

3-2021

After Forty Years, Nebraska Weighs in on Assisting Suicide: Criminal Liability for Assisting Suicide in Nebraska After *State v. Stubbendieck*

Samuel S. Baue
University of Nebraska College of Law

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Samuel S. Baue, *After Forty Years, Nebraska Weighs in on Assisting Suicide: Criminal Liability for Assisting Suicide in Nebraska After State v. Stubbendieck*, 99 Neb. L. Rev. 736 (2020)
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Note*

After Forty Years, Nebraska Weighs in on Assisting Suicide: Criminal Liability for Assisting Suicide in Nebraska After *State v.* *Stubbendieck*

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* Samuel S. Baue, J.D. candidate, 2021, University of Nebraska College of Law; B.A., 2018, University of Nebraska-Lincoln. This Note is dedicated to my parents, Marc and Stacy Baue, my brother, Josh Baue, and my sister, Grace Baue. I would like to thank my colleagues on the NEBRASKA LAW REVIEW for their hard work in preparing this Note for publication. I would also like to thank my outstanding family, friends, professors, coworkers, and classmates who have supported me. Finally, please be advised that this Note discusses issues of suicide in detail. If you or a loved one are concerned about suicide, call the National Suicide Prevention Lifeline at 1-800-273-8255 to speak with a counselor and get help.

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I. INTRODUCTION

In *State v. Stubbendieck*,¹ the Nebraska Supreme Court affirmed the first conviction for assisting suicide² in state history,³ even though the Nebraska Legislature had criminalized assisting suicide more than forty years prior.⁴ The Nebraska Legislature made assisting suicide a Class IV felony in 1977 by enacting section 28-307 of the Ne-

1. 302 Neb. 702, 924 N.W.2d 711 (2019).

2. In other jurisdictions across the United States, the language that assisting suicide statutes use to describe the forbidden, criminal assistive conduct includes “assisting,” “causing,” “encouraging,” “advising,” “aiding,” and “aiding and abetting” suicide. See *infra* notes 52–59 and accompanying text. Although Americans are probably most familiar with the term “assisted suicide” to describe the crime of helping another person commit suicide, I have made the rhetorical choice to use the term “assisting suicide” throughout this Note. I do this for two primary reasons. First, the title of NEB. REV. STAT. § 28-307 (Reissue 2016) (the statute at issue in *Stubbendieck*) uses the term “Assisting suicide.” Second, most Americans likely associate the term “assisted suicide” with physician-assisted suicide. See *infra* note 53 and accompanying text. Because the *Stubbendieck* case does not deal with assisting suicide in the context of physician-assisted suicide, this Note addresses assisting suicide law broadly and does not take up specific issues of physician-assisted suicide. For a broader discussion on the importance of rhetorical choices in legal discourse, see Samuel Baue, Ideographic Analysis of *Matal v. Tam*: <Freedom of Speech>, <Property>, and Reappropriation 15 (Mar. 12, 2018) (unpublished B.A. thesis, University of Nebraska-Lincoln) (on file with the NEBRASKA LAW REVIEW).

3. Prior to *Stubbendieck*, no reported Nebraska cases involved a conviction for assisting suicide. In *State v. Fuller*, the defendant was convicted of murder and argued on appeal that he should have been tried under the assisting suicide statute (with its substantially lesser penalty), but the Nebraska Supreme Court explained that the assisting suicide statute was inapplicable to offenses committed prior to January 1, 1979, including the defendant’s offense. 203 Neb. 233, 241–42, 278 N.W.2d 756, 761 (1979). However, it should be noted that the lack of convictions for assisting suicide in Nebraska does not necessarily mean that assisting suicide is rare or unusual. Police and prosecutors are generally reluctant to pursue charges for assisting suicide because of the sensitive and complex issues involved. See Catherine D. Shaffer, Note, *Criminal Liability for Assisting Suicide*, 86 COLUM. L. REV. 348, 369–71 (1986) (analyzing data suggesting that prosecutions for assisting suicide are exceedingly rare and explaining that “[p]olice and prosecutors appear to be reluctant to bring charges for suicide assistance”).

4. Nebraska’s assisting suicide statute, NEB. REV. STAT. § 28-307, became effective January 1, 1979. See *Fuller*, 203 Neb. at 241–42, 278 N.W.2d at 761 (explaining that, because Nebraska’s assisting suicide statute became operative on January 1, 1979, it is inapplicable to any offense committed prior to that date).

braska Revised Statutes, which reads in pertinent part: “A person commits assisting suicide when, with intent to assist another person in committing suicide, he aids and abets him in committing or attempting to commit suicide.”⁵ In interpreting the statute for the first time, the Nebraska Supreme Court clarified the legal contours of assisting suicide in Nebraska but simultaneously raised new, difficult issues that must be resolved in future criminal prosecutions.⁶

The bizarre and sensational facts of *Stubbendieck* take place against the backdrop of national controversy in the legal status of assisting suicide.⁷ In 2019 alone, New Jersey⁸ and Maine⁹ both legalized physician-assisted suicide.¹⁰ Further, the highly publicized case of *Commonwealth v. Carter* recently sparked controversy after the Massachusetts Supreme Judicial Court affirmed the involuntary manslaughter conviction of a defendant who pressured her depressed boyfriend, through text messages and phone calls, to kill himself.¹¹ Accordingly, the first judicial interpretation of Nebraska’s assisting suicide statute warrants analysis to clarify the status of assisting suicide in Nebraska.¹²

The *Stubbendieck* holding establishes an overly broad standard for assisting suicide in Nebraska.¹³ Under the standard established by the Nebraska Supreme Court in *Stubbendieck*, a defendant may engage in a moderate degree of involvement in the death of the victim—

5. NEB. REV. STAT. § 28-307(1).

6. See *infra* Parts IV–V (discussing the legal significance of the *Stubbendieck* opinion and unresolved legal issues).

7. For a timeline and brief overview of recent developments in physician-assisted suicide laws across the United States, see *Physician-Assisted Suicide Fast Facts*, CNN, <https://www.cnn.com/2014/11/26/us/physician-assisted-suicide-fast-facts/index.html> [<https://perma.unl.edu/KR8M-JFZJ>] (last updated June 11, 2020).

8. N.J. STAT. ANN. § 26:16-1 to -20 (West 2020). Physicians in New Jersey may prescribe lethal drugs to patients who meet certain criteria and have less than six months left to live. *Id.*

9. ME. STAT. tit. 22, § 2140 (2020). Terminally ill adults in Maine who are deemed mentally competent and have less than six months to live may request a prescription for life-ending medication. *Id.*

10. See *Physician-Assisted Suicide Fast Facts*, *supra* note 7.

11. 115 N.E.3d 559 (Mass. 2019), *cert. denied*, 140 S. Ct. 910 (2020). Defendant Michelle Carter was sentenced to fifteen months in jail, and the Supreme Court of the United States denied her petition for writ of certiorari on January 13, 2020. *Id.* The sensational facts of the *Carter* case provoked widespread outrage and garnered national media attention. See, e.g., Pete Williams, *Supreme Court Won't Hear Appeal of Michelle Carter, Convicted of Encouraging Boyfriend's Death by Suicide with Text Messages*, NBC NEWS (Jan. 13, 2020, 8:39 AM), <https://www.nbcnews.com/politics/supreme-court/supreme-court-will-not-consider-michelle-carter-appeal-urging-boyfriend-n1114381> [<https://perma.unl.edu/L56T-M2WD>].

12. See *supra* note 3 and accompanying text (explaining that prior to *Stubbendieck* no reported Nebraska cases involved a conviction for assisting suicide).

13. See *infra* section V.B.

such as temporarily smothering and giving poison to the victim¹⁴— and still only face prosecution for assisting suicide¹⁵ rather than homicide.¹⁶ Yet, on the other end of the spectrum, a Nebraska defendant may now incur criminal liability for assisting suicide by minimally participating in the victim's death; mere verbal encouragement of suicide is sufficient to find guilt when suicide is attempted or completed.¹⁷

This Note proceeds in five Parts. Part II discusses the history and public policy considerations for assisting suicide laws and describes the various approaches taken to criminalize assisting suicide in jurisdictions across the United States.¹⁸ Part III provides an overview of the *Stubbendieck* opinion and the key takeaways from the court's first interpretation of Nebraska's assisting suicide statute.¹⁹ Part IV examines how the *Stubbendieck* opinion provides useful precedent for distinguishing assisting suicide from criminal homicide in light of a multi-jurisdictional challenge to draw distinctions between the two.²⁰ Finally, Part V argues that the Nebraska Supreme Court's interpretation of "aiding and abetting," as used in Nebraska's assisting suicide statute, employs far too broad of a standard and recommends preferable alternative approaches taken by courts in jurisdictions with similar statutes.²¹

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14. *State v. Stubbendieck*, 302 Neb. 702, 716–18, 924 N.W.2d 711, 723 (2019) (describing Stubbendieck's involvement in the victim's suicide, which included temporarily smothering and giving poison to the victim).
 15. In cases with facts similar to *Stubbendieck*, other jurisdictions with assisting suicide statutes have also struggled to differentiate criminal homicide from extreme cases of assisting suicide. *See infra* Part IV.
 16. In Nebraska, a person commits murder in the first degree "if he or she kills another person (1) purposely and with deliberate and premeditated malice, or . . . (3) by administering poison or causing the same to be done." NEB. REV. STAT. § 28-303 (Reissue 2016). First degree murder is either a Class I or IA felony, while assisting suicide is a Class IV felony. NEB. REV. STAT. §§ 28-303, -307 (Reissue 2016).
 17. *Stubbendieck*, 302 Neb. at 716–18, 924 N.W.2d at 723 ("[A]iding and abetting requires some participation in a criminal act which must be evidenced by word, act, or deed, and mere encouragement or assistance is sufficient to make one an aider or abettor. No particular acts are necessary, however, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime. Yet, evidence of mere presence, acquiescence, or silence is not enough to sustain the State's burden of proving guilt under an aiding and abetting theory." (footnotes omitted)).
 18. *See infra* Part II.
 19. *See infra* Part III.
 20. *See infra* Part IV (describing the challenges courts in other jurisdictions have faced when trying to distinguish assisting suicide from criminal homicide and arguing that the *Stubbendieck* opinion helps clarify the issue).
 21. *See infra* Part V.

II. THE LAW OF ASSISTING SUICIDE IN CONTEXT

A. History and Approaches in Other Jurisdictions

Under English common law, suicide was a crime.²² Because suicide was a crime, any attempt, incitement, or conspiracy to commit suicide was a crime as well.²³ Although several states once criminalized suicide as a common law offense, no state ever went so far as to actually punish an offender.²⁴ Today, no state criminalizes suicide or the attempt to commit suicide.²⁵ This reflects the prevailing belief that suicide requires psychological rather than criminal intervention.²⁶ However, the vast majority of jurisdictions in the United States, to

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22. *Hales v. Petit*, 75 Eng. Rep. 387, 400 (C.B. 1562) (“[H]e who determines to kill himself . . . the quality of the offence is murder. . . . [i]t is an offence against nature, against God, and against the King. Against nature, because it is contrary to the rules of self-preservation, which is the principle of nature; for every thing living does by instinct of nature defend itself from destruction, and then to destroy one’s self is contrary to nature, and a thing most horrible. Against God, in that it is a breach of His commandment, *thou shalt not kill*; and to kill himself, by which act he kills in presumption his own soul, is a greater offence than to kill another. Against the King in that hereby he has lost a subject, and . . . [he who took his own life] has offended the King, in giving such an example to his subjects, and it belongs to the King, who has the government of the people, to take care that no evil example be given them, and an evil example is an offence against him.”); see also *In re Joseph G.*, 667 P.2d 1176, 1178 (Cal. 1983) (discussing the crime of suicide in England); *State v. Willis*, 121 S.E.2d 854, 855–56 (N.C. 1961) (same). English courts criminalized suicide because it was viewed as an offense against the king, as it deprived the king of a subject. English courts also perceived suicide as contrary to God and nature. Suicide was treated as a form of homicide often referred to as “self-murder.” Shaffer, *supra* note 3, at 349–50.
23. Shaffer, *supra* note 3, at 349 (discussing inchoate and accomplice liability for the crime of suicide).
24. *Id.* at 350; *Willis*, 121 S.E.2d at 854–56. In *Willis*, the Supreme Court of North Carolina explained that in North Carolina, as in many states, the common law of England is still in effect insofar as it is not “destructive of, or repugnant to, or inconsistent with” our form of government and to the extent it has not been abrogated or repealed by statute or has become obsolete. *Id.* The court went on to discuss that because the only punishments available for suicide under the common law have been prohibited by state constitutions or statutes, suicide essentially remains a crime in name alone and offenders cannot be punished. *Id.* The court could not find any previous American case that gave a punishment for the crime of suicide.
25. *Joseph G.*, 667 P.2d at 1178 (noting that no jurisdictions in the United States presently criminalize suicide and most jurisdictions also do not criminalize the attempt thereof); Sean Sweeney, Note, *Deadly Speech: Encouraging Suicide and Problematic Prosecutions*, 67 CASE W. RES. L. REV. 941, 946 (2017) (“In time, society has grown to recognize that suicide has many causes and has gradually eliminated the severe legal and religious punishments attached to it.”).
26. *Joseph G.*, 667 P.2d at 1178 (“[P]unishing suicide is contrary to modern penal and psychological theory.” (quoting VICTOR VICTOROFF, *THE SUICIDAL PATIENT* 173–74 (1982))).

varying degrees and by various methods, criminalize the act of assisting another to commit suicide.²⁷

Jurisdictions in the United States take three general approaches in criminalizing assisting suicide.²⁸ Thirty states, including Nebraska,²⁹ have statutes that specifically criminalize assisting suicide as a *sui generis*³⁰ offense.³¹ Ten states have statutes that criminalize assisting suicide as a form of criminal homicide.³² Five states and the District of Columbia prohibit conduct that amounts to assisting suicide under the common law, either as a standalone offense or under a theory of criminal homicide.³³ Michigan recognizes the common law offense of

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27. See *infra* notes 31–39 and accompanying text (describing the approaches taken by jurisdictions in the United States to criminalize assisting suicide).
 28. See *infra* notes 31–39 and accompanying text. Jurisdictions in the United States generally criminalize assisting suicide as a *sui generis* offense, as a form of criminal homicide, or as a *sui generis* offense in some circumstances and a form of criminal homicide in other circumstances.
 29. In Nebraska, assisting suicide is an independent offense from criminal homicide. NEB. REV. STAT. § 28-307 (Reissue 2016).
 30. As used herein, a *sui generis* crime is one which state legislatures (or state courts in jurisdictions where criminal liability is imposed under a common law theory) recognize as an independent offense. Assisting suicide in these jurisdictions is a *sui generis* offense in that the offense of assisting suicide is a unique offense independent from any criminal homicide laws. See *Sui Generis*, BLACK'S LAW DICTIONARY (11th ed. 2019) (“Of its own kind or class; unique or peculiar.”).
 31. ALA. CODE § 22-8B-4 (2020); CAL. PENAL CODE § 401 (West 2020); DEL. CODE ANN. tit. 11, § 645 (2020); GA. CODE ANN. § 16-5-5 (2020); IDAHO CODE § 18-4017 (2020); 720 ILL. COMP. STAT. ANN. 5/12-34.5 (West 2020); IND. CODE ANN. § 35-42-1-2.5 (West 2020); IOWA CODE ANN. § 707A.2 (West 2020); KAN. STAT. ANN. § 21-5407 (West 2020); KY. REV. STAT. ANN. § 216.302 (West 2020); LA. STAT. ANN. § 14:32.12 (2020); ME. STAT. tit. 17, § 204 (2019), <https://legislature.maine.gov/statutes/17-A/title17-Asec204.html> [<https://perma.unl.edu/3Y6J-LW2N>]; MD. CODE ANN., CRIM. LAW § 3-102 (West 2020); MICH. COMP. LAWS § 750.329a (2020); MINN. STAT. § 609.215 (2019); MISS. CODE ANN. § 97-3-49 (2020); NEB. REV. STAT. § 28-307 (Reissue 2016); N.H. REV. STAT. ANN. § 630:4 (2020); N.J. STAT. ANN. § 2C:11-6 (West 2020); N.M. STAT. ANN. § 30-2-4 (2020); N.D. CENT. CODE § 12.1-16-04 (2020); OHIO REV. CODE ANN. § 3795.04 (West 2020); OKLA. STAT. tit. 21, § 813 (2020); 11 R.I. GEN. LAWS § 11-60-3 (2020); S.C. CODE ANN. § 16-3-1090 (2020); S.D. CODIFIED LAWS § 22-16-37 (2020); TENN. CODE ANN. § 39-13-216 (2020); TEX. PENAL CODE ANN. § 22.08 (West 2020); WASH. REV. CODE § 9A.36.060 (2020); WIS. STAT. § 940.12 (2020).
 32. ALASKA STAT. § 11.41.120 (2020); ARIZ. REV. STAT. ANN. § 13-1103 (2020); ARK. CODE ANN. § 5-10-104 (2020); COLO. REV. STAT. § 18-3-104 (2020); CONN. GEN. STAT. ANN. § 53a-56 (West 2020); FLA. STAT. § 782.08 (2020); HAW. REV. STAT. § 707-702 (2020); MO. REV. STAT. § 565.023 (2020); OR. REV. STAT. § 163.125 (2020); UTAH CODE ANN. § 76-5-205 (LexisNexis 2020).
 33. MICH. COMP. LAWS § 750.329a; Wash. Metro. Area Transit Auth. v. Johnson, 726 A.2d 172 (D.C. 1999); Commonwealth v. Carter, 115 N.E.3d 559 (Mass. 2019), *cert. denied*, 140 S. Ct. 910 (2020); State v. Willis, 121 S.E.2d 854, 854–56 (N.C. 1961); Wackwitz v. Roy, 418 S.E.2d 861 (Va. 1992); Lenoci v. Leonard, 21 A.3d 694 (Vt. 2011) (applying common law principles to analyze liability where defendant’s conduct allegedly caused victim’s suicide); Moats v. Preston Cty. Comm’n, 521 S.E.2d 180 (W. Va. 1999) (same).

assisting suicide in addition to its assisting suicide statute.³⁴ Montana,³⁵ New York,³⁶ and Pennsylvania³⁷ have statutes that prohibit assisting suicide as a standalone offense under certain circumstances and as a form of criminal homicide under other circumstances.³⁸ The legal status of assisting suicide is undetermined in Nevada and Wyoming.³⁹

In states that have statutes specifically criminalizing assisting suicide as a *sui generis* offense,⁴⁰ assisting suicide is generally a lesser-included offense of criminal homicide.⁴¹ Nebraska law is representative of this approach.⁴² Alaska is illustrative of jurisdictions that define suicide assistance as a form of criminal homicide—in Alaska a defendant who “intentionally aids another person to commit suicide” is guilty of manslaughter.⁴³ Pennsylvania’s statutory scheme is representative of states that criminalize suicide assistance as a *sui generis*

34. MICH. COMP. LAWS § 750.329a.

35. MONT. CODE ANN. § 45-5-105 (2019). In Montana, a defendant is guilty of criminal homicide, rather than aiding or soliciting suicide, only when the victim dies as a result of the defendant’s aid or solicitation. MONT. CODE ANN. § 45-5-102 (2019).

36. N.Y. PENAL LAW §§ 120.30, 125.15 (McKinney 2020). In New York, a defendant is guilty of second-degree manslaughter, rather than assisting suicide, when the defendant “intentionally causes or aides” the victim to commit suicide.

37. 18 PA. CONS. STAT. § 2505 (2020). In Pennsylvania, the defendant is guilty of criminal homicide when the defendant causes the victim’s suicide by “force, duress or deception.” *Id.*

38. Interestingly, the Model Penal Code treats “causing or aiding suicide” both as a form of criminal homicide and as an independent offense, depending on the nature of the conduct at issue:

A person may be convicted of criminal homicide for causing another to commit suicide only if he purposely causes such suicide by force, duress or deception . . . A person who purposely aids or solicits another to commit suicide is guilty of a felony of the second degree if his conduct causes such suicide or an attempted suicide, and otherwise of a misdemeanor.

MODEL PENAL CODE § 210.5 (AM. LAW INST. 2017).

39. *See Assisted Suicide Laws in the United States*, PATIENTS RIGHTS COUNCIL, <http://www.patientsrightscouncil.org/site/assisted-suicide-state-laws/> [<https://perma.unl.edu/JW4K-KN2V>] (last updated Jan. 6, 2017) (indicating the undetermined status of assisting suicide in Nevada and Wyoming). Neither Nevada or Wyoming recognize common law crimes nor do they have a statute that addresses assisting suicide.

40. *See supra* note 30 and accompanying text (explaining assisting suicide as a *sui generis* offense).

41. Guyora Binder & Luis Chiesa, *The Puzzle of Inciting Suicide*, 56 AM. CRIM. L. REV. 65, 71, 108 (2019) (discussing the status of assisting suicide as a lesser-included offense of criminal homicide in some jurisdictions).

42. *See State v. Fuller*, 203 Neb. 233, 242, 278 N.W.2d 756, 761 (1979) (discussing that criminal defendant convicted of murder may have been eligible for jury instruction on assisting suicide if the statute was in effect at that time).

43. ALASKA STAT. § 11.41.120 (2020); *see supra* note 32 and accompanying text (setting forth jurisdictions where assisting suicide is criminalized as a form of criminal homicide rather than as a *sui generis* offense).

offense⁴⁴ under certain circumstances and as criminal homicide under other circumstances.⁴⁵ In Pennsylvania, a defendant is guilty of criminal homicide, rather than assisting suicide, when the defendant causes the victim's suicide by "force, duress or deception."⁴⁶

*Commonwealth v. Carter*⁴⁷ is illustrative of the approach taken in jurisdictions that prosecute assisting suicide under a common law theory of criminal homicide.⁴⁸ In Massachusetts, involuntary manslaughter is not a statutory crime but is instead defined at common law as the unintentional killing of another person through "wanton or reckless" conduct that disregards probable harm to another.⁴⁹ The Massachusetts Supreme Judicial Court held that defendant Michelle Carter acted wantonly and recklessly by helping her suicidal boyfriend form a plan to kill himself and by pressuring him to follow through when he sought to abandon the attempt.⁵⁰ In jurisdictions that have no assisting suicide statutes, defendants such as Carter face the full penalties of criminal homicide laws, whereas defendants in other jurisdictions would be punished less severely under assisting suicide laws.⁵¹

To add to the complexity of the issue, state statutes that prohibit assisting suicide vary widely in the conduct they forbid.⁵² For example, a number of states provide exceptions for healthcare providers who provide varying degrees of assistance to competent adults who decline life-sustaining treatment.⁵³ The language statutes use in

44. See *supra* note 30 and accompanying text (explaining assisting suicide as a *sui generis* offense).

45. 18 PA. CONS. STAT. § 2505 (2020). The other jurisdictions following this approach are Montana and New York, although the Model Penal Code follows this approach as well. See *supra* notes 35–38.

46. 18 PA. CONS. STAT. § 2505.

47. 115 N.E.3d 559 (Mass. 2019), *cert. denied*, 140 S. Ct. 910 (2020); see *supra* note 11 and accompanying text (discussing the *Carter* case).

48. See *supra* note 33 and accompanying text (discussing jurisdictions that criminalize assisting suicide under a common law theory of criminal liability).

49. *Carter*, 115 N.E.3d at 569 (setting forth the standard for the common law crime of involuntary manslaughter); *Commonwealth v. Welansky*, 55 N.E.2d 902, 909 (Mass. 1944) (same).

50. *Carter*, 115 N.E.3d at 569.

51. In jurisdictions that prohibit assisting suicide by statute, assisting suicide is generally a distinct and lesser-included offense. Binder & Chiesa, *supra* note 41, at 71, 108 (discussing the nature of assisting suicide as a lesser-included offense in jurisdictions which criminalize assisting suicide as a *sui generis* offense). Had Carter faced prosecution in a jurisdiction that deals with assisting suicide as a standalone offense, the State almost certainly would have prosecuted her for assisting suicide rather than criminal homicide. See *infra* Part IV (discussing the dividing line between assisting suicide and criminal homicide in jurisdictions that recognize both as separate offenses).

52. See *supra* notes 28–51 and accompanying text (discussing the different approaches states use to criminalize assisting suicide).

53. The statutory scheme in California is typical of this approach. In California, a physician may prescribe a lethal drug for a patient to self-administer if the pa-

describing criminal assistive conduct include “assisting,”⁵⁴ “causing,”⁵⁵ “encouraging,”⁵⁶ “advising,”⁵⁷ “aiding,”⁵⁸ and, in the case of Nebraska, “aiding and abetting” suicide.⁵⁹ As a result, whether a defendant’s conduct amounts to criminal suicide assistance depends greatly on the jurisdiction in question.⁶⁰

B. Public Policy Considerations

The predominant policy rationale for assisting suicide laws is that the State’s interest in preserving life is greater than an individual’s desire for death, especially when such an individual is otherwise healthy.⁶¹ Assisting suicide laws also serve several subordinate pur-

tient is competent and terminally ill. CAL. HEALTH & SAFETY CODE § 443.1 (Deering 2020). California’s assisting suicide statute specifically excludes prosecution against such a physician. CAL. PENAL CODE § 401 (Deering 2020). Although not currently legal in Nebraska, activists have made notable attempts to legalize physician-assisted suicide in the state. As early as 1937, State Senator John H. Stock introduced legislation to legalize “euthanasia,” but the bill never went to a vote. *Nebraska*, DEATH WITH DIGNITY, <https://www.deathwithdignity.org/states/nebraska/> [<https://perma.unl.edu/QVP7-38YK>] (last viewed Aug. 14, 2020). Legislators also introduced physician-assisted suicide bills in 1996 (LB 1259), 1997 (LB 406), and 1999 (LB 70). *Id.* On January 17, 2017, Nebraska State Senator Ernie Chambers introduced the Patient Choice at End of Life Act (LB 450) to implement physician-assisted suicide in Nebraska, but the legislation failed to advance. Because *Stubbendieck* does not deal with assisting suicide in the context of physician-assisted suicide, this Note addresses assisting suicide law broadly and does not take up specific issues of physician-assisted suicide.

54. *See, e.g.*, MINN. STAT. § 609.215 (2019) (“Whoever intentionally . . . assists another in taking the other’s own life may be sentenced to imprisonment for not more than 15 years or to payment of a fine of not more than \$30,000, or both.”).
55. N.Y. PENAL LAW § 125.15 (McKinney 2020) (“A person is guilty of manslaughter in the second degree when: . . . [h]e intentionally causes or aids another person to commit suicide.”).
56. *See, e.g.*, MINN. STAT. § 609.215 (“Whoever intentionally . . . encourages . . . another in taking the other’s own life may be sentenced to imprisonment for not more than 15 years or to payment of a fine of not more than \$30,000, or both.”).
57. *See, e.g., id.* (“Whoever intentionally advises . . . another in taking the other’s own life may be sentenced to imprisonment for not more than 15 years or to payment of a fine of not more than \$30,000, or both.”).
58. *See, e.g.*, N.Y. PENAL LAW § 125.15 (“A person is guilty of manslaughter in the second degree when: . . . [h]e intentionally causes or aids another person to commit suicide.”).
59. NEB. REV. STAT. § 28-307 (Reissue 2016) (“A person commits assisting suicide when, with intent to assist another person in committing suicide, he aids and abets him in committing or attempting to commit suicide.”).
60. *See infra* Part IV (describing conduct that qualifies as assisting suicide in some jurisdictions but qualifies as criminal homicide in other jurisdictions). For a broader discussion on the importance of rhetorical choices in legal discourse, see Baue, *supra* note 2.
61. *Cruzan v. Dir.*, Mo. Dep’t of Health, 497 U.S. 261, 282 (1990) (“[A] State may properly decline to make judgments about the ‘quality’ of life that a particular individual may enjoy, and simply assert an unqualified interest in the preserva-

poses.⁶² They attempt to prevent potential defendants from encouraging a victim to commit suicide in order to advance the defendant's own interests.⁶³ They also address the inadequacies of homicide laws, aiming to penalize defendants who wrongfully participate in the death of a consenting victim but who might not fulfill the required elements for criminal homicide.⁶⁴

These laws are justified from the utilitarian point of view—suicide is a tragedy and major public health problem, and the State is justified in punishing those who help bring about the victim's death.⁶⁵ The suicidal individual's judgment is often distorted by an irrational focus on present suffering.⁶⁶ Suicidal persons also generally underestimate their capacity to recover from negative life events and do not appreciate the negative effects their deaths will have on others in their lives and society as a whole.⁶⁷ Thus, while it may be counterproductive to

tion of human life to be weighed against the constitutionally protected interests of the individual.”); *Compassion in Dying v. Washington*, 79 F.3d 790, 817 (9th Cir. 1996) (concluding that terminally ill individuals' liberty interests in controlling the time and manner of death outweighed the State's “unqualified interest in preserving life”), *rev'd*, 521 U.S. 702 (1997); *In re Joseph G.*, 667 P.2d 1176, 1181 (Cal. 1983) (discussing that a rationale underlying assisting suicide statutes is the State interest in the sanctity of life); *see also* Konstantin Tretyakov, *The Right to Die in the United States, Canada, and China: Legal Fictions and Their Utility in a Comparative Perspective*, 21 U. PA. J.L. & SOC. CHANGE 79, 82 (2018) (finding that states were willing to recognize a patient's right to withdraw life-saving treatment if the quality of the patient's life was considered too low); Shaffer, *supra* note 3, at 354 (“[T]he state interest in preserving life overrides an individual's preference for death.”).

62. *See infra* notes 63–64 and accompanying text (discussing the subordinate purposes of assisting suicide statutes).
63. *See Joseph G.*, 667 P.2d at 1181 (discussing that assisting suicide statutes attempt to discourage individuals from promoting suicide to advance their own personal interests).
64. *See id.*
65. Binder & Chiesa, *supra* note 41, at 68. Under utilitarian theory, the government has “a collective responsibility to serve the general welfare,” and “criminal punishment [is] a social cost worth bearing in so far as it deters conduct expected to be even more socially costly.” *Id.* Binder and Chiesa also argue that from a utilitarian perspective, assisting suicide is worthy of criminalization because suicide is a serious public health problem. *Id.*
66. *Id.* (“Those who commit suicide may do so to alleviate current misery, but there are several reasons to expect that this decision will often be short-sighted. First, misery, and pessimism about interventions to alleviate it, can be co-occurring symptoms of depression. Second, cognitive psychology has established present-bias as a common cognitive error in evaluating choices.” (footnotes omitted)).
67. *Id.* (“[C]ognitive psychology has shown that we are more resilient than we suppose: where unhappiness is caused by a catastrophic event like a disabling accident, it is often surprisingly ephemeral, as we adjust our expectations to our circumstances. Not only may individuals underestimate their own welfare loss from suicide in these ways, they may also undervalue the welfare loss to others who will grieve, or be deprived of their productive contributions.” (footnotes omitted)).

punish individuals in need of psychological help for attempting or committing suicide,⁶⁸ no such reasoning prevents the State from punishing those who, fully capable of assessing the suicidal individual's decision, assist or encourage suicide.⁶⁹

The rationale for punishing the assisting defendant and not the victim can be understood through comparison to the punishment of an accessory to a crime where the principal's conduct is excused, for example, by reason of insanity.⁷⁰ Like a principal laboring under a condition of insanity, the suicide victim's suicidal conduct is wrongful, but excused.⁷¹ An accomplice, however, would not benefit from the excuse and remains guilty.⁷² A defendant who furnishes a gun to a suicidal victim intending that the victim take his or her life should be no less liable than an accessory who furnishes a gun to an insane individual intending that he or she kill someone else.⁷³

Critics argue that assisting suicide laws impinge on the autonomy and freedom of competent adults to make the deeply personal choice as to whether to live or die.⁷⁴ Advocates of an individual's "right to die" charge that the State should not punish people for aiding a competent adult to take his or her own life unless the defendant has done

68. *Joseph G.*, 667 P.2d at 1178 (discussing the modern view that suicidal individuals require psychological, rather than legal intervention, and that punishment of suicide is contrary to modern penal and psychological theory).

69. *See infra* notes 70–73 and accompanying text (discussing the justifications for punishing the criminal assistant, but not the victim, in assisting suicide cases).

70. Binder & Chiesa, *supra* note 41, at 83 (elaborating on the view that an assisting suicide defendant is treated as an accessory to wrongful but excused conduct by the principal).

71. *Id.* (explaining that the excuse of the victim's conduct "would not extend to those who aid or encourage the suicide, given that they could typically be deterred by the criminal sanction and punishing them for contributing to the death of another would not be manifestly cruel").

72. Where a defense is classified as a justification, the conduct at issue is not wrongful. Thus, an accomplice to a justified act does not incur criminal liability. However, where the defense is classified as an excuse (such as the insanity defense), the underlying conduct remains wrongful and the excuse only benefits the defendant laboring under the excusing condition. As such, an accomplice to a crime where the principal is excused is not discharged of criminal liability. *See United States v. Lopez*, 662 F. Supp. 1083, 1086 (N.D. Cal. 1987) (discussing criminal theory underlying defenses classified as excuse defenses).

73. Comparing, in this way, the crime of assisting suicide to the crime of aiding and abetting presents problems and played a central role in the Nebraska Supreme Court's reasoning in *Stubbendieck*. *See infra* Part V.

74. *See, e.g.*, Binder & Chiesa, *supra* note 41, at 69 (discussing that punishing the encouragement of suicide is unappealing from a libertarian perspective because doing so restricts fundamental personal freedoms); Tretyakov, *supra* note 61, at 83 (analyzing judicial and political arguments in the context of physician-assisted suicide that an individual's "right to die" is supported by "the common law doctrines of self-determination, bodily integrity, and informed consent, and the constitutional law doctrine of the right to privacy").

something to interfere with the suicidal individual's autonomy.⁷⁵ As social trends and movements, like the so-called "right to die" movement, continue to place an increasing value on individual autonomy, utilitarian justifications for assisting suicide laws may struggle to withstand the scrutiny of arguments for respecting bodily autonomy and personal freedoms.⁷⁶

III. THE STUBBENDIECK OPINION

The Nebraska Supreme Court analyzed Nebraska's assisting suicide statute⁷⁷ for the first time in *State v. Stubbendieck*.⁷⁸ The defendant, Matthew Stubbendieck (Stubbendieck), and the victim, Alicia Wilemon-Sullivan (Sullivan), were in a long-distance romantic relationship maintained predominantly over text message.⁷⁹ Stubbendieck lived in Cass County, Nebraska, and Sullivan lived in Jacksonville, Florida.⁸⁰ Sullivan told Stubbendieck that she was suffering from an aggressive form of cancer, had given up on treatment, and wanted to die.⁸¹ Over several weeks, the two formed a plan for Sullivan to fly to Nebraska, marry Stubbendieck, and kill herself.⁸² Stubbendieck obtained a plane ticket for Sullivan and searched for drugs he could use to help Sullivan commit suicide.⁸³ A witness testi-

75. See *supra* note 53 and accompanying text (discussing physician-assisted suicide laws). This is precisely the issue addressed by several assisting suicide statutes that punish more harshly or only punish conduct that interferes with the victim's autonomy and judgment. For example, in Pennsylvania, the defendant is guilty of criminal homicide when the defendant causes the victim's suicide by force, duress, or deception. 18 PA. CONS. STAT. § 2505 (2020).

76. Marvin Zalman, John Strate, Denis Hunter & James Sellars, *Michigan's Assisted Suicide Three Ring Circus—An Intersection of Law and Politics*, 23 OHIO N.U. L. REV. 863, 908 (1997) (noting that social trends favoring personal autonomy, such as the so-called "right to die" movement, continue to gain traction in mainstream society).

77. NEB. REV. STAT. § 28-307 (Reissue 2016).

78. *State v. Stubbendieck*, 302 Neb. 702, 924 N.W.2d 711 (2019). See *supra* note 3 and accompanying text (explaining that the *Stubbendieck* case was the first in Nebraska state history to adjudicate a conviction for assisting suicide).

79. *Stubbendieck*, 302 Neb. at 704–05, 924 N.W.2d at 716.

80. *Id.*

81. *Id.* ("During the course of the investigation, Stubbendieck told investigators that he believed Sullivan was suffering from 'Stage IV cancer.' Stubbendieck indicated that Sullivan 'hated' hospitals, but had been convinced by friends to undergo radiation treatments in Jacksonville, Florida. According to Stubbendieck, Sullivan terminated radiation therapy after only 5 weeks because her condition had not improved.").

82. *Id.* Over the course of the couple's lengthy text message conversations, Sullivan repeatedly threatened to harm herself and claimed to be in great pain. The two established a plan to get married in Nebraska, after which Sullivan would "go out in [Stubbendieck's] arms as [his] wife." *Id.* (alternation in original).

83. *Id.* Notably, the airline ticket Stubbendieck purchased for Sullivan was a one-way ticket. *Id.*

fied that Stubbendieck suggested he obtained liquid morphine for Sullivan, and another witness testified that Stubbendieck said he planned to inject Sullivan with morphine to “put her to sleep.”⁸⁴

Sullivan arrived in Nebraska on July 31, 2017.⁸⁵ The next day, witnesses saw Sullivan taking pills before Stubbendieck took her to a lake outside of Weeping Water, Nebraska.⁸⁶ Stubbendieck told authorities that Sullivan began cutting her wrists with a knife at the lake, and that he suffocated Sullivan at least twice to help her kill herself; however, he claimed that he ultimately did not suffocate her to death and left the area while she was still alive and talking to him.⁸⁷ On August 5, 2017, Stubbendieck reported Sullivan’s death and led local law enforcement to her body.⁸⁸

Due to the stage of decomposition of the body, an autopsy was unable to determine a cause of death.⁸⁹ However, the autopsy revealed no signs of injury (other than the cuts on her wrist), and, in a bizarre twist, there were no signs of illness, including cancer.⁹⁰ Sullivan did have, however, a level of morphine in her system that was within the range of some overdose cases.⁹¹ The pathologist who performed the autopsy determined that drugs, asphyxiation, and hypothermia could not be excluded as contributing factors.⁹² After obtaining witness interviews, autopsy results, and Stubbendieck’s text messages, authori-

84. *Id.* at 705–06, 924 N.W.2d at 716.

85. *Id.* at 706, 924 N.W.2d at 717.

86. *Id.*

87. *Id.* (“Stubbendieck indicated that the two remained in the remote area for approximately 8 hours. Stubbendieck admitted that during that time, on two occasions, he attempted to assist Sullivan by covering her nose and mouth in order to suffocate her. Stubbendieck told investigators that Sullivan was alive and conversing with him when he left her 7 1/2 hours after arriving at the location.”).

88. *Id.* at 704, 924 N.W.2d at 716.

89. *Id.* at 707–08, 924 N.W.2d at 717–18.

90. *Id.* at 707, 924 N.W.2d at 717.

91. *Id.* This, coupled with the fact that there was evidence suggesting Stubbendieck had sought and obtained the morphine for Sullivan (and potentially even directly administered the morphine by injecting Sullivan) for the purpose of killing her, was particularly damning for Stubbendieck. As discussed *infra* Part IV, most jurisdictions in the United States are in broad agreement that furnishing the means of suicide (e.g., the poison, gun, knife, etc.) to the victim constitutes assisting suicide.

92. *Stubbendieck*, 302 Neb. at 707, 924 N.W.2d at 717. The defense seized on evidence suggesting Sullivan was addicted to narcotics in an apparent attempt to cast reasonable doubt as to whether her death was a suicide at all, especially considering the autopsy could not determine a cause of death. Paul Hammel, *Co-Workers of Man Accused in Assisted-Suicide Case Say They Told Him His Plan Was ‘Legally Wrong’*, OMAHA WORLD-HERALD (Apr. 13, 2018), https://www.omaha.com/news/crime/co-workers-of-man-accused-in-assisted-suicide-case-say/article_a547d8e1-57f5-5e5c-8cee-0dca9d505b8b.html [https://perma.unl.edu/3RE6-KR57].

ties charged Stubbendieck with assisting suicide.⁹³ Stubbendieck was found guilty and sentenced to probation.⁹⁴

Stubbendieck appealed to the Nebraska Supreme Court, arguing there was insufficient evidence to support conviction and that the trial court improperly admitted irrelevant and prejudicial evidence, including some of Stubbendieck's text messages and the forensic pathologist's autopsy results and testimony.⁹⁵ The court held that, although the autopsy could not determine a cause of death, the autopsy results and associated testimony were not irrelevant or unfairly prejudicial because they were crucial to determining whether Sullivan had actually killed herself and to what degree Stubbendieck had participated.⁹⁶ Similarly, the court held that Stubbendieck's text message exchanges were not irrelevant or unfairly prejudicial because they contained information relevant to Stubbendieck's motive and involvement in Sullivan's death.⁹⁷

The *Stubbendieck* opinion provided guidance for the first time on how Nebraska courts should analyze sufficiency of evidence in assisting suicide cases.⁹⁸ Unsurprisingly, the court relied on Nebraska aiding and abetting jurisprudence in interpreting Nebraska's assisting suicide statute.⁹⁹ The court noted that aiding and abetting is not a crime in its own right but, instead, is a theory for finding criminal liability for an underlying crime.¹⁰⁰ As interpreted by the *Stubbendieck* court, a defendant satisfies the aiding and abetting requirement of Nebraska's assisting suicide statute¹⁰¹ by participating physically or verbally in the commission or attempted commission of a

93. *Stubbendieck*, 302 Neb. at 706, 924 N.W.2d at 717.

94. *Id.* at 707, 924 N.W.2d at 717.

95. *Id.* The fact that the autopsy was unable to determine a decisive cause of death was critical for Stubbendieck's argument on appeal. Stubbendieck argued that the "corpus delicti" of the crime of assisting suicide could not be proven beyond a reasonable doubt if it was unclear whether a suicide had in fact occurred. *Id.* at 718, 924 N.W.2d at 723–24.

96. *Id.* at 709–12, 924 N.W.2d at 719–20 ("[The pathologist's] testimony was relevant to the extent that it provided the trier of fact with evidence that the injuries sustained and drugs ingested were in furtherance of a successful attempt at suicide and not the result of natural causes. The fact that Sullivan's body was found to have a lethal amount of morphine cannot be discounted, especially as it relates to the testimonial evidence regarding Stubbendieck's attempts to acquire morphine in furtherance of Sullivan's plan, an affirmative act which constitutes aiding or abetting under § 28-307.>").

97. *Id.* at 715–16, 924 N.W.2d at 722.

98. *See infra* notes 99–106 (discussing sufficiency of evidence in the *Stubbendieck* case).

99. NEB. REV. STAT. § 28-307 (Reissue 2016); *Stubbendieck*, 302 Neb. at 716, 924 N.W.2d at 723.

100. *Stubbendieck*, 302 Neb. at 716, 924 N.W.2d at 722.

101. NEB. REV. STAT. § 28-307.

suicide, including “mere encouragement” of the victim’s suicide.¹⁰² The court did not require any specific conduct, an agreement to commit suicide, or that the defendant physically participate in the suicide.¹⁰³ However, the court did require that the State prove the defendant’s participation beyond “mere presence, acquiescence, or silence.”¹⁰⁴

Applying this standard, the court determined that Stubbendieck (1) encouraged Sullivan to commit suicide by texting her to come to Nebraska and kill herself, and (2) participated in the suicide by searching for and “ostensibly” acquiring morphine as well as temporarily suffocating Sullivan.¹⁰⁵ Finally, the court determined that Stubbendieck’s own admissions combined with the corroborative evidence of the text messages, witness testimony, and autopsy results proved the corpus delicti of the crime beyond a reasonable doubt.¹⁰⁶

IV. DISTINGUISHING ASSISTING SUICIDE FROM HOMICIDE

The facts of the *Stubbendieck* case straddle the thin line between assisting suicide and homicide that jurisdictions across the United States have struggled to characterize.¹⁰⁷ Stubbendieck’s conduct comes close to fulfilling the elements of murder while still being more appropriately characterized as assisting suicide.¹⁰⁸ While the court’s

102. *Stubbendieck*, 302 Neb. at 716, 924 N.W.2d at 722–23. The precedent set by the Nebraska Supreme Court in concluding that “mere encouragement” of a victim’s suicide is sufficient to commit assisting suicide is problematic. *See infra* Part V (discussing the problems and alternative solutions to the standard of “mere encouragement”).

103. *Stubbendieck*, 302 Neb. at 716–17, 924 N.W.2d at 723. By not requiring any specific conduct to find a defendant guilty of assisting suicide, the Nebraska Supreme Court aligned Nebraska with the majority of American jurisdictions, which do not require any specific conduct to find a defendant guilty of assisting suicide. *See infra* Part IV (discussing approaches taken in other jurisdictions with regard to assisting suicide).

104. *Stubbendieck*, 302 Neb. at 717, 924 N.W.2d at 723. Indeed, a defendant’s mere presence, acquiescence, or silence with regard to a victim’s suicide would be insufficient to find a defendant guilty of assisting suicide in any jurisdiction in the United States. *See infra* Parts IV–V (discussing approaches taken in other jurisdictions with regard to assisting suicide).

105. *Stubbendieck*, 302 Neb. at 717, 924 N.W.2d at 723.

106. *Id.* at 718–19, 924 N.W.2d at 724.

107. *See infra* notes 131–37 and accompanying text (discussing the difficulties that many jurisdictions have encountered in drawing distinctions between assisting suicide and criminal homicide).

108. Importantly, Stubbendieck admitted to temporarily smothering the victim, and the trial court found that Stubbendieck ostensibly obtained morphine and furnished it to the victim with the intent that she used the drugs to kill herself. *Stubbendieck*, 302 Neb. at 717, 924 N.W.2d at 723; *see also* *People v. Cleaves*, 280 Cal. Rptr. 146, 148–49 (Ct. App. 1991) (finding defendant guilty of homicide where defendant held victim’s body in place while victim strangled himself); *State v. Sexson*, 869 P.2d 301, 305 (N.M. Ct. App. 1994) (finding defendant guilty

opinion does not discuss the issue, it was a focal point at oral argument.¹⁰⁹ Chief Justice Heavican and Justice Stacy questioned Kimberly Klein, counsel for the State, on why (and indeed, if) Stubbendieck's conduct constituted assisting suicide rather than criminal homicide.¹¹⁰ Klein responded with:

[T]he line between the two can be drawn rather finely. If the defendant had taken an act which essentially directly contributed to the death of the victim, then you would be dealing with homicide. If he does something to aid and abet?—and that's what really distinguishes this from a homicide?—to aid and abet her in suicide, then he would be guilty of the Class IV felony of assisting suicide rather than the Class I felony of first-degree murder.¹¹¹

The State's reasoning on this critical issue warrants analysis, as it is illustrative of the consistent struggle to distinguish cases of assisting suicide from criminal homicide in jurisdictions that have criminalized assisting suicide.¹¹²

A. The Spectrum of Assistive Conduct

In describing conduct that “essentially” and “directly” contributes to the victim's death,¹¹³ the State highlights the importance of proximate causation¹¹⁴ in distinguishing murder from assisting suicide.¹¹⁵ This approach is characteristic of the dominant trend in other jurisdic-

of homicide where defendant held rifle aimed at victim while victim pulled the trigger); *People v. Minor*, 898 N.Y.S.2d 440, 443 (Sup. Ct. 2010) (finding defendant guilty of homicide where defendant held knife in place and positioned knife to deal maximum damage while victim repeatedly thrust himself on knife). The defendant's conduct in each of these cases arguably involves less active participation in the victim's death than Stubbendieck's participation in Sullivan's death, yet Stubbendieck was only charged with and convicted of assisting suicide, whereas the defendants in each of these cases were convicted of homicide.

109. Oral Argument, *Stubbendieck*, 302 Neb. 702, 924 N.W.2d 711 (No. S-18-600), <https://supremecourt.nebraska.gov/video-arguments-02-28-2019>.

110. *Id.* at 42:09–43:00.

111. *Id.* Interestingly, Klein's response here is characteristic of the dominant trend in other jurisdictions in which courts conduct fact-specific inquiries on a case-by-case basis to determine how “direct,” “overt,” “foreseeable,” “active,” or “affirmative” the conduct in question is. *See infra* notes 113–21 (discussing the case-by-case inquiry typical of other jurisdictions).

112. *See infra* notes 131–37 and accompanying text (discussing the difficulties that many jurisdictions have encountered in drawing distinctions between assisting suicide and criminal homicide).

113. Oral Argument, *supra* note 109 at 42:09–43:00.

114. In Nebraska, criminal conduct is the proximate cause of a given harm when (1) “the injury would not have occurred” without the conduct, (2) that conduct is the “natural and probable” cause of that harm, and (3) “there was no efficient intervening cause.” *State v. Irish*, 292 Neb. 513, 521, 873 N.W.2d 161, 168 (2016).

115. Generally, all crimes require an actus reus, a mens rea, and, where the crime involves a prohibited result rather than prohibited conduct (where the crime is a so-called “result crime”), causation of an injury to the legal interest protected by the criminal law. JOSHUA DRESSLER & STEPHEN P. GARVEY, *CRIMINAL LAW CASES AND MATERIALS* 133 (7th ed. 2016).

tions in which courts conduct fact-specific inquiries to determine how “direct,”¹¹⁶ “overt,”¹¹⁷ “foreseeable,”¹¹⁸ “active,”¹¹⁹ or “affirmative”¹²⁰ the conduct in question is.¹²¹

These cases typically operate on a continuum—the more actively the defendant participates in the act causing the death of the victim, the closer in time the defendant’s conduct is to the victim’s death, and where the death of the victim is a more direct and foreseeable consequence of the defendant’s actions, the more likely the court is to characterize the defendant’s conduct as criminal homicide as opposed to assisting suicide.¹²² For example, where a defendant kills a com-

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116. *People v. Minor*, 898 N.Y.S.2d 440, 442–43 (Sup. Ct. 2010) (applying the standard that homicide is appropriate where the defendant’s participation in the death of the victim was “active” and “direct”).
117. *State v. Bouse*, 264 P.2d 800, 812 (Or. 1953) (concluding that the defendant was guilty of homicide because of his assistance in the “overt act” ultimately causing death), *overruled on different grounds* by *State v. Fischer*, 376 P.2d 418 (1962).
118. *People v. Duffy*, 595 N.E.2d 814, 816 (N.Y. 1992) (finding defendant guilty of murder where the victim’s death was a “foreseeable” consequence of defendant’s conduct of giving a drunk and suicidal victim a loaded gun).
119. *In re Joseph G.*, 667 P.2d 1176, 1180 (Cal. 1983) (“[T]he key to distinguishing between the crimes of murder and of assisting suicide is the active or passive role of the defendant in the suicide.”).
120. Shaffer, *supra* note 3, at 348 (“If an assistant participates affirmatively in the suicide, for instance by pulling the trigger or administering a fatal dose of drugs, courts agree that the appropriate charge is murder.”).
121. For explanations of this fact-specific analysis, see, e.g., *People v. Matlock*, 336 P.2d 505, 511 (Cal. 1959); *In re Ryan N.*, 112 Cal. Rptr. 2d 620, 633 (Ct. App. 2001); *People v. Cleaves*, 280 Cal. Rptr. 146, 148–49 (Ct. App. 1991); *Bouvia v. Superior Court*, 225 Cal. Rptr. 297, 306 (Ct. App. 1986); *Fister ex rel. Estate of Fister v. Allstate Life Ins. Co.*, 783 A.2d 194, 201 (Md. 2001); *People v. Kevorkian*, 527 N.W.2d 714, 738–39 (Mich. 1994); *State v. Fuller*, 203 Neb. 233, 241, 278 N.W.2d 756, 761 (1979); *State v. Sexson*, 869 P.2d 301, 305 (N.M. Ct. App. 1994); *Binder & Chiesa*, *supra* note 41, at 116.
122. See, e.g., *Joseph G.*, 667 P.2d at 1180 (“[T]he key to distinguishing between the crimes of murder and of assisting suicide is the active or passive role of the defendant in the suicide.”); *Matlock*, 336 P.2d at 508, 511 (finding defendant guilty of murder where defendant allegedly strangled the victim at the victim’s request); *Cleaves*, 280 Cal. Rptr. at 148–49 (finding defendant guilty of murder where defendant held victim in place while victim strangled himself); *Fuller*, 203 Neb. at 241, 278 N.W.2d at 761 (holding defendant guilty of murder when defendant directly administered fatal air bubble into victim’s bloodstream directly before the victim’s death); *Duffy*, 595 N.E.2d at 816 (finding defendant guilty of murder where the victim’s death was a “foreseeable” consequence of defendant’s conduct of giving drunk and suicidal victim a loaded gun); *People v. Minor*, 898 N.Y.S.2d 440, 442–43 (Sup. Ct. 2010) (applying the standard that homicide is appropriate where the defendant’s participation in the death of the victim was “active” and “direct”); *Bouse*, 264 P.2d at 812 (“[T]he [assisting suicide] statute does not contemplate active participation by one in the overt act directly causing death. It contemplates some participation in the events leading up to the commission of the final overt act, such as furnishing the means for bringing about death,—the gun, the knife, the poison, or providing the water, for the use of the person who himself commits the act of self-murder. But where a person actually performs, or

pletely passive victim at the victim's request, a court in any jurisdiction would easily characterize the defendant's conduct as murder, at the extreme "homicide" end of the spectrum.¹²³

Even before Nebraska's assisting suicide statute was in effect, the Nebraska Supreme Court recognized the principle that a victim's consent, and even participation, in the act causing death does not transform a homicide into a suicide.¹²⁴ In *State v. Fuller*, the victim held out his arm while, at the victim's request, the defendant injected a lethal air bubble into the victim's bloodstream.¹²⁵ The Nebraska Supreme Court reversed Fuller's murder conviction on other grounds but recognized that the victim's consent did not change the fact that Fuller's alleged conduct amounted to murder.¹²⁶

On the other end of the spectrum, courts are generally more likely to characterize a defendant's conduct as assisting suicide as opposed to homicide when the defendant's conduct is more passive, occurs before the victim's death or as part of a larger chain of events leading up to the victim's death, and where the death of the victim is a more indirect and unforeseeable consequence of the defendant's actions.¹²⁷ American jurisdictions are in broad agreement that a defendant merely furnishing the means of suicide to the victim (e.g., gun, knife,

actively assists in performing, the overt act resulting in death, such as shooting or stabbing the victim, administering the poison, or holding one under water until death takes place by drowning, his act constitutes murder, and it is wholly immaterial whether this act is committed pursuant to an agreement with the victim, such as a mutual suicide pact."); Shaffer, *supra* note 3, at 348.

123. This is essentially what happened in the Nebraska case of *State v. Fuller*, where the defendant was found guilty of murder rather than assisting suicide for directly administering a fatal air bubble into the victim's bloodstream at the victim's request. *Fuller*, 203 Neb. at 241, 278 N.W.2d at 761; *see also Matlock*, 336 P.2d at 508, 511 (involving defendant actively killing passive victim at victim's request); *Bouse*, 264 P.2d at 812 (same).

124. *Fuller*, 203 Neb. at 241, 278 N.W.2d at 761.

125. *Id.* at 234, 278 N.W.2d at 758.

126. *Id.* at 234, 241, 278 N.W.2d at 758, 761. Fuller's conviction was reversed on Fifth Amendment grounds.

127. *See, e.g., Joseph G.*, 667 P.2d at 1180 (discussing that defendant's conduct must have a direct causal link to victim's death to constitute homicide); *Cleaves*, 280 Cal. Rptr. at 150-51 (explaining that the appropriate charge is assisting suicide where the defendant's participation in the victim's death is "passive"); *People v. Kevorkian*, 527 N.W.2d 714, 738-39 (Mich. 1994) (holding that assisting suicide, rather than murder, was the appropriate charge where defendant inserted a needle that was attached to a device equipped with lethal drugs into the arm of the suicidal victim and instructed the victim on how to operate the device in order to cause death); *Duffy*, 595 N.E.2d at 816 (concluding that the foreseeability of the victim's death was a critical factor in whether defendant's conduct amounted to assisting suicide or homicide); *Minor*, 898 N.Y.S.2d at 443 (holding the directness of the defendant's participation in the victim's death to be critical in whether defendant's conduct amounted to homicide); Shaffer, *supra* note 3, at 351 n.28 (noting that "active involvement that directly results in the death of a suicidal person" is considered murder).

poison) constitutes assisting suicide.¹²⁸ Verbal conduct that amounts to advising or encouraging a victim to commit suicide would fall on the extreme “assisting suicide” end of the spectrum.¹²⁹

Of course, the most important issue in the present discussion is not what conduct can clearly be characterized as either assisting suicide or homicide, but rather, the characterization of conduct that falls in the gray area between the two crimes.¹³⁰ Courts in jurisdictions that recognize the crime of assisting suicide have found the following conduct to constitute criminal homicide: holding a knife in place and positioning the knife to inflict maximum damage while the victim repeatedly thrust himself on it;¹³¹ holding a rifle aimed at the victim while the victim pulled the trigger;¹³² giving an intoxicated and suicidal victim a rifle and ammunition and encouraging the victim to kill himself;¹³³ and tying up the victim and holding the victim’s body in place so he could successfully strangle himself.¹³⁴ Conversely, courts have deemed the following conduct assisting suicide: driving off of a cliff in furtherance of a suicide pact formed by the driver-defendant and passenger-victim, resulting in the death of only the passenger;¹³⁵ aiming a shotgun at the victim while the victim pulled the trigger;¹³⁶ and inserting a needle, attached to a device equipped with lethal

128. See, e.g., *Joseph G.*, 667 P.2d at 1180 (“If the defendant merely furnishes the means, he is guilty of aiding a suicide; if he actively participates in the death of the suicide victim, he is guilty of murder.”); *Matlock*, 336 P.2d at 51; *In re Ryan N.*, 112 Cal. Rptr. 2d 620, 632 (Ct. App. 2001); *Fister ex rel. Estate of Fister v. Allstate Life Ins. Co.*, 783 A.2d 194, 201 n.8 (Md. 2001); *Kevorkian*, 527 N.W.2d at 738–39 (“Where a defendant merely is involved in the events leading up to the death, such as providing the means, the proper charge is assisting in a suicide.”); *State v. Sexson*, 869 P.2d 301, 305 (N.M. Ct. App. 1994); *Bouse*, 264 P.2d at 812 (“[Assisting suicide] contemplates some participation in the events leading up to the commission of the final overt act, such as furnishing the means for bringing about death,—the gun, the knife, the poison, or providing the water, for the use of the person who himself commits the act of self-murder.”); *Binder & Chiesa*, *supra* note 41, at 116; *Shaffer*, *supra* note 3, at 360 (“Providing the means of suicide appears to be the act against which the assistance statutes are primarily directed.”).

129. See, e.g., CAL. PENAL CODE § 401 (West 2020); *Williams v. State*, 53 So. 3d 734, 745–46 (Miss. 2010); *State v. Stubbendieck*, 302 Neb. 702, 716, 924 N.W.2d 711, 723 (2019).

130. See *infra* notes 131–37 and accompanying text (providing examples of conduct that falls in the gray area between assisting suicide and criminal homicide).

131. *Minor*, 898 N.Y.S.2d at 443.

132. *Sexson*, 869 P.2d at 303. Ironically, a Maryland court (in a hypothetical) explained that it would have found this exact same conduct to constitute assisting suicide rather than homicide. *Fister*, 783 A.2d at 201 n.8.

133. *People v. Duffy*, 595 N.E.2d 814, 816 (N.Y. 1992).

134. *People v. Cleaves*, 280 Cal. Rptr. 146, 148–49 (Ct. App. 1991).

135. *In re Joseph G.*, 667 P.2d 1176, 1183 (Cal. 1983).

136. *Fister*, 783 A.2d at 201 n.8 (hypothetical). Ironically, a New Mexico court found this very same conduct to constitute homicide rather than assisting suicide. *Sexson*, 869 P.2d at 303.

drugs, into the arm of the suicidal victim and instructing the victim how to operate the device in order to cause death.¹³⁷

B. Analysis of Stubbendieck's Conduct

In light of the above distinctions between homicide and assisting suicide, a murder charge against Stubbendieck was unlikely without clear evidence that Sullivan died of asphyxiation or morphine overdose and that Stubbendieck had personally administered the morphine.¹³⁸ The forensic pathologist who performed the victim's autopsy was unable to determine whether the victim died from morphine overdose, the cuts on her arms, hypothermia, Stubbendieck's smothering of her, or a combination of the four.¹³⁹ The State likely did not bring murder charges against Stubbendieck precisely because it was impossible to determine if Stubbendieck directly or actively participated in the victim's death when the victim's specific cause of death could not be determined.¹⁴⁰

Because Stubbendieck admitted to smothering the victim, at least temporarily,¹⁴¹ there is little doubt that he would have been charged with (and likely convicted of) murder if the victim's autopsy revealed the cause of death to be asphyxiation.¹⁴² Similarly, the State likely would have charged Stubbendieck with murder if the victim's autopsy revealed the cause of death to be morphine overdose and there was stronger evidence that Stubbendieck himself administered the

137. *People v. Kevorkian*, 527 N.W.2d 714, 734 (Mich. 1994). Of course, the criminal defendant in this case is the infamous Dr. Jack Kevorkian, who controversially assisted numerous medical patients in ending their lives. See Keith Schneider, *Dr. Jack Kevorkian Dies at 83; A Doctor Who Helped End Lives*, N.Y. TIMES (June 3, 2011), <https://www.nytimes.com/2011/06/04/us/04kevorkian.html> [<https://perma.unl.edu/H2ET-4ZYC>] (discussing the controversial legacy of Jack Kevorkian).

138. See *People v. Matlock*, 336 P.2d 505, 511 (Cal. 1959) (holding defendant guilty of murder, rather than assisting suicide, when defendant allegedly strangled victim at victim's request); *Kevorkian*, 527 N.W.2d at 734 (determining that the proper charge was assisting suicide rather than murder because defendant physician merely provided lethal drugs to the victim rather than personally administering the drugs); Shaffer, *supra* note 3, at 348 ("If an assistant participates affirmatively in the suicide, for instance by pulling the trigger or administering a fatal dose of drugs, courts agree that the appropriate charge is murder.").

139. *State v. Stubbendieck*, 302 Neb. 702, 707, 924 N.W.2d 711, 717 (2019).

140. Direct and active participation in the death of the victim is the critical finding required for the charge of murder as opposed to assisting suicide. See *supra* notes 116–22 and accompanying text.

141. *Stubbendieck*, 302 Neb. at 704–07, 924 N.W.2d at 716–17.

142. See *Matlock*, 336 P.2d at 511 (holding defendant guilty of murder, rather than assisting suicide, when defendant allegedly strangled victim at victim's request); *People v. Cleaves*, 280 Cal. Rptr. 146, 148–49 (Ct. App. 1991) (finding defendant guilty of murder where defendant held victim in place while victim strangled himself).

drug.¹⁴³ Indeed, such a scenario is virtually indistinguishable from cases such as *Fuller*, where the defendant actively killed a consenting victim.¹⁴⁴ In reality, the evidence suggested Stubbendieck obtained and furnished morphine to the victim with the intent to assist the victim in committing suicide.¹⁴⁵ However, there was no evidence that he personally administered the drug other than his vaguely worded prior texts implying he would inject Sullivan with the drug.¹⁴⁶ As discussed above, merely furnishing the victim with the means of suicide is nearly universally regarded as assisting suicide rather than homicide.¹⁴⁷

Stubbendieck presents two noteworthy precedents for distinguishing assisting suicide from homicide.¹⁴⁸ First, the Nebraska Supreme Court signaled that it is willing to regard a relatively high degree of direct, active assistance by the defendant in the death of the victim as assisting suicide rather than homicide.¹⁴⁹ Second, the court aligned Nebraska with the vast majority of jurisdictions in recognizing that a defendant furnishing the means of suicide to the victim constitutes assisting suicide rather than homicide.¹⁵⁰ As such, *Stubbendieck* will undoubtedly be useful precedent for distinguishing criminal homicide from assisting suicide in future criminal prosecutions.¹⁵¹ However, *Stubbendieck* has also created an overly broad standard for aiding and abetting suicide, the problems of which this Note now addresses.¹⁵²

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143. See *Kevorkian*, 527 N.W.2d at 734 (determining that the proper charge was assisting suicide rather than murder because defendant merely provided lethal drugs to the victim rather than personally administering the drugs); Shaffer, *supra* note 3, at 348 (“If an assistant participates affirmatively in the suicide, for instance by pulling the trigger or administering a fatal dose of drugs, courts agree that the appropriate charge is murder.”).
 144. *State v. Fuller*, 203 Neb. 233, 241, 278 N.W.2d 756, 761 (1979); see also *Matlock*, 336 P.2d at 508, 511 (involving defendant actively killing passive victim at victim’s request); *Bouse*, 264 P.2d at 812 (same).
 145. *Stubbendieck*, 302 Neb. at 717, 924 N.W.2d at 723.
 146. One of Stubbendieck’s coworkers testified that Stubbendieck had said he planned to “[s]hoot her [Sullivan] up with morphine’ in order to ‘put her to sleep.’” *Id.* at 705–06, 924 N.W.2d at 716 (alteration in original).
 147. See *supra* note 128 and accompanying text.
 148. See *supra* section IV.A (discussing how courts differentiate assisting suicide from homicide).
 149. Importantly, Stubbendieck admitted to temporarily smothering the victim, and the trial court found that Stubbendieck ostensibly obtained morphine and furnished it to the victim with the intent that she use the drugs to kill herself. *Stubbendieck*, 302 Neb. at 717, 924 N.W.2d at 723.
 150. *Id.*; see *supra* note 128 and accompanying text.
 151. In particular, future courts may look to *Stubbendieck* in determining the extent to which a defendant may participate in the victim’s death without incurring liability for criminal homicide.
 152. See *infra* Part V (discussing the problems created by the standard for assisting suicide established in *Stubbendieck*).

V. THE STANDARD OF AIDING AND ABETTING

The standard for aiding and abetting suicide established by the *Stubbendieck* court is broad, vague, and encompasses conduct that should be beyond the scope of Nebraska's assisting suicide statute.¹⁵³ The court's application of common law aiding and abetting theory to the statute is problematic because existing aiding and abetting jurisprudence is not appropriate for the crime of assisting suicide,¹⁵⁴ and the standard of "mere encouragement" is overly broad.¹⁵⁵ Instead, the court should have applied a tempered approach similar to approaches used by other jurisdictions.¹⁵⁶

A. Aiding and Abetting Jurisprudence Is Inappropriate

Even though the language of Nebraska's assisting suicide statute specifically refers to "aiding and abetting,"¹⁵⁷ the application of common law aiding and abetting principles to the crime of assisting suicide is inappropriate. In Nebraska, aiding and abetting is not a separate crime; instead, it is a theory for finding the defendant liable for an underlying crime.¹⁵⁸ Under Nebraska's aiding and abetting statute, "[a] person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender."¹⁵⁹ However, suicide is not a crime in Nebraska.¹⁶⁰ The *Stubbendieck* court itself notes that "aiding and abetting requires some participation in a criminal act."¹⁶¹ This makes the crime of aiding and abetting suicide a puzzling contradiction in terms.¹⁶² The Nebraska Legislature failed to clarify this contradiction as it did not

153. The *Stubbendieck* standard criminalizes conduct that intuitively does not amount to felony criminal conduct. Minimal assistance, such as mere encouragement of suicide, is generally too far removed from a victim's death and the policies behind assisting suicide statutes to justify punishment. See *infra* section V.B (arguing that the *Stubbendieck* standard is overly broad).

154. See *infra* section V.A (arguing that the application of common law aiding and abetting principles to the crime of assisting suicide is inappropriate).

155. See *infra* section V.B (arguing that the *Stubbendieck* standard is overly broad).

156. See *infra* section V.C (providing examples of approaches taken by courts in California and Minnesota that represent a tempered approach to assisting suicide jurisprudence).

157. NEB. REV. STAT. § 28-307 (Reissue 2016) ("A person commits assisting suicide when, with intent to assist another person in committing suicide, he aids and abets him in committing or attempting to commit suicide.").

158. *State v. Dixon*, 282 Neb. 274, 295, 802 N.W.2d 866, 886 (2011).

159. NEB. REV. STAT. § 28-206 (Reissue 2016).

160. *State v. Stubbendieck*, 302 Neb. 702, 716, 924 N.W.2d 711, 722–23 (2019). Indeed, no American jurisdiction today criminalizes suicide or the attempt to commit suicide. See *supra* note 25 and accompanying text.

161. *Stubbendieck*, 302 Neb. at 716, 924 N.W.2d at 723.

162. This is because aiding and abetting requires an underlying criminal act from which to derive accomplice liability. *Id.* Because suicide is not a crime, the victim's suicide cannot constitute an underlying crime from which to derive accom-

define aiding and abetting under Nebraska's assisting suicide statute.¹⁶³

Because there is no criminal liability for aiding and abetting without an underlying crime, the *Stubbendieck* court was not restricted to applying the definition of aiding and abetting as established by Nebraska complicity jurisprudence.¹⁶⁴ Rather, the court was free to use a different standard for determining liability under Nebraska's assisting suicide statute¹⁶⁵ because it was analyzing the *sui generis*¹⁶⁶ crime of assisting suicide rather than criminal liability derived from the actions of a principal defendant.¹⁶⁷ The court's strict adherence to common law aiding and abetting principles was thus not a foregone conclusion.¹⁶⁸

B. The *Stubbendieck* Standard Is Overly Broad

The standard of aiding and abetting, by encompassing "mere encouragement," is overly broad; it holds defendants accountable for deaths that cannot reasonably be attributed to their conduct.¹⁶⁹ As discussed above, the spectrum of conduct potentially qualifying as assisting suicide ranges all the way from active participation in

pliance liability. *See supra* section II.A (explaining that no American jurisdiction criminalizes suicide in modern times).

163. NEB. REV. STAT. § 28-307 (Reissue 2016). To make matters worse, the jury in *Stubbendieck* was not provided with the definition of "aids and abets" in the context of assisting suicide. *See* Oral Argument, *supra* note 109, at 31:15.
164. It would make sense to apply common law theories of accomplice liability to assisting suicide if suicide itself was a crime. Indeed, because suicide was a crime in medieval England, this is the approach medieval English courts took in punishing suicide assistance, conspiracy to commit suicide, and attempted suicide. *See supra* section II.A (explaining the history of assisting suicide laws). However, because suicide is no longer a crime, applying common law theories of accomplice liability to the crime of assisting suicide is not appropriate because there is no underlying crime at issue.
165. NEB. REV. STAT. § 28-307.
166. *See supra* note 30 and accompanying text (explaining assisting suicide as a *sui generis* offense).
167. *See supra* notes 159–65 and accompanying text (discussing that suicide is not an underlying crime from which accomplice liability can be derived).
168. For preferable alternatives that the Nebraska Supreme Court could have taken, see *infra* section V.C.
169. *See* Binder & Chiesa, *supra* note 41, at 84. Binder and Chiesa argue that verbal encouragement that does not provide information essential to completing a suicide lacks a causal nexus to the death of the victim. They further posit that where the defendant merely provides inconsequential encouragement of suicide, the victim's suicidal act should be viewed as a superseding cause. *See also* Shaffer, *supra* note 3, at 360 (arguing that holding defendants liable for inconsequential assistance of suicide is unreasonable and does not serve the underlying policies of assisting suicide statutes).

death,¹⁷⁰ on one extreme, to passive assistance,¹⁷¹ on the other extreme.¹⁷² The standard set by *Stubbendieck* seems to place Nebraska on the latter extreme, where mere encouragement of suicide amounts to assisting suicide.¹⁷³

1. *The Stubbendieck Standard Inappropriately Criminalizes Trivial Assistance*

The *Stubbendieck* standard criminalizes acts that intuitively do not amount to felony criminal conduct.¹⁷⁴ For example, imagine a situation where a victim attempted or committed suicide after the defendant told the victim to kill himself during a heated argument. If the defendant intended to assist the victim in committing suicide when the statement was made, that defendant could be found to have aided and abetted a suicide.¹⁷⁵ Considering another example, a defendant could be convicted for offering a terminally ill family member support and encouragement in her decision to take her own life.¹⁷⁶ Although intuitively it is senseless to hold either of these hypothetical defendants criminally liable for the death of the victim, such conduct is arguably encouragement of suicide under the *Stubbendieck* standard.¹⁷⁷

Minimal assistance, such as mere encouragement of suicide, is generally too far removed from a victim's death and the public policy con-

170. See, e.g., *In re Joseph G.*, 667 P.2d 1176, 1183 (Cal. 1983); *Fister ex rel. Estate of Fister v. Allstate Life Ins. Co.*, 783 A.2d 194, 201 n.8 (Md. 2001); *People v. Kevorkian*, 527 N.W.2d 714, 734 (Mich. 1994).

171. See, e.g., CAL. PENAL CODE § 401 (West 2020); *In re Ryan N.*, 112 Cal. Rptr. 2d 620, 632 (Ct. App. 2001); *State v. Melchert-Dinkel*, 844 N.W.2d 13, 23 (Minn. 2014); *Williams v. State*, 53 So. 3d 734, 745–46 (Miss. 2010); *State v. Stubbendieck*, 302 Neb. 702, 716, 924 N.W.2d 711, 723 (2019).

172. See *supra* Part IV (discussing the spectrum of conduct potentially constituting assisting suicide).

173. *Stubbendieck*, 302 Neb. at 716–17, 924 N.W.2d at 722–23 (explaining that mere encouragement of suicide can constitute assisting suicide).

174. See *infra* notes 175–99 and accompanying text (explaining how the *Stubbendieck* standard is overly broad).

175. See *Commonwealth v. Carter*, 115 N.E.3d 559 (Mass. 2019), *cert. denied*, 140 S. Ct. 910 (2020). The defendant in *Carter* was convicted of involuntary manslaughter (Massachusetts does not have an independent criminal statute for assisting suicide) for verbally encouraging her depressed boyfriend to kill himself. Although the *Carter* defendant's conduct exceeded the conduct in this hypothetical because she actually helped the victim plan the suicide during their discussions, *Carter* provides an illustration of a defendant being held criminally responsible for the death of another due to entirely verbal conduct.

176. In similar circumstances in 1975, Palm Springs, California authorities declined to press charges against a man who stood by while his terminally ill wife killed herself because the man “had acted out of love and compassion.” *No Charges in Suicide*, N.Y. TIMES (Oct. 5, 1975), <https://www.nytimes.com/1975/10/05/archives/no-charges-in-suicide.html> [https://perma.unl.edu/PSH4-AY5H].

177. *Stubbendieck*, 302 Neb. at 716–17, 924 N.W.2d at 722–23 (explaining that mere encouragement of suicide can constitute assisting suicide).

siderations undergirding assisting suicide statutes to justify punishment.¹⁷⁸ As one writer noted: “When the act of assistance is so slight that the encouragement provided to the suicidal individual was probably *de minimus* [sic], there is little reason to bring the force of criminal sanctions for assisting suicide to bear.”¹⁷⁹ This is because punishing trivial assistance does not serve the primary utilitarian goal of assisting suicide statutes: protecting human life.¹⁸⁰ Inconsequential encouragement of suicide that does not actually cause a victim to commit suicide or attempt to commit suicide—such as where the victim would have attempted or committed suicide regardless of the defendant’s encouragement—does not endanger human life.¹⁸¹ Additionally, where the defendant’s assistance is inconsequential to the victim’s death in this way, punishment or threat of punishment does not serve the purpose of assisting suicide statutes in protecting a victim’s life.¹⁸² In such cases, whatever societal benefits assisting suicide laws may have are substantially outweighed by the heavy criminal penalties inflicted on defendants.¹⁸³ Punishing mere encouragement of suicide also forces courts to draw the incredibly blurred line between criminal suicide encouragement and innocuous conduct such as advocating for the right to suicide.¹⁸⁴

178. Shaffer, *supra* note 3, at 360 (arguing that minimal assistance in a victim’s suicide is too far removed from a victim’s death to justify punishment considering the policy justifications of assisting suicide). See also Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427, 435–37 (2008) and the discussion in subsection V.B.2 on the role of causation in assisting suicide laws.

179. Shaffer, *supra* note 3, at 360. Shaffer does an excellent job critiquing the problems with many assisting suicide statutes and proposes a model assisting suicide statute based on policy considerations. *Id.* at 372–76.

180. The predominant policy rationale for assisting suicide laws is that the State’s interest in preserving life is greater than an individual’s desire for death, especially when such an individual is otherwise healthy. See *supra* section II.B (discussing public policy considerations underlying assisting suicide laws).

181. In such a circumstance, one cannot say the defendant’s conduct is a factual cause of the victim’s suicide or attempted suicide because the harm to the victim would still have happened regardless of any conduct by the defendant. See Dressler, *supra* note 178, at 435–37 and the discussion in subsection V.B.2 for information on the role of causation in assisting suicide laws.

182. See *supra* section II.B (discussing the predominant policy rationale for assisting suicide laws—the State’s interest in protecting life is greater than an individual’s desire for death).

183. See *supra* text accompanying note 179.

184. Sweeney, *supra* note 25, at 948 (discussing that, where jurisdictions punish verbal encouragement of suicide, courts could conceivably find criminal liability where defendants merely advocate for a broad right to suicide).

2. *The Stubbendieck Standard Problematically Lacks a Proximate Causation Requirement*

In assisting suicide cases, verbal encouragement is distinct from verbal assistance, such as providing instruction on how to implement the means of suicide thereby enabling a victim to commit suicide.¹⁸⁵ Perhaps unsurprisingly, research has not uncovered a single reported case where a defendant was convicted of assisting suicide for mere verbal encouragement.¹⁸⁶ Courts' reluctance to characterize verbal encouragement as assisting suicide can be traced to the nature of causation in assisting suicide statutes.¹⁸⁷ Some jurisdictions that prohibit "aiding" suicide do not require the defendant to cause (directly or indirectly) the death of the victim, likely reflecting the lack of any causation requirement in traditional complicity law.¹⁸⁸ For example, as colorfully noted by the Supreme Court of Mississippi, the requisite encouragement or assistance need not be "persuasive, direct, or significant," and "encouragement 'in any manner' is sufficient to constitute the crime."¹⁸⁹

As explored below, courts in other jurisdictions have interpreted assisting suicide statutes to require a proximate causal link between the defendant's conduct and the victim's death or attempted suicide.¹⁹⁰ The Nebraska Supreme Court in *Stubbendieck* did not require a proximate causal link between the defendant's conduct and the victim's death,¹⁹¹ making assisting suicide a so-called "conduct crime" rather than a "result crime" (meaning that the social harm caused by the crime is the encouragement or assistive conduct instead of the re-

185. *See Commonwealth v. Carter*, 115 N.E.3d 559 (Mass. 2019), *cert. denied*, 140 S. Ct. 910 (2020) (finding defendant guilty of involuntary manslaughter when defendant suggested the means of suicide and provided verbal instructions on implementing such means); *State v. Melchert-Dinkel*, 844 N.W.2d 13, 23 (Minn. 2014) (finding that defendant's alleged suggestion of the means of suicide, together with defendant's alleged instructions on how to implement such means, constituted "assistance" rather than "encouragement" under Minnesota's assisting suicide statute).

186. *Binder & Chiesa*, *supra* note 41, at 115.

187. *Id.* at 113 (discussing that some jurisdictions do not require the defendant to cause the death of the victim to be guilty of assisting suicide).

188. *See id.* ("Another problematic feature of these statutes is that they extend liability for manslaughter to intentional assistance of suicide that does not cause death.").

189. *Williams v. State*, 53 So. 3d 734, 745–46 (Miss. 2010).

190. *See infra* section V.C (discussing preferable alternative approaches taken by courts in California and Minnesota). For example, California courts require "direct" and "active" participation in the events leading to the suicide. *In re Ryan N.*, 112 Cal. Rptr. 2d 620, 632 (Ct. App. 2001); *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187, 197–98 (Ct. App. 1988). Minnesota courts require conduct that enables the victim to commit suicide. *Melchert-Dinkel*, 844 N.W.2d at 23.

191. *State v. Stubbendieck*, 302 Neb. 702, 716–17, 924 N.W.2d, 711, 722–23 (2019) (explaining that mere encouragement of suicide can constitute assisting suicide).

sult of death).¹⁹² This simply cannot be what the Nebraska Legislature intended, as policy justifications establish assisting suicide as a classic result crime.¹⁹³ The dominant policy rationale for punishing assisting suicide is clearly framed in terms of a harmful result: The loss of human life.¹⁹⁴

The lack of a causation requirement is unsettling and will likely lead to unjust results.¹⁹⁵ Causation in criminal cases is a fundamental means by which courts assess a defendant's culpability.¹⁹⁶ Causation requirements are essential for ensuring proportional punishment for the conduct and resulting harm at issue.¹⁹⁷ In assisting suicide cases, where there is no principal defendant from whom to derive liability and no underlying crime, jurisdictions that convict defendants of assisting suicide for inconsequential verbal encouragement in effect do away with causation requirements and unjustly punish defendants for deaths that cannot reasonably be attributed to their conduct.¹⁹⁸ After *Stubbendieck*, Nebraska is such a jurisdiction.¹⁹⁹

C. Narrowing the Scope: The California and Minnesota Approaches

The Nebraska Supreme Court must narrow the scope for aiding and abetting suicide by adopting one of the approaches taken by courts in jurisdictions with similar assisting suicide statutes.²⁰⁰ For instance, California courts qualify the actus reus of the offense by

192. A "result crime" is focused on prevention of or punishment for a harmful outcome while a "conduct crime" is focused on preventing or punishing an act. For example, murder is a "result crime" defined by the harmful result, the death of a human being. Driving while intoxicated is a "conduct crime" solely defined by the act, regardless of whether it causes any harm. DRESSLER & GARVEY, *supra* note 115, at 133.

193. *See supra* section II.B (discussing public policy considerations underlying assisting suicide laws). Because the primary policy justification for assisting suicide laws is the protection of human life, assisting suicide is a result crime focused on preventing or punishing a harmful social outcome, the loss of human life.

194. *See supra* note 61 and accompanying text (explaining that the primary policy justification for assisting suicide laws is the State's desire to protect human life).

195. *See infra* notes 196–97, and accompanying text (discussing that causation is essential for assessing a defendant's culpability and proportionally punishing defendants for the conduct at issue).

196. *See Dressler, supra* note 178, at 435–37 (examining the importance of causation requirements for criminal laws).

197. *Id.*

198. *See supra* notes 178–97 and accompanying text (arguing that defendants should not be criminally liable for assisting suicide where the conduct at issue is mere verbal encouragement).

199. *State v. Stubbendieck*, 302 Neb. 702, 716–17, 924 N.W.2d 711, 722–23 (2019) (explaining that mere encouragement of suicide can constitute assisting suicide).

200. *See infra* notes 201–35 and accompanying text (discussing preferable alternative approaches taken by courts in California and Minnesota).

reading a sort of proximate causation requirement into the statute.²⁰¹ Minnesota courts invalidate the prohibition against inconsequential verbal encouragement on First Amendment grounds.²⁰²

1. *The California Approach: Implicit Proximate Causation Requirement*

California's assisting suicide statute is very similar to Nebraska's²⁰³ in that it criminalizes "aiding and abetting" suicide, including encouraging or advising another to commit suicide.²⁰⁴ However, California courts refuse to hold defendants criminally liable for merely giving inconsequential advice or encouragement.²⁰⁵ Instead, the State must prove that the defendant engaged in "the *direct* aiding and abetting of a specific suicidal act. . . . Some active and intentional participation in the events leading to the suicide are required in order to establish a violation."²⁰⁶

By requiring the defendant's conduct to be specifically and directly related to the victim's suicidal act, California punishes egregious conduct that has a proximate causal relationship to a specific act of suicide.²⁰⁷ At the same time, conduct that could not have reasonably led to the victim's death (even if it constitutes encouragement) is beyond the scope of punishment under this approach.²⁰⁸ Additionally, the

201. California courts require "direct" and "active" participation in the events leading to the suicide. *In re Ryan N.*, 112 Cal. Rptr. 2d 620, 632 (Ct. App. 2001); *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187, 197–98 (Ct. App. 1988).

202. Specifically, Minnesota courts require conduct that enables the victim to commit suicide. *State v. Melchert-Dinkel*, 844 N.W.2d 13, 23 (Minn. 2014).

203. NEB. REV. STAT. § 28-307 (Reissue 2016).

204. CAL. PENAL CODE § 401 (West 2020) ("(a) Any person who deliberately aids, advises, or encourages another to commit suicide is guilty of a felony. (b) A person whose actions are compliant with the provisions of the End of Life Option Act . . . shall not be prosecuted under this section."); NEB. REV. STAT. § 28-307 ("A person commits assisting suicide when, with intent to assist another person in committing suicide, he aids and abets him in committing or attempting to commit suicide.").

205. California courts require "direct" and "active" participation in the events leading to the suicide. *Ryan N.*, 112 Cal. Rptr. 2d at 632; *McCollum*, 249 Cal. Rptr. at 197–98.

206. *McCollum*, 249 Cal. Rptr. at 197–98.

207. California's requirement that the defendant participate directly and actively in the victim's death imposes a requirement of proximate causation as defined by the Supreme Court of California. *See State Dep't of State Hosps. v. Superior Court*, 349 P.3d 1013, 1022 (Cal. 2015) (discussing that a core consideration in assessing proximate cause is the nexus between the defendant's conduct and the injury to the victim).

208. *See supra* note 207 (discussing California courts' requirement of proximate causation). Minimal assistance, such as mere encouragement of suicide, is generally too far removed from a victim's death to justify punishment. *See supra* section V.B (discussing conduct that could not have reasonably led to the victim's death, such as inconsequential encouragement).

California approach gives courts much-needed discretion in determining what constitutes “direct” and “active” participation in the events leading to the suicide.²⁰⁹ Such discretion allows courts to ensure that convictions serve policy goals and punish morally culpable defendants who have subverted the will of their victims for their own benefit.²¹⁰ Though this discretion also carries with it the risk that courts will apply the law inconsistently,²¹¹ the California approach better serves policy goals—particularly that of protecting human life—and is well worth the potential risk of inconsistent outcomes.²¹²

2. *The Minnesota Approach: Proximate Causation Required Via Strict Scrutiny Under the First Amendment*

The Supreme Court of Minnesota has taken a very different, yet compelling, route by interpreting its assisting suicide statute to mean that the State may not convict defendants for acts of inconsequential encouragement.²¹³ Minnesota’s assisting suicide statute makes it a felony to “advise,”²¹⁴ “encourage,”²¹⁵ or “assist”²¹⁶ a victim in taking the victim’s life.²¹⁷ In the landmark case of *State v. Melchert-Dinkel*, the Supreme Court of Minnesota held that the State could prosecute a

209. See *supra* Part IV (discussing the wide-ranging ways courts have interpreted and applied the nebulous concepts of “active,” “direct,” and the like in assisting suicide cases).

210. Indeed, California courts fundamentally view proximate cause as a tool used to enforce public policy considerations. See *State Dep’t of State Hosps.*, 349 P.3d at 1022 (discussing how California courts use proximate cause to limit an actor’s liability in light of public policy considerations).

211. Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 424–25 (2007) (discussing how discretion is one factor that can lead to inconsistent outcomes and fundamental unfairness).

212. See *supra* note 61 and accompanying text (explaining that the primary policy justification for assisting suicide laws is the State’s desire to protect human life).

213. *State v. Melchert-Dinkel*, 844 N.W.2d 13, 23 (Minn. 2014).

214. In the context of assisting suicide, the Supreme Court of Minnesota interpreted the verb “advise” to mean “to ‘[i]nform.’” *Id.* (alteration in original) (citing *Advise*, THE NEW SHORTER OXFORD ENGLISH DICTIONARY (4th ed. 1993)).

215. In the context of assisting suicide, the Supreme Court of Minnesota interpreted the verb “encourage” to mean “to ‘[g]ive courage, confidence, or hope.’” *Id.* at 23 (citing *Encourage*, THE NEW SHORTER OXFORD ENGLISH DICTIONARY (4th ed. 1993)).

216. In the context of assisting suicide, the Supreme Court of Minnesota defines “assist[ance]” as “speech or conduct that provides another person with what is needed for the person to commit suicide.” *Id.* at 23.

217. MINN. STAT. § 609.215 (2019) (“Whoever intentionally advises, encourages, or assists another in taking the other’s own life may be sentenced to imprisonment for not more than 15 years or to payment of a fine of not more than \$30,000, or both . . . Whoever intentionally advises, encourages, or assists another who attempts but fails to take the other’s own life may be sentenced to imprisonment for not more than seven years or to payment of a fine of not more than \$14,000, or both.”).

defendant for “assisting” suicide but, on First Amendment grounds, could not prosecute a defendant for “encouraging” or “advising” another to commit suicide.²¹⁸ Specifically, the court concluded that the prohibition against “assisting” suicide, as opposed to “encouraging” or “advising” another to commit suicide, was narrowly drawn to serve the State’s compelling interest in preserving human life.²¹⁹

In the context of assisting suicide, the *Melchert-Dinkel* court defined “assistance” as conduct that enables the victim to commit suicide.²²⁰ Notably, this standard does not prohibit prosecution based on verbal encouragement or assistance per se.²²¹ Rather, it prohibits prosecution based on tangentially related verbal encouragement, and requires such verbal actions by the defendant to have a direct causal link to the victim’s death.²²² The court even directly addressed the issue of causation, explaining: “Prohibiting only speech that assists suicide, combined with the statutory limitation that such enablement must be targeted at a specific individual, narrows the reach to only the most direct, causal links between speech and the suicide.”²²³

3. *Implications for Nebraska Post-Stubbendieck*

The judicial interpretations issued by courts in California and Minnesota limiting the scope of their states’ respective assisting suicide laws thus take very different analytical routes but end up with similar conclusions.²²⁴ The California approach of reading a narrower actus

218. 844 N.W.2d at 16.

219. *Id.* at 23.

220. *Id.*

221. *Id.* (“While enablement perhaps most obviously occurs in the context of physical assistance, speech alone may also enable a person to commit suicide. Here, we need only note that speech instructing another on suicide methods falls within the ambit of constitutional limitations on speech that assists another in committing suicide.”).

222. *Id.* (“Unlike the definition of ‘assist,’ nothing in the definitions of ‘advise’ or ‘encourage’ requires a direct, causal connection to a suicide.”).

223. *Id.* In directly tying culpability to proximate causation and refusing to hold that entirely verbal conduct could never constitute assisting suicide, the Supreme Court of Minnesota wisely recognized that in some highly unusual cases mere verbal conduct could be the proximate cause of a victim’s suicide. For instance, in the only reported case in which a defendant incurred criminal liability for helping another commit suicide through entirely verbal conduct, the defendant in *Commonwealth v. Carter* was convicted of involuntary manslaughter for verbally encouraging her depressed boyfriend to kill himself. 115 N.E.3d 559 (Mass. 2019), *cert. denied*, 140 S. Ct. 910 (2020). Carter’s completely verbal conduct was clearly the proximate cause of the victim’s death because she gave the victim the idea for how to kill himself and instructed him as to how to carry out the suicide. *Id.* *Carter* provides an excellent illustration of a defendant being held criminally responsible for the death of another due to entirely verbal conduct.

224. Namely, both approaches require a direct causal link between the defendant’s conduct and the victim’s death. *See infra* note 225 and accompanying text (discussing the direct causal link required under both approaches).

reus into the statute and the Minnesota approach of invalidating the statutory prohibition of inconsequential encouragement on First Amendment grounds both function to require a more direct, proximate causal link between the defendant's conduct and the victim's death.²²⁵

Consider the earlier examples of an individual telling another in an argument to kill himself or a person offering reassurance and support to a terminally ill family member in her decision to commit suicide.²²⁶ Under either the California or Minnesota approach, the defendant in both illustrations would not be subject to criminal liability for assisting suicide.²²⁷ Under the California approach, neither act could reasonably be considered *active* participation in a *specific* suicidal act.²²⁸ As for the Minnesota approach, the verbal encouragement of both defendants would be protected under the First Amendment because (in the absence of additional facts such as the victim's mental incapacity) the encouragement in question did not enable the victim to take his or her own life.²²⁹ Thus, by supplying a much-needed causation element, each approach places defendants whose actions cannot reasonably be responsible for the suicide of another outside the scope

225. The Supreme Court of Minnesota recognized that its invalidation of the statutory prohibition of inconsequential verbal encouragement would require a direct causal link between the defendant's conduct and the victim's death. *Melchert-Dinkel*, 844 N.W.2d at 23. California's requirement that the defendant participate directly and actively in the victim's death similarly imposes a requirement of proximate causation as defined by the Supreme Court of California. *See State Dep't of State Hosps. v. Superior Court*, 349 P.3d 1013, 1022 (Cal. 2015) (discussing that a core consideration in assessing proximate cause is the nexus between the defendant's conduct and the injury to the victim).

226. *See supra* notes 175–76 and accompanying text (setting forth hypotheticals involving assisting suicide).

227. *See infra* notes 228–29 and accompanying text (explaining that under either the California or Minnesota approach neither of the hypothetical defendants would be subject to criminal liability for assisting suicide).

228. California courts require “direct” and “active” participation in the events leading to the suicide. *See supra* subsection V.C.1. In these two hypotheticals, neither defendant is “directly” or “actively” participating in the victim's death (for example, by providing the means of suicide or instructions for a method of suicide that the victim otherwise would have been unaware of). Rather, the conduct of the defendants in both examples is only tangentially related to the suicidal act.

229. The Minnesota Supreme Court in *Melchert-Dinkel* defined prohibited suicide “assistance” as conduct that enables the victim to commit suicide. 844 N.W.2d at 23. With regard to the hypotheticals, neither defendant's conduct could be said to have enabled the victim's suicide because the statements of the defendants did not provide the victims with the resources necessary to commit suicide. These hypothetical situations should be contrasted with highly unusual circumstances such as those present in the case of *Commonwealth v. Carter*, where the victim's suicide would not have occurred without the verbal conduct of the defendant. 115 N.E.3d 559 (Mass. 2019), *cert. denied*, 140 S. Ct. 910 (2020).

of prosecution, while still holding defendants responsible for conduct that endangers the lives of suicidal individuals.²³⁰

Remarkably, the *Stubbendieck* opinion is entirely devoid of references to assisting suicide jurisprudence in other jurisdictions, despite being Nebraska's first²³¹ judicial interpretation of a statute that bears a strong resemblance to statutes that have been analyzed in depth in other states.²³² It is disappointing that the *Stubbendieck* opinion does not discuss the First Amendment considering a critical portion of Stubbendieck's conduct consisted entirely of verbal encouragement.²³³ The evidence in *Stubbendieck* was damning enough that the Nebraska Supreme Court could have applied a more tempered approach, such as those taken by courts in California and Minnesota, and achieved the same result without establishing such a needlessly? broad standard.²³⁴ It should not hesitate to do so in the future.²³⁵

VI. CONCLUSION

After more than forty years, the *Stubbendieck* opinion has finally provided criminal law practitioners in Nebraska with guidance on the meaning of aiding and abetting suicide.²³⁶ However, in establishing the scope for assisting suicide, the Nebraska Supreme Court created a standard that is overly broad.²³⁷ A defendant may participate somewhat actively and directly in the victim's death (conduct that in some jurisdictions would amount to homicide)²³⁸ and still only be convicted

230. See Dressler, *supra* note 178, at 435–37; see also *supra* section V.B (discussing the role of causation requirements in assisting suicide laws).

231. See *supra* note 3 (discussing that the *Stubbendieck* case is the first judicial interpretation of Nebraska's assisting suicide statute).

232. State v. Stubbendieck, 302 Neb. 702, 924 N.W.2d 711 (2019). Notably, California's assisting suicide statute is very similar to Nebraska's in that it criminalizes "aiding and abetting" suicide, including encouraging or advising another to commit suicide. CAL. PENAL CODE § 401 (West 2020).

233. *Stubbendieck*, 302 Neb. at 717, 924 N.W.2d at 723.

234. See *supra* section V.B (arguing that the standard established by the *Stubbendieck* holding is overly broad).

235. If history is any indication, it will likely be many years before the Nebraska Supreme Court revisits the issue of assisting suicide. See *supra* note 3 and accompanying text (explaining that the *Stubbendieck* case was the first time that a Nebraska court was able to interpret Nebraska's assisting suicide statute, despite the fact that the statute had been in effect for more than forty years).

236. See *supra* note 3 and accompanying text.

237. See *supra* section V.B (arguing that the *Stubbendieck* opinion establishes an overly broad standard for assisting suicide and forgoes proximate causation requirements traditionally required for criminal convictions).

238. Compare *Stubbendieck*, 302 Neb. at 717, 924 N.W.2d at 723 (finding Stubbendieck guilty of assisting suicide after he admitted to temporarily smothering the victim and obtaining morphine, which he gave to the victim ostensibly with the intent that she use the drug to kill herself), with *People v. Cleaves*, 280 Cal. Rptr. 146, 148–49 (Ct. App. 1991) (finding the defendant guilty of homicide where

of aiding and abetting suicide.²³⁹ Conversely, mere verbal encouragement of suicide (presumably even inconsequential encouragement that does not actually cause the suicide or attempted suicide of the victim) can constitute aiding and abetting suicide.²⁴⁰

Nebraska should adopt an approach like that taken in California or Minnesota to narrow the scope of assisting suicide so as to require a proximate causal relationship between the defendant's conduct and the victim's death.²⁴¹ Such approaches are more reasonably tailored to achieve the public policy goals of assisting suicide statutes.²⁴² The next time the Nebraska Supreme Court reviews a conviction for assisting suicide, it would be wise to consider the detailed jurisprudence of assisting suicide law in jurisdictions with similar statutes.²⁴³ Hopefully, this time, it will not take more than forty years to achieve such resolution.²⁴⁴

the defendant held the victim's body in place while the victim strangled himself); *State v. Sexson*, 869 P.2d 301, 305 (N.M. Ct. App. 1994) (finding the defendant guilty of homicide where the defendant held a rifle aimed at the victim while the victim pulled the trigger); *and* *People v. Minor*, 898 N.Y.S.2d 440, 443 (Sup. Ct. 2010) (finding the defendant guilty of homicide where the defendant held a knife in place and in a position to deal maximum damage while the victim repeatedly thrust himself on knife). The defendant's conduct in each of these cases arguably involves at least the same level of participation in the victim's death as *Stubbendieck's* participation in Sullivan's death, yet *Stubbendieck* was only charged with and convicted of assisting suicide, whereas the defendants in each of the other cases were convicted of homicide.

239. *Stubbendieck*, 302 Neb. at 705–06, 924 N.W.2d at 716–17.

240. *Id.* at 716–17, 924 N.W.2d at 722–23 (explaining that mere encouragement of suicide can constitute assisting suicide).

241. *See supra* section V.C (discussing preferable alternative approaches to assisting suicide jurisprudence taken by courts in California and Minnesota).

242. *See supra* Part II (discussing the policy justifications of assisting suicide statutes); *see also supra* Part V (arguing that assisting suicide statutes which require a proximate causal relationship between the defendant's conduct and the victim's death are reasonably tailored to achieve policy justifications).

243. *See supra* section V.C (discussing the similarities between Nebraska's assisting suicide statute and those in California and Minnesota and arguing that the approaches taken by courts in California and Minnesota are preferable to the approach taken by the Nebraska Supreme Court in *Stubbendieck*).

244. *See supra* note 3 and accompanying text.