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Laura Green
The Law of Death and Dying
Final Paper—AWR

Introduction

While a state may permissibly proscribe physician assisted suicide, some states have gone further and prohibited speech encouraging suicide.¹ Such legislation not only offends the First Amendment, but also potentially sanctions physicians for discussing end of life treatment plans, which could inevitably threaten the doctor-patient relationship.² The Supreme Court has taken on several notable cases regarding end of life decision making; however, the Court has yet to rule on whether any states' statute prohibiting speech encouraging suicide violates the First Amendment.³

¹ See, e.g., MINN. STAT. § 619.215; O.C.G.A. § 15-5-5(b). See also, *Wash. v. Glucksberg*, 521 U.S. 702 (1997) (upholding the constitutionality of a Washington statute that made it a felony to knowingly cause or aid another person to attempt suicide).

² *Infra*, Part II, Section B.

³ See *Glucksberg*, 521 U.S. at 735; *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (U.S. 1990) (holding that a state has a right to require clear and convincing evidence of an incompetent person's desire to refuse life sustaining treatment in order for life support to be removed).

This paper will discuss three cases involving First Amendment challenges to state statutes criminalizing the promotion or advertising of suicide. While the statutes at issue target suicide generally, this paper will focus on the statutes as they relate to patient-physician communication. Part I will provide history on the treatment of suicide and assisted suicide in the United States. Part II will discuss informed consent and practices that hasten death. Part III will provide the framework for how the Supreme Court analyzes a First Amendment challenge. Part IV will discuss three recent cases that have challenged the constitutionality of statutes abridging speech encouraging suicide. Part V will explain why the *Melchert-Dinkel* Court erred in upholding § 609.215 and why *Final Exit Network (Minnesota)* was correct in striking it down. Furthermore, it will explain that while *Final Exit Network (Georgia)* was correct in holding that the statute was underbroad. Part VI will discuss how upholding § 609.215 and similar statutes could have a detrimental impact on informed consent and the doctor-patient relationship. Part VI will also recommend a statutory framework that would balance the government's compelling interest in preserving life and preventing suicide and protecting First Amendment rights necessary to foster adequate patient-physician dialogue during end of life treatment decisions.

Part I: History Perspective and Trends in the Treatment of Suicide

A. English Common Law Tradition

Under English Common Law, suicide was a serious crime.⁸ The act of committing suicide motivated by anger was punished by forfeiting land and chattel to the King; if committed because of pain and suffering, only the deceased chattel was forfeited.⁹ Furthermore, the

⁸See *In re Joseph G.*, 34 Cal. 3d 429, 433 (1983); Catherine Shaffer, *Criminal Liability for Assisting Suicide*, 86 COLUM. L. REV. 348, 349 (1986).

⁹Sue Wool Brenner, *Undue Influence in the Criminal Law: A proposed Analysis of the Criminal Offense of "Causing Suicide"*, 57 ALB. L. REV. 62, 64 (1982).

deceased would not receive a funeral.¹⁰ Because suicide was a crime, encouraging suicide and conspiracy to commit suicide were crimes as well.¹¹ An individual that encouraged suicide and was present was known as a “principal in the first degree”; if the adviser was not present he or she would be considered an “accessory before the fact”.¹²

B. United States Tradition

While several courts in early United States deemed suicide a criminal act, no court adopted the English common law punishments of forfeiture.¹³ Criminal acts in the United States are now set forth by statute.¹⁴ States have moved away from treating suicide as a criminal offense.¹⁵ There are several rationales for the United States’ treatment of suicide.¹⁶ One justification is that the individual that committed suicide could not be penalized; forfeiture of wealth and ignominious burial would only serve as a punishment to the innocent family of the deceased.¹⁷ Another justification is that suicide was seen as an act by the mentally ill; therefore, medical treatment, not culpability, was warranted.¹⁸ Many states do, however, criminalize assisting one in suicide.¹⁹ Twenty-two states criminalize assisted suicide by statute as a separate

¹⁰ *Id.*

¹¹ 4 W. Blackstone, Commentaries, 188-89.

¹² *See*, Shaffer, *supra* note 8, at 348.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *See Id.*

¹⁶ *See* Leslie L. Mangini, *To Help or Not to Help: Assisted Suicide and its Moral, Ethical and Legal Ramifications*, 18 SETON HALL LEG. J. 728, 734.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *See* Ala. Code § 22-8A-10 (1997); Alaska Stat. § 11.41.120 (2004); Ariz. Rev. Stat. Ann. § 12-1103 (2001 & Supp. 2006); Ark. Code Ann. § 5-10-106; Cal. Penal Code § 401 (West 1999 & Supp. 2006); Colo. Rev. Stat. Ann. § 18-3-104 (West 2006); Conn. Gen. Stat. § 53a-56 (West 2001 & Supp. 2006); Del. Code Ann. Tit. 11, § 645 (2001); Fla. Stat. Ann. § 782.08 (West 2000 & Supp. 2006); Ga. Code Ann. § 16-5-5 (2003); Haw. Rev. Stat. Ann. § 327E-13 (2000); Idaho Code Ann. § 56-56-1022 (2002); 720 Ill. Comp. Stat. Ann. 5-12-31 (West 2002 & Supp. 2006); Ind. Code Ann. § 35-42-1-2.5 (2004); Iowa Code Ann. § 707A.2 (2003); Kan. Stat. Ann. § 21-3406 (1995 & Supp. 2005); Ky. Rev. Stat. Ann. § 216.302 (1999); La. Rev. Stat. Ann. § 14:32.12 (1997 & Supp. 2006); Me. Rev. Stat. Ann. It. 17-A, § 204 (2006); Md. Code Ann. Crim. Law § 3-102 (2002); Mich. Comp. Laws Ann. § 750.329a (2004); Minn. Stat. ann. § 609.215 (West 2003 & Supp. 2005); Miss. Code Ann. § 97-3-49 (West 2005 & Supp. 2005); Mo. Ann. Stat § 565.023 (West 1999 & Supp. 2006); Mont. Code Ann. § 45-5-105 (2005 & Supp. 2006);

offense or a type of murder or manslaughter.²⁰ The model penal code states that criminal homicide is the appropriate charge if “a person purposely causes suicide by force, duress or deception.”²¹ Aiding or soliciting another to commit suicide is a second degree felony under the model penal code if a suicide or attempted suicide occurs.²²

The Supreme Court has held that the government has a compelling interest in preserving life and preventing suicide, which outweighs an individual’s desire to take one’s own life.²⁷ This means that states are permitted to create laws prohibiting suicide, and in turn assisted suicide.²⁸ Currently, physician-assisted suicide is illegal in Forty-Six states and the District of Columbia.²⁹ Four states have legalized physician-assisted suicide.³⁰ The first state to legalize the practice was Oregon, in 1994, followed by Washington in 2008, Montana in 2009, and most recently, Vermont in 2013.³¹ The legalization of assisted suicide is also being considered in New Jersey, Kansas and Hawaii, while a similar bill in Connecticut was narrowly defeated.³²

Nev. Rev. Stat. Ann. § 20-412 (1997); N.H. Rev. Stat. Ann. § 630:4 (2001); N.J. Stat. An. § 2C:11-6 (2005); N.M. Stat. Ann. § 30-2-4 (2004); N.Y. Penal Law § 120.30 (McKinney 2004 Supp. 2006); N.D. Cent. Code § 12.1-16-05 (1997); Ohio Rev. Code Ann. § 3795.02 (2005); Okla. Stat. Ann. Tit. 21 § 814 (2002); 18 Pa. Cons. Stat. Ann § 2505 (West 1998 & Supp. 2006); R.I. Gen. Laws § 11-60-3 (2002); S.C. Code. Ann. § 16-3-1090 (2003); S.D. Codified Laws § 22-16-37 (2006); Tenn. Code Ann. § 39-13-216(b)(2)(2003 & Supp. 2005); Tex. Penal Code. Ann. § 22.08 (Vernon 2003 & Supp. 2006); Utah Code Ann. § 75-2a-122 (1993 & Supp. 2007); Va. Code Ann. § 8.01-622.1 (2000); Wash. Rev. Code Ann. § 9A.36.060 (West 2000 & Supp. 2005); W. Va. Code Ann. § 16-30-2 (2006); Wis. Stat. Ann. § 940.12 (West 2005); Wyo. Stat. Ann. § 35-22-414 (2005).

²⁰ *Id.*

²¹ Model Penal Code § 210.5(1).

²² *Id.*

²⁷ Glucksberg, 521 U.S. at 729.

²⁸ *See generally id.*

²⁹ EUTHANASIA, Euthanasia.procon.org/view.resource.php?resourceID=000132 (last visited Dec. 3, 2013).

³⁰ *See* ORS § 127.815; 18 V.S.A. chapter 113; *Baxter v. Montana*, P.3d 2009 WL 5155363 (Mont. 2009) (holding that a competent patient has a right to “use the assistance of his physician to obtain a prescription for a lethal dose of medication that the patient may take on his own if and when he decides to terminate his life” under Article II of the Montana Constitution).

³¹ *See id.*

³² 2012 Bill Tracking NJ A.B. 3328.

Lay people are generally in favor of physician assisted suicide under at least some circumstances.³³ In 2005, a Harris Poll showed that 70 percent of adults in the United States supported physician assisted suicide laws.³⁴ In another poll, when Americans were asked “When a person has a disease that cannot be cured, do you think doctors should be allowed by law to end the patient’s life by some painless means if the patient and his family request it?” seventy-one percent stated “yes.”³⁵ This is a thirty-four percent increase in an affirmative answer since 1947.³⁶

The medical community is split on the issue of physician assisted suicide.³⁷ Many adhere to the view that physicians should not engage in assisted suicide because it violates their obligations under the Hippocratic Oath to do no harm.³⁸ Those opposed to physician assisted suicide are also concerned about the harm to the doctor-patient relationship; however, empirical evidence has indicated that this concern is without merit.³⁹ Supporters of physician assisted suicide stress patient autonomy.⁴⁰

Part II: Treatment Decisions and Hastening Death

A. Informed Consent

³³ SIDNEY H. WANZER, M.D. & JOSEPH GLENMULLEN, M.D., *TO DIE WELL* 91 (Da Capo Press, 2007).

³⁴ *Id.*

³⁵ Public Divide Over Moral Acceptability of Doctor Assisted Suicide, GALLUP (May 31, 2007) <http://www.gallup.com/poll/27727/public-divided-over-moral-acceptability-doctorassisted-suicide.aspx>; (It is important to note that the result was only fifty-eight percent yes when respondents were asked the question the following way "When a person has a disease that cannot be cured and is living in severe pain, do you think doctors should or should not be allowed by law to assist the patient to commit suicide if the patient requests it?").

³⁶ *Id.*

³⁷ See, Steven Reinberg, *Most Doctors Oppose Physician Assisted Suicide*, U.S. NEWS & WORLD REPORT (Sept. 13, 2013) <http://health.usnews.com/health-news/news/articles/2013/09/11/most-doctors-oppose-physician-assisted-suicide-poll-finds>.

³⁸ *Id.*

³⁹ ALAN B. ASTROW, M.D., *FACING DEATH, WHERE CULTURE, RELIGION AND MEDICINE MEET* 45-48 (Howard M. Spiro, et al, eds., Yale Univ. Press 2006).

⁴⁰ Reinberg *supra*, note 37.

Informed consent is a patient's agreement to a course of treatment after having been informed of benefits, risks and alternatives.⁴⁵ There are several justifications for informed consent.⁴⁶ The patient-centered beneficence justification rests on the Hippocratic Oath and the belief that obtaining consent is to benefit the patient.⁴⁷ For example, a physician might be unaware of patient-specific issues that could come to light upon discussing the side-effects of a particular drug.⁴⁸ Informed consent is also justified on basis of bolstering societal trust of physicians and hospitals.⁴⁹ The Autonomy justification rests on the principle that a patient has a right to make his or her own choices.⁵⁰ While these justifications complement each other in substantiating the need for informed consent, recent trends toward more patient-centered approaches indicates that autonomy is the most prevalent rationale.⁵¹

One challenge in determining the parameters of informed consent is how much information a patient should be given.⁵² The majority of jurisdictions follow a "reasonable practitioner" approach, which requires disclosure of information that a practitioner would make in similar situation.⁵³ Recently, however, courts have required a more patient-centered approach, as opposed to a "reasonable practitioner" standard.⁵⁴ The subjective approach requires a patient be given "enough information to exercise self-determination".⁵⁵ The subjective standard poses a challenge for physicians in that they must make very individualized determinations on what

⁴⁵ See Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 902-903 (1994).

⁴⁶ ROBERT M. VEATCH, PATIENT PHYSICIAN RELATIONSHIP, THE PATIENT AS PARTNER, PART 2 83-85 (David H. Smith & Robert M. Veatch, eds., 1991).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See Veatch, *supra* note 46 at 83.

⁵³ See *Id.* at 83; See also Bernard Barber, INFORMED CONSENT IN MEDICAL THERAPY, AND RESEARCH 39 (Rutgers Univ. Press ed., 1980).

⁵⁴ See Veatch, *supra* note 46 at 83.

⁵⁵ *Id.* at 84.

information to disclose, as it is infeasible to disclose all information to a patient.⁵⁶ A “reasonable patient” standard requires a physician to disclose information by determining what a reasonable person in that patient’s situation would want disclosed.⁵⁷ While there is a risk that a patient will not receive some information that he or she might consider relevant, it still requires the physician to make a more individualized determination than the “reasonable practitioner” approach.⁵⁸

B. End of Life Treatment

The role of physicians has transformed from the role of strictly a healer, to the alleviator of suffering and pain.⁵⁹ Communication between physician and patients is crucial, and required under the doctrine of informed consent; however, a physician’s obligation is even more pervasive in the context of end of life treatment.⁶⁰ When engaging in end of life treatment discussions with a patient, first, the physician should seek to gain insight into the patient’s “domain of personhood.”⁶¹ This includes learning about the patient’s personality, character, family, culture and other information relevant to his or her personhood.⁶² The physician should also seek to understand the nature of disease as well as what impact the disease is having on the individual patient, for example, the threat to integrity that a patient perceive if they are no longer able to feed him or herself.⁶³ The physician should also establish realistic goals based on the individual’s priority.⁶⁴ There are several measures a physician could theoretically take part in

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 85.

⁵⁹ *See* Vacco v. Quill, 521 U.S. 793, 809 (1997) (noting that physicians’ role in withholding medical treatment and other life-hastening methods is evidence that doctors’ role has expanded from that of solely a “healer”).

⁶⁰ *Supra* Part II, A; BALFOUR M. MOUNT, PALLIATIVE MEDICINE, A CASE BASED MANUAL 228 (Neil MacDonald, ed., 1999).

⁶¹ *Supra* Mount, note 60.

⁶² *Id.* at 228.

⁶³ *Id.* at 228.

⁶⁴ *Id.* at 229.

that would result in ending the patient's life, euthanasia, physician assisted suicide and the "double effect" of morphine, coupled with refusal of hydration and nutrition.

Euthanasia, the most controversial method, is generally understood as "the deliberate termination of another's life at his request".⁷⁴ Euthanasia requires the physician to engage in an overt act that ends the patient's life, such as injecting a lethal substance into the patient.⁷⁵ In the United States, euthanasia is generally not considered an acceptable means for a physician to treat a terminally ill patient.⁷⁶

Physician assisted suicide involves a physician prescribing a drug or other substance for the purpose of assisting the patient in committing suicide.⁷⁷ This method, while still very controversial, is currently legal in three states and on law maker's radars in many others.⁷⁸ It differs from euthanasia in that physician assisted suicide, unlike euthanasia, does not require the physician to engage in a positive act.

A physician may employ the principle of "double effect" in the context of terminal sedation. Double effect, here, involves treating symptoms of the patient's illness by a means that also brings about unconsciousness.⁷⁹ In order for the principle of "double effect" to apply, the unconsciousness must be an unintended consequence, even if unconsciousness is foreseen.⁸⁰ The crucial difference between this practice and physician assisted suicide or euthanasia is the

⁷⁴ Glucksberg, 521 U.S. 702, 734 (U.S. 1997).

⁷⁵ George P. Smith, II, *Refractory Pain, Existential Suffering, and Palliative Care: Releasing an Unbearable Lightness of Being*, 20 CORNELL J.L. & PUB. POL'Y 469, 512-13 (2006).

⁷⁶ Wanzer, *supra* note 43, at 91.

⁷⁷ *Id.* at 91.

⁷⁸ Susan Haigh, *Assisted Suicide on legal Agenda in Several States*, FOXNEWS.COM (Feb. 8, 2013) (<http://www.foxnews.com/health/2013/02/08/assisted-suicide-on-legal-agenda-in-several-states/>).

⁷⁹ LYNN A. JANSEN, RN, PHD & DANIEL P. SULMASY, OFM, M.D., PHD, *Sedation, Alimentation, Hydration and Equivocation: Careful Conversation About Care at the End of Life*, 136 ANNALS OF INTERNAL MEDICINE 845, 845 (2002).

⁸⁰ *Id.*

physician's intent.⁸¹ While some physicians oppose the practice on the grounds that it is disguised euthanasia, the practice is generally considered legal throughout the United States.⁸² "Double effect", in this context, is no different from any other drug side effect.⁸³ So long as the patient is aware of the potential side effects, this practice is ethically and legally sound.⁸⁴

In order for terminal sedation to result in death, a patient must utilize his or her autonomy in the refusal of hydration and nutrition.⁸⁵ This involves a patient whose appetite, digestion or absorption of water and nutrients has not been directly affected by the patient's illness, and the patient chooses to refuse nutrition.⁸⁶

Part III: First Amendment Analytical Framework

The First Amendment of the United States Constitution prevents the government from interfering in one's freedom of expression.⁹¹ This right to free speech, however, is not absolute. In the *United States v. Chaplinsky*, the Supreme Court set forth several categorical exceptions to free speech: fighting words, obscenity, defamation, fraud, incitement and speech incident to criminal conduct.⁹² The Supreme Court has adopted category-specific analyses for determining what speech falls into the aforementioned categories.⁹³ The Supreme Court has emphatically

⁸¹ *Id.*; Wanzer *supra*, note 33 at 91.

⁸² Wanzer *supra*, note 33 at 91; Jansen *supra*, note 79, at 845.

⁸³ Wanzer *supra*, note 33 at 93-94.

⁸⁴ *Id.*; Veatch *supra*, note 46 at 83-84.

⁸⁵ Jansen *supra*, note 79 at 845.

⁸⁶ *Id.*

⁹¹ U.S. CONST. amend. I (Congress shall make no law...abridging the freedom of speech...).

⁹² *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

⁹³ *See generally*, *Cohen v. California*, 403 U.S. 15 (1971) (requiring that in order for speech to be deemed "fighting words", unprotected by the First Amendment, the words must be directed at a person, tend to invite immediate breach of the peace, be highly offensive and a captive audience); *Brandenburg v. Ohio*, 395 U.S. 444 (1969)

rejected the premise that new categories of speech could be created by balancing the value of a category of speech against its social good.⁹⁴ The Court has acknowledged, however, that there may be categories of unprotected speech that have not yet been enumerated.⁹⁵ In order to create a category of unprotected speech there must be persuasive evidence of “a tradition of proscription.”⁹⁶

A. Incitement to Criminal Activity

The relevant exception to speech encouraging suicide is incitement to criminal activity.⁹⁷ In *Brandenburg v. Ohio*, the Supreme Court overturned a conviction for violating a syndicalism statute, holding that a state may only proscribe advocacy of violating the law where “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁹⁸

B. Regulation of Protected Speech

Even if the speech the government is attempting to regulate does not fall into the enumerated categories of unprotected speech, it may still be permissibly regulated.¹⁰² Whether the government may regulate speech, and the level of judicial scrutiny to which such regulation will be put is determined by whether the regulation is content-based or neutral. Content-based regulations target the substantive meaning of the speech and are subject to strict scrutiny. There

(requiring that in order for speech to be categorized as “incitement” there must be a risk of imminent lawless action, the speaker must have the intent to incite lawless action and intent for the lawless action to occur immediately); *Miller v. California*, 413 U.S. 15 (1973) (requiring that in order for speech to be deemed “obscene” it must be determined that a reasonable person would determine that the work appeals to the prurient interest, the work depicts or describes sexual conduct in a patently offensive way and the work lacks literary, artistic or political scientific value).

⁹⁴ *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2734 (U.S. 2011).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See *State v. Melchert-Dinkel*, 816 N.W.2d 703 (Minn. App. 2012); *State v. Final Exit Network, Inc.*, No. A13-0563 (Minn. App. 2013) (examining whether the “incitement to criminal activity” exception applies to speech encouraging criminal activity).

⁹⁸ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹⁰² *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385-386 (1992).

are four types of content based regulations: viewpoint restriction, subject matter restriction, speaker-based restriction, and restrictions that are targeted at the communicative impact of the listener.¹⁰³ Content-neutral regulations are those that only incidentally burden speech.¹⁰⁴ Content-neutral regulations include laws that restrict the time, place and manner of speech and laws that target the secondary effect of communication without regard to the communicative impact.¹⁰⁵

If a regulation is content based, the Court will apply strict scrutiny.¹⁰⁶ If the regulation is content neutral, but incidentally burdens free speech, the court will first determine whether the regulation relates to a legitimate government interest.¹⁰⁷ If so, a reviewing court will apply intermediate scrutiny.¹⁰⁸ If the regulation is unrelated to furthering a legitimate governmental interest, the court will engage in strict scrutiny review.¹⁰⁹

i. Strict Scrutiny

The Constitution prohibits the government from restricting expression because of the ideas espoused.¹¹⁰ Therefore, when the government seeks to make a restriction based on content, strict scrutiny must be satisfied.¹¹¹ The first prong of the strict scrutiny standard is a compelling governmental interest.¹¹² The stronger the government interest is, the more likely it is that the

¹⁰³*Id.*

¹⁰⁴*Id.*

¹⁰⁵*Id.*

¹⁰⁶ *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

¹⁰⁷ *Id.*

¹⁰⁸*Id.*

¹⁰⁹*Id.*

¹¹⁰*Id.*

¹¹¹*Id.*

¹¹² *O'Brien*, 391 U.S. at 377.

statute will be upheld.¹¹³ The second prong of the strict scrutiny standard is that the law be narrowly tailored to the government's interest.¹¹⁴

When analyzing a content-based restriction in speech, the government's purpose is often the controlling factor.¹¹⁵ Even if speech may be constitutionally regulated by the government, it must be narrowly tailored to the government's purported interest.¹²⁰ Otherwise constitutional statutes will not satisfy strict scrutiny if it is underbroad or overbroad.¹²¹ These doctrines focus on the scope of government regulation after the category of regulation has been determined.¹²³ While the law may be valid as to some of the speech covered by the statute that has been determined to be unprotected, this doctrine could deem the law facially invalid.¹²⁴

A statute is unconstitutionally overbroad if in the effort to punish speech that is not constitutionally protected, protected speech is restricted as well.¹²⁵ Such a statute will be invalidated if it prohibits a substantial amount of speech protected by the First Amendment.¹²⁶ The overbreadth doctrine has been called a "strong medicine", and infrequently used to strike down a government regulation.¹²⁷ This doctrine serves as a restraint on the government's regulatory power by precluding a law from suppressing a substantial amount of constitutionally protected speech.¹²⁹

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ 4C M.J. CONSTITUTIONAL LAW § 78.

¹²⁰ *R.A.V.*, 505 U.S. at 385.

¹²¹ *Id.*

¹²³ Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 39.

¹²⁴ *See, e.g., United States v. Williams*, 553 U.S. 285, 292 S. Ct. (2008).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁹ *Erznoznik v City of Jacksonville*, 422 US 205, 214-15 (1975) (holding that a law prohibiting nudity in drive-in movie theaters was not permissible as a traffic regulation because it was no more distracting than other unrestricted types of films the drive in movie theater might play).

A statute is underbroad if it targets only some speech that furthers a legitimate governmental interest.¹³⁵ Underbreadth occurs when a statute is too specific, regulating certain speech encompassed by the purported government interest, but not other speech hindering the government interest.¹³⁶

Part IV: Challenges to Laws Against Promoting and Advertising Assisted Suicide

Several cases have challenged the constitutionality of laws seeking to prohibit speech that encourages suicide.¹⁴³ It is undisputed that the government has a compelling interest in preserving life.¹⁴⁴ The statutes at issue in the following cases have been challenged on the basis of whether or not the speech in question is protected, and whether the government has narrowly tailored the statute to meet its compelling interest in suicide prevention and preserving human life.¹⁴⁵

The statute at issue in *Minnesota v. Final Exit Network Inc.* (*Final Exit Network (Minnesota)*) and *State v. Melchert-Dinkel* was Minnesota statute § 609.215. In relevant part, subdivision one criminalizes “whoever intentionally advises or 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.”¹⁴⁶ The statute at issue in *Final Exit Network, Inc. v. State of Georgia* was OCGA § 15-5-5(b), in relevant part, states that one “who publicly advertises, offers, or holds him-self or herself out as offering that he or she will

¹³⁵ *Id.*

¹³⁶ *R.A.V.*, 505 U.S. at 402 (A government regulation was invalidated under the doctrine of underbreadth because the government purported interest was in keeping the peace. The statute, however, was limited to fighting words regarding race, color, creed or religion. The Court reasoned that if the government’s interest was keeping public peace all fighting words would be banned, not just certain categories of fighting words. Similarly, a state cannot ban speech advertising suicide.).

¹⁴³ *Melchert-Dinkel*, 816 N.W.2d; *Final Exit Network*, A13-0563; *Final Exit Network*, 722 S.E.2dv722.

¹⁴⁴ *Id.* (The government conceded this point in all three cases.).

¹⁴⁵ *Melchert-Dinkel*, 816 N.W.2d; *Final Exit Network*, A13-0563.

¹⁴⁶ Minn. Stat. §609.215.

intentionally and actively assist another person in the commission of suicide and commits any overt act to further that purpose is guilty of a felony.”¹⁴⁷ The statutes at issue are similar, in that they are both targeting, and criminalizing certain types of communication about suicide.¹⁴⁸ The Georgia statute differs from the Minnesota statute in that the former proscribes one from advertising that he or she will assist in a suicide, while the latter disallows actual discussion between individuals that is deemed “encouragement” of suicide.¹⁴⁹

A. State of Minnesota v. Final Exit Network

Minnesota v. Final Exit Network involved the criminal prosecution of Final Exist Network (FEN), a non-profit corporation that provided “exit-guide” services and other end of life counseling services, Lawrence Egbert, a FEN medical director and Roberta Massey, a FEN case coordinator.¹⁵⁰ FEN, Egbert and Massey were charged with advising, encouraging or assisting another in committing suicide, among other offenses related to FEN’s services.¹⁵¹

To become a member of FEN an individual must fill out a short form and send a payment.¹⁵² FEN provides free exit-guide services to qualifying members.¹⁵³ In order to qualify for exit-guide services, the individual seeking membership must have a phone interview with a “first responder” in order for FEN to gain information about his or her medical condition, family history and reasons for the desire to hasten death.¹⁵⁴ The first responder also requests a letter from the member reiterating the facts discussed during the interview.¹⁵⁵ The first responder’s

¹⁴⁷ § 15-5-5 (b).

¹⁴⁸ *Id.*; § 609.219.

¹⁴⁹ § 15-5-5 (b).

¹⁵⁰ Final Exit Network, A13-0563 at 3.

¹⁵¹ *Id.* at 2.

¹⁵² JOIN OR RENEW FINAL EXIT NETWORK MEMBERSHIP, <https://donatenow.networkforgood.org/1438731> (last visited Nov. 30, 2013).

¹⁵³ *Id.*

¹⁵⁴ Final Exit Network, A13-0563 at 3.

¹⁵⁵ *Id.*

notes and the letter from the member are reviewed by FEN's medical director, who then determines whether the member qualifies for exit-guide services.¹⁵⁶ Upon approval, the member is instructed on the instruments that must be purchased in order to facilitate the helium asphyxiation, the recommended method of suicide.¹⁵⁷ The member is told to purchase specific helium tanks, a plastic hood and plastic tubing.¹⁵⁸ Members receiving exit-guidance must be capable of physically performing all of the tasks necessary to facilitate his or her suicide. The only physical contact an exit-guide has with the member is holding his or her hand to provide moral support as well as prevent the plastic hood used from being inadvertently removed by the member due to involuntary movements that might occur during the process.¹⁵⁹

This case arose from the death of a Fifty-seven year old woman named Doreen Dunn.¹⁶¹ Dunn had been living with chronic pain for over ten years as a result of a multitude of medical conditions.¹⁶² Law enforcement eventually linked Dunn's death to FEN, and in May 2012 a grand jury returned an indictment charging FEN medical director, Lawrence Egbert, with four counts relating to encouraging suicide under § 609.215.¹⁶³ Roberta L. Massey, a FEN representative to whom Dunn faxed her personal letter and medical information to, was charged with three counts under the same statute.¹⁶⁴

¹⁵⁶*Id.*

¹⁵⁷ Helium causes death by depriving the brain of oxygen. Once deprived of all oxygen, one is unconscious in less than a minute. This method does not cause discomfort the way that being smothered would because this method does not cause a buildup of carbon-dioxide, which is what causes oxygen "hunger". Wanzer *supra*, note 33 at 116-17.

¹⁵⁸Final Exit Network, A13-0563 at 3.

¹⁵⁹*Id.*

¹⁶¹*Id.*

¹⁶²*Id.* at 4.

¹⁶³*Id.*

¹⁶⁴*Id.*

The Minnesota Court of Appeals held that the provision of § 609.215 criminalizing “encouraging” and “advising” suicide was an infringement on protected speech, and was facially overbroad; therefore, granted the defendants’ motion to dismiss the charges.¹⁶⁵

The court refused to find that promoting suicide is akin to promoting speech integral to illicit conduct. The court noted its reluctance to create a new category of unprotected speech, as well as its unwillingness to extend the categories that already exist to cover more types of speech.¹⁶⁶ The Court emphasized that the specific content-defined speech must itself be traditionally proscribed.¹⁶⁷ The Court noted that unlike actually assisting in a suicide, speech advising suicide is not traditionally proscribed.¹⁶⁸ The Court emphasized that few states actually criminalize speech encouraging suicide; and furthermore, historically, when advising one about committing suicide was punishable, it was on the theory aiding and abetting what was, then, the criminal act of committing suicide.¹⁶⁹ The Court rejected the government’s argument that speech encouraging suicide falls into a category of speech not covered by the First Amendment; therefore, the statute would have to satisfy strict scrutiny in order to be upheld.

The Court held that the statute did not pass strict scrutiny because it was not narrowly tailored.¹⁷⁰ It was uncontested that the government has a compelling interest in preserving human life.¹⁷¹ The court found based on a plain reading of the statute that the government intended to prevent “any and all expressions of support, guidance, planning or education to

¹⁶⁵Final Exit Network, A13-0563 at 15 (While the charges relating to “encouraging” suicide were dropped, the court found that there was sufficient evidence to establish a reasonable probability that the defendants violated the constitutional prohibition on assisting suicide.).

¹⁶⁶*Id.* at 8.

¹⁶⁷*Id.*

¹⁶⁸*Id.* at 9.

¹⁶⁹*Id.* (Citing *Glucksberg*, 521 U.S. at 715-716).

¹⁷⁰*Id.* at 14-15.

¹⁷¹Final Exit Network, A13-0563 at 11(Citing *Cruzan*, 497 U.S. at 261, 282).

people who want to end their own lives.”¹⁷² The statute did not define the terms “advise” or “encourage”; therefore, the Court looked to the dictionary definitions for guidance. Based on the dictionary definitions, the Court read “encourage” to mean “inspire with hope, courage or confidence” and “advise” to mean “counsel, or inform.”¹⁷³ The court interpreted this to criminalize all expressions of support. The Court was particularly concerned about the potential for even political discourse about “right to die” issues being criminalized.¹⁷⁴ The Court noted that the state could achieve its goal of preventing suicide through less restrictive legislation.¹⁷⁵

The Court also rejected the government’s position that the statute could be given a limited construction to only punish the unprotected speech.¹⁷⁶ The Court noted that here, the speech covered by the statute was all protected.¹⁷⁷ The statute at issue criminalized a broad spectrum of speech about suicide; therefore, the court found that the statute was not narrowly tailored to the state’s asserted interest of preserving life.

B. The State of Minnesota v. Melchert-Dinkel

State v. Melchert-Dinkel involved the criminal prosecution of William Merchert-Dinkel for violating § 609.215. This case involved the suicide of, Mark Dryborough, in 2005 and a \ Nadia Kajouji, in 2008.¹⁷⁹ An investigation by Minnesota law enforcement revealed that shortly before both individuals committed suicide, they had engaged in conversation via email and messaging with the defendant.¹⁸⁰ Melchert-Dinkel used several aliases on websites promoting

¹⁷²*Id.* at 12.

¹⁷³*Id.*

¹⁷⁴*Id.* at 15.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 13(Distinguished *State v. Crawley*, noting that in that case, was unprotected and protected speech covered by the statute, whereas here, there is only protected speech covered by the statute.).

¹⁷⁷*Id.*

¹⁷⁹ *Melchert-Dinkel*, 816 N.W.2d at 705.

¹⁸⁰*Id.*

suicide as a personal right.¹⁸¹ He presented himself as a female emergency room nurse who purported “she” was suicidal as well.¹⁸² The communication between Melchert-Dinkel and Dryborough involved Melchert-Dinkel, under the guise of a woman named Li Dao, offering to postpone “her” own suicide until Dryborough was ready to, as well as asking if Dryborough had made any further attempts or had any thoughts on his suicide.¹⁸³ Melchert-Dinkel communicated with Kajouji under the pseudonym “Cami”, where he engaged in several discussions with Kajouju about effective methods of committing suicide, as well as a desire to watch her hang herself.¹⁸⁴

The Court held that the statute at issue did not offend the First Amendment.¹⁸⁶ The court held that the statute was prohibiting the encouragement of “proscribable” conduct and, therefore, was not protected by the First Amendment.¹⁸⁷ The court noted that although committing suicide is not illegal, the lack of prohibition “does not reflect either a public policy approving suicide or tolerating assisting suicide.”¹⁸⁸ Given Minnesota’s history of condemning suicide and explicit prohibition against physician assisted suicide the court found that speech encouraging suicide was akin to encouraging criminal conduct.¹⁹¹ Speech that encourages illicit conduct is not protected under the First Amendment of the Constitution; therefore, the Court held that the statute at issue did not implicate the First Amendment.¹⁹²

¹⁸¹*Id.* at 706

¹⁸²*Id.*

¹⁸³*Id.*

¹⁸⁴*Id.* at 708.

¹⁸⁶Melchert-Dinkel, 816 N.W.2d at 713.

¹⁸⁷*Id.*

¹⁸⁸*Id.* at 713,714.

¹⁹¹Melchert-Dinkel, 816 N.W.2d at 714.

¹⁹²*Id.*

Furthermore, the court found that even if the speech were protected, the government had a compelling interest, and the law was narrowly tailored.¹⁹⁴ The Minnesota Court of Appeals held that the statute was not unconstitutionally overbroad.¹⁹⁵ The court found that speech that intentionally advises or encourages suicide is a narrow category of speech, and did not cover social and political speech about suicide.¹⁹⁶ The court also rejected the defendant's contention that the term "encourage" includes "supportive language that agrees with the other person's decision to commit suicide."¹⁹⁷ The court relied on the Oxford English Dictionary definition of the word encourage, "a transitive verb commonly meaning to attempt to persuade or 'to induce' to do a particular thing."¹⁹⁸ The court recognized "encourage" could be used to describe any speech in support of suicide; however, found that the statute is still not overly broad because the other uses of encouragement are unprotected by the First Amendment.¹⁹⁹ The court read the prohibition to only cover a small subset of pro-suicide speech, allowing for social and political communication on the matter.

C. Final Exit Network, Inc. v. The State of Georgia

In *Final Exit Network, Inc. v. The State of Georgia*, the statute at issue was Georgia statute O.C.G.A. § 16-5-5(b).²⁰¹ The law provided "any person who publicly advertises, offers, or holds himself or herself out as offering that he or she will intentionally and actively assist another person in the commission of suicide and commits any overt act to further that purpose is guilty of a felony."²⁰² This case also involved FEN, the nonprofit defendant at issue in *Final Exit*

¹⁹⁴*Id.* at 716.

¹⁹⁵*Id.*

¹⁹⁶*Id.* at 715.

¹⁹⁷*Id.* at 715.

¹⁹⁸Melchert-Dinkel, 816 N.W.2d at 715.

¹⁹⁹*Id.* at 716.

²⁰¹ *Final Exit*, 290 Ga. at 508.

²⁰² § 16-5-5(b).

Network (Minnesota) as well as similar facts. Here, however, the court found that the statute was not narrowly tailored, because it did not encompass other speech encouraging suicide that affects the government's purported interest.²⁰³

Part V: First Amendment Analysis of Laws Prohibiting the Promotion of Suicide

In assessing the disparate treatments of the same statute, it is important to note the factual differences in the two scenarios. *The Final Exit (Minnesota)* facts involve a scenario where the defendants were seeking to alleviate a patient's suffering and provide a support system.²¹⁶ *Melchert-Dinkel* involves deceit and predatory communication with vulnerable people—the type of situation laws such as the one at issue are targeting.²¹⁷ The conflicting outcomes in the two cases is indicative of the need to establish a law that appropriately addresses the government's core concerns while adhering to the First Amendment. Failure to do so could have consequences beyond the predatory actions. Legislation broadly covering “encouraging suicide” could potentially stifle open and honest communications between physician and patient.²¹⁸

A. Incitement to Criminal Activity Exception

The *Final Exit Network (Minnesota)* Court was correct in holding that speech encouraging or advising suicide was protected by the First Amendment because it did not fall into the incitement to criminal activity exception. It is crucial to note that in Minnesota, suicide is no longer criminalized.²¹⁹ Furthermore, the *Final Exit Network (Minnesota)* Court correctly held that the statute was not narrowly tailored.

²⁰³Final Exit, 290 Ga. at 510.

²¹⁶ Supra, Part IV, Section A.

²¹⁷Supra, Part IV, Section B.

²¹⁸ Kevin B. O'Reilly, *State takes first-ever path to approve assisted suicide*, AMEDNEWS.COM (May 29, 2013) (<http://www.amednews.com/apps/pbcs.dll/personalia?id=koreilly>).

²¹⁹Final Exit Network, A13-0563 at 8.

The *Melchert-Dinkel* Court incorrectly held that speech encouraging suicide is unprotected by the First Amendment because it is akin to speech integral to criminal conduct. After acknowledging that suicide is not a crime in Minnesota, the Court erred in relying on the *Glucksberg* analysis to find that because suicide is not condoned, it is analogous to criminal conduct. In the portion of the *Glucksberg* opinion applied by the *Melchert-Dinkel* Court, the Supreme Court was conducting a due process analysis.²²⁰ In a due process analysis, the Supreme Court examines “the Nation’s history, legal traditions and practices”.²²¹ The Court must engage in a different analysis when addressing a First Amendment challenge. It is presumed that speech is protected by the First Amendment unless it falls into one of the categories enumerated in *Chaplinsky*.

The exception at issue in these statutes is incitement to criminal conduct.²²² Even accepting the *Melchert-Dinkel* Court’s analytical frame work examining of the Nation’s history and legal traditions to determine whether such speech is “integral to criminal conduct”, its analysis fails. While only a minority of states, the legalization of physician-assisted suicide might demonstrate growing acceptance of the practice. There is strong support for the legalization of physician-assisted suicide in several other states as well.²²³ This can be attributed, in part to the “baby boomer” generation.²²⁴ As this group continues to age, and face end of life issues, they are becoming more vocal about legalizing physician-assisted suicide.²²⁵ Assisted suicide is an issue on the rise in the United States. While the practice has not achieved majority acceptance, the growing trend in raising awareness to the benefits of physician-assisted suicide

²²⁰ *Glucksberg*, 521 U.S. 210.

²²¹ *Id.*

²²² *Melchert-Dinkel*, 816 N.W.2d; Final Exit Network, A13-0563.

²²³ Susan Haigh, *Assisted Suicide on legal Agenda in Several States*, FOXNEWS.COM (Feb. 8, 2013) (<http://www.foxnews.com/health/2013/02/08/assisted-suicide-on-legal-agenda-in-several-states/>).

²²⁴ *Id.*

²²⁵ *Id.*

refutes the notion that the practice is akin to criminal activity. Had suicide been statutorily criminalized, speech encouraging suicide would not be protected by the First Amendment. In Minnesota, that is not the case; furthermore, the *Melchert-Dinkel* Court failed to cite any case law to support its assertion that conduct that it is generally disfavored may be akin criminal conduct absent statutory prohibition.²²⁶

The *Final Exit (Minnesota)* Court correctly noted that the Court is reluctant to create new categories of unprotected speech. The dictum in *United States v. Stevens* indicates that the Court will be reluctant to add to the list of unprotected speech enumerated in *Chaplinsky*.²²⁷ Furthermore, if the Court were to add another category of unprotected speech there would have to be a showing that the category of speech itself has a history of being banned.²²⁸ As the *Melchert-Dinkel* Court noted, suicide itself has been punishable in United States' history; however, no evidence has been put forth by the government that showing a history of punishing speech that encourages suicide.

B. Strict Scrutiny

It is undisputed that the government has an interest in preserving human life.²²⁹ The Supreme Court has also acknowledged that suicide in particular is a public health problem that is closely associated with depression and affects a vulnerable population; therefore, the government has an interest in studying this problem and protecting that particular group of vulnerable individuals.²³⁰ In *Final Exit Network (Georgia)*, *Final Exit Network (Minnesota)* and *Melchert-Dinkel*, the courts all correctly categorized the regulations as “content based”, and identified that

²²⁶Melchert-Dinkel, 816 N.W.2d.

²²⁷ *United States v. Stevens*, 130 S. Ct. 1577, 1585 (refusing to add animal cruelty to the categories of speech that are not protected by the First Amendment.).

²²⁸ *Brown*, 131 S. Ct. at 2738 (noting that unlike sexual material, there is no tradition of banning violent speech).

²²⁹ *Cruzan*, 497 U.S. at 282.

²³⁰ *Id.*

the prevention of suicide was in fact a compelling interest. The courts' decision then turned on whether the restriction was narrowly tailored.²³¹

The first step in determining whether or not a statute is narrowly tailored is the text of the statute itself.²³² Section 609.215 criminalizes “advising” or “encouraging” another in taking the other’s own life; however, neither term is statutorily defined.²³³ In *Final Exit Network*, “advise” was defined as to counsel or inform. “Encourage” was defined as “to inspire with hope, courage or confidence”. In *Melchert-Dinkel*, “encourage” was defined as “to induce” or “to stimulate by assistance.”²³⁴ The Court also accepted that “encourage” could also encompass supportive language.²³⁵ Despite this concession the Court did not find that the statute was overbroad for encompassing too much protected speech.²³⁶ The Court’s analysis, however, rested on its flawed holding that speech inducing suicide is not protected by the First Amendment.²³⁷ The Court posited that because other forms of the statute are not constitutionally protected, the statute would not be deemed overbroad because of some instances where the First Amendment might be offended.

The Supreme Court of Georgia correctly held that a statute that prohibited publicly advertising assisted suicide was underbroad. There, the government’s asserted interest was in preserving human life.²³⁸ The statute only criminalized public advertisement of assisted suicide,

²³¹*Id.*

²³²*United States v. Williams*, 553 U.S. 285, 293 (2008).

²³³ § 609.215.

²³⁴ *Melchert-Dinkel*, 816 N.W.2d. at 716.

²³⁵*Id.*

²³⁶*Id.*

²³⁷*Id.* (“Loosely considered, the work ‘encourage’ might additionally encompass merely supportive and agreeable language...But this does not establish constitutional overbreadth because the other forms of encouragement are not protected...”).

²³⁸ *Final Exit*, 290 Ga. at 509.

while not criminalizing other instances of promoting assisted suicide.²³⁹ The court indicated that the statute would have satisfied judicial scrutiny if it had been written to include all forms of promoting assisted suicide, public and private.²⁴⁰ The court correctly found that the law was not narrowly tailored to the state's asserted interest; therefore, the statute was unconstitutional for underbreadth.

VI: Recommendation

The *Melchert-Dinkel* Court's holding could have dire consequences for patients nearing the end of their lives discussing treatment options with their physicians. Patients have a right to be informed of different treatment options by his or her physician.²⁴¹ Furthermore, it has been suggested patients have a "right not to suffer" when death is imminent.²⁴² While there is no set rubric for the amount of information a patient must receive, courts have required at a minimum, that a physician divulge the amount of information that other practitioners would give in the same situation.²⁴³ A higher standard applied by some courts would require the physician to divulge as much information as that particular patient would want to disclose.²⁴⁴ Under either standard, the statute at issue in these cases poses a potential roadblock to the physician-patient relationship.

While physician-assisted suicide is still widely considered unethical by the medical community, other palliative care measures may be affected by similar statutes. While Minnesota Statute § 609.215 removes liability from physicians actually administering the treatment, the statute is unclear as to physician liability in engaging in discussions with the patient regarding

²³⁹ *Id.*

²⁴⁰ *See id.*

²⁴¹ Veatch, *supra* note 46, at 83.

²⁴² *See* Smith *supra*, note 75, at 478.

²⁴³ *Id.* at 84-85.

²⁴⁴ *Id.*

end of life treatment and options. For example, the use of pain medication, such as morphine, that also has the effect of causing sedation is generally deemed an ethical treatment plan.²⁴⁵ A patient also has the right to utilize his or her autonomy by refusing hydration and nutrition.²⁴⁶ This could be expressed after a patient is unconscious by way of an advance directive indicating the patient's wishes.²⁴⁷ While a physician actually engaging in these treatments will not be criminally liable for assisting in suicide, these options may not be clearly recognized and understood by a patient; therefore, it is incumbent on the patient's physician to inform the patient of the side effects of the morphine, as well as well as the patient's wishes going forward.²⁴⁸ A physician engaging in such a conversation could run afoul of the statute, despite the exemption, because an open and honest discussion on the patient's viable options might cross the line into a treatment "knowingly administered...to cause death."²⁴⁹

In order to protect physician's from criminal liability for abiding by the Hippocratic Oath, and protecting patient autonomy, statutes aimed at preventing suicide and preserving life, especially among vulnerable populations, must be narrowly drafted to exclude discussion of treatment plans. The statute cannot, however, be drafted too narrowly, or it will run the risk underbreadth.²⁵⁰

Working off of the statute at issue in *Final Exit Network (Minnesota)* and *Melchert-Dinkel*, an adequate statute could follow the Model Penal Code, and require that duress, undue influence or deceit be used in the "encouragement" of the taking of the other's life. The statute

²⁴⁵*Id.*

²⁴⁶*Id.*

²⁴⁷ Advanced directives may be used to decide in advance medical treatment one wants to receive or refuse if one becomes physically or mentally incapable of communicating those wishes. See DEATH AND DYING SOURCEBOOK 283 (Annemarie S. Muth ed., 1st ed. 2000).

²⁴⁸ § 609.217.

²⁴⁹*Id.*

²⁵⁰ See *id.*

could also expand the exemption for physicians to explicitly exclude end of life treatment plan discussions from culpability. Incorporating these requirements would hold Melcher-Dinkel liable for predatorily contacting his victims and encouraging suicide, while removing liability from Final Exit Network for providing compassionate encouragement. Furthermore, this would remove the consequence of inhibiting open and honest discussion between patients and their physicians.

Similar to the Statute in *Final Exit (Georgia)*, the recommended statute could potentially be challenged for underbreadth, as it would be carving out on particular area of the government's interest in preserving life and preventing suicide by only proscribing encouragement when done under duress, force or fraud. The statute could likely withstand such a challenge if the government more specifically defines its compelling interest. As alluded to in *Washington v. Glucksberg*, which solidified the government's compelling interest in protecting life, the government is primarily concerned with protecting the lives of those that are most vulnerable.²⁵¹ Such a challenge can also be countered by pointing to Scalia's dicta in the landmark underbreadth case, *R.A.V.*, where he stated "When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists."²⁵² Relying on this dictum, the government could argue that such a statute strikes at the very reason for prohibiting the encouragement of suicide.

Conclusion

While a state may prohibit assisted suicide, the state may not disregard the First Amendment protections enumerated by the Constitution. Speech encouraging suicide is not

²⁵¹ *Glucksberg*, 521 U.S. at 735.

²⁵² *R.A.V.*, 505 U.S. at 408.

categorically excluded from First Amendment protections. Such speech also cannot be categorized as speech integral to criminal conduct. While suicide was a crime under English common law, the United States trend has been not to criminalize the act. Furthermore, speech encouraging suicide is not a traditionally proscribed act, unless it rises to the level of assisting in the suicide or suicide attempt.

Speech encouraging suicide is not in a category excluded from First Amendment protections; therefore, the government must show that it has a compelling interest, and the law must but narrowly tailored to further that interest. It is widely accepted that the government has a compelling interest in preserving life and protecting vulnerable populations. In order for the government to constitutionally address this interest, laws should create culpability targeting predatory behaviors by requiring fraud, for example. This will promote open and honest conversation between patients and their physicians while allowing culpability for predators and those that actually assist in suicide, in states where assisted-suicide is illegal.