, such as hate speech and speech that incites others to lawlessness. States need to harness the power of words and use precise language and specificity when drafting statutes aimed at preventing suicides.

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176. *Id.*

177. S. 1384, 192d Gen. Ct. (Mass. 2021); H. 2381, 192d Gen. Ct. (Mass. 2021); *see also supra* note 143 and accompanying text.

178. MELVIN I. UROFSKY, *LETTING GO: DEATH, DYING, AND THE LAW* 118–29 (1993).

