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## EXISTENCE OF A SUICIDE PACT AS A COMPLETE DEFENSE TO A SURVIVOR'S CRIMINAL LIABILITY: STATE V. SAGE

*If thou and nature can so gently part  
The stroke of death is as a lover's pinch,  
Which hurts, and is desired.*<sup>1</sup>

Can one who encourages another's suicide through a suicide pact be absolved of criminal liability? The Ohio Supreme Court answered this question in the affirmative in *State v. Sage*.<sup>2</sup> The court held that a suicide survivor's proof that another's death resulted from a mutual suicide pact acts as a complete defense to criminal liability.<sup>3</sup> Not since 1872 has the Ohio Supreme Court discussed criminal liability for suicide pact members who aid and abet another's suicide.<sup>4</sup> The *Sage* court did not differentiate between classic suicide pacts where each member agrees to commit suicide, and suicide-murder pacts where one person agrees to commit suicide and the other consents to murder.

### SAGE FACTS AND HOLDING

This case came before the Ohio Supreme Court following two appellate court reversals of Roy H. Sage's aggravated murder convictions.<sup>5</sup> In the second appeal, the Franklin County Court of Appeals held, *inter alia*, that the trial court committed reversible error when it refused to charge the jury on the lesser included offense of involuntary manslaughter, and instead charged only on the offense of aggravated murder.<sup>6</sup> The Ohio Supreme Court reversed this holding, explaining that the existence of a suicide pact acted as a complete defense to any crime of homicide under Ohio law.<sup>7</sup> Hence, if the jury believed the defendant's suicide defense, he would not be found guilty of either aggravated murder or involuntary manslaughter.

On February 22, 1982, police responded to a reported shooting at Catherine Wanner's apartment.<sup>8</sup> Upon entering the premises, they found Wanner and Sage lying on her bed.<sup>9</sup> Wanner died from gunshot wounds to her left temple and left chest.<sup>10</sup> Sage survived but suffered superficial head and abdominal gun-

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<sup>1</sup> W. SHAKESPEARE, *THE TRAGEDY OF ANTONY AND CLEOPATRA*, Act. V, Scene II.

<sup>2</sup> *State v. Sage*, 31 Ohio St. 3d 174, 510 N.E.2d 343 (1987).

<sup>3</sup> *Id.* at 178-179, 510 N.E.2d at 346-347.

<sup>4</sup> The last Ohio Supreme Court case to address the subject of criminal liability for suicide pact survivors was *Blackburn v. State*, 23 Ohio St. 146 (1872).

<sup>5</sup> *Sage*, 31 Ohio St. 3d at 175-76, 510 N.E.2d at 345.

<sup>6</sup> *Id.* at 176, 510 N.E.2d at 345.

<sup>7</sup> *Id.* at 179, 510 N.E.2d at 347.

<sup>8</sup> *Id.* at 173, 510 N.E.2d at 343.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

shot wounds.<sup>11</sup>

Sage claimed that he and Wanner were lovers, and that they agreed to a suicide pact whereby he shot himself and she shot herself.<sup>12</sup> The prosecution argued that Sage either shot Wanner, or that Wanner shot herself under duress.<sup>13</sup>

The Ohio Supreme Court omitted the trial court's exact jury instructions in its opinion, but held that the trial court's refusal to charge the jury on the lesser included offense of involuntary manslaughter was not reversible error.<sup>14</sup> The court explained that neither suicide, nor aiding and abetting suicide, is a crime in Ohio. Thus, they reasoned that the existence of a suicide pact acted as a complete defense to any crime of homicide under Ohio law.<sup>15</sup>

### SUICIDE LAW HISTORY

Early English courts punished suicide as murder.<sup>16</sup> Public officials buried the suicide victim in a public highway and drove a stake through the corpse to assure that the body would not rise again.<sup>17</sup> Afterwards, the crown confiscated the suicide victim's property.<sup>18</sup> Since English lawmakers considered suicide self-murder, they considered surviving suicide pact members attempted murderers.<sup>19</sup> In 1961 Parliament enacted the English Suicide Act, which abolished criminal penalties for suicide.<sup>20</sup>

American courts expressly rejected the early English view which considered suicide murder.<sup>21</sup> American lawmakers adopted the position that a suicide attempt is a symptom of mental illness, and punishment of such an involuntary symptom is futile.<sup>22</sup> The American view, however, can lead to unintended consequences. Although lawmakers may find no reason to punish the person who

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> To establish his theory that Wanner was either murdered or had committed suicide under duress, the prosecutor introduced evidence to show a crossed out portion of Wanner's alleged suicide note which read "But th -- guy wants to kill me." Another part of the note stated "I wanted to die with you Roy," only the word "you" was crossed out. The suicide note was written on the reverse side of a sexually explicit love note to Sage, written in the third person as though it was dictated.

<sup>14</sup> *Sage*, 31 Ohio St.3d at 179, 510 N.E.2d at 347.

<sup>15</sup> *Id.*

<sup>16</sup> Brenner, *Undue Influence in the Criminal Law: A Proposed Analysis of the Criminal Offense of "Causing Suicide,"* 47 ALB. L. REV. 62, 64 (1982). See also Hales v. Petit, 1 Plowd 253, 75 Eng. Rep. 387 (C.B. 1565) for a typical early English suicide case.

<sup>17</sup> See WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW*, 257-61 (1970). See generally Mikell, *Is Suicide Murder?*, 3 COLUM. L. REV. 379 (1903).

<sup>18</sup> Brenner, *supra* note 16, at 64.

<sup>19</sup> *Id.* at 85 (citing Regina v. Alison, 8 Car. & Payne 418, 173 Eng. Rep 557 (1838); Rex v. Dyson, 168 Eng. Rep 930 (1823)).

<sup>20</sup> Barry, *Suicide and the Law*, 5 MELB. U.L. REV. 1, 7 (1965).

<sup>21</sup> Markson, *The Punishment of Suicide — A Need for Change*, 14 VILL. L. REV. 463, 465 (1969); Burnett v. People, 204 Ill. 208, 222, 68 N.E. 505, 510 (1903).

<sup>22</sup> Bergler, *Suicide: Psychoanalytic and Medico-Legal Aspects*, 8 LA. L. REV. 504, 533 (1908) (citing East, *Suicide from the Medico-Legal Aspect*, BRIT. MED. J. (Aug. 8, 1931)).

attempts suicide, it does not follow that society should not deter and punish those people who aid, abet, and advise suicide.<sup>23</sup>

How can courts impose criminal sanctions on a defendant who aids and abets a non-criminal suicide? Many jurisdictions declare suicide an illegal or criminal act, but impose no penalty for it.<sup>24</sup> Other states simply recognize that encouraging suicide is a felony, but that suicide is no crime.<sup>25</sup>

Possible suicide related criminal charges against non-victims fall into three general categories: 1) causing suicide;<sup>26</sup> 2) aiding and abetting suicide;<sup>27</sup> and 3) supporting suicide through a mutual suicide pact.<sup>28</sup>

The most culpable suicide related crime is causing suicide. *Commonwealth v. Bowen*<sup>29</sup> was the first American case to discuss the concept of proximate cause as it relates to suicide. That case concerned a prisoner who encouraged a fellow inmate to hang himself.<sup>30</sup> The jury found Bowen not guilty, after the judge instructed the jury that Bowen could not be convicted as a principal for the deceased's self-murder, if the deceased would have committed suicide without Bowen's encouragement.<sup>31</sup>

The *Bowen* court laid the groundwork for today's crime of causing suicide.<sup>32</sup> In this crime the defendant's will replaces that of the suicide victim's.<sup>33</sup> If the victim acts voluntarily, the defendant is absolved of criminal liability. The Model Penal Code provides a typical causing suicide statute.<sup>34</sup> It imposes liability for criminal homicide only if the defendant purposely causes suicide through the use of force, duress, or deception.<sup>35</sup> To prove the crime of causing suicide, the prosecution must show that the defendant imposed his will on the victim.

An aider and abettor, however, merely assists the victim in carrying out his or her original intention.<sup>36</sup> The Model Penal Code considers purposeful aiding or soliciting suicide a second degree felony, if such act actually causes

<sup>23</sup>The Ohio Supreme Court failed to address this important distinction in *Sage*.

<sup>24</sup>Markson, *supra* note 21.

<sup>25</sup>See, e.g., *Burnett*, 204 Ill. at 208, 68 N.E. at 505.

<sup>26</sup>See, e.g., *Commonwealth v. Bowen*, 13 Mass. 356 (1816).

<sup>27</sup>See, e.g., *People v. Roberts*, 211 Mich. 187, 178 N.W. 690 (1920).

<sup>28</sup>See, e.g., *People v. Matlock*, 51 Cal. 2d 682, 336 P.2d 505 (1959).

<sup>29</sup>13 Mass. 356 (1816).

<sup>30</sup>*Id.* at 356-57.

<sup>31</sup>*Id.* at 358.

<sup>32</sup>See the following statutes that impose criminal penalties for causing suicide. HAWAII REV. STAT. § 707-702 (b) (1985); N.Y. PENAL LAW § 120.35 (McKinney 1975); PA. CONS. STAT. ANN. § 2505 (Purdon 1983).

<sup>33</sup>Brenner, *supra* note 16, at 63.

<sup>34</sup>M.P.C. § 210.05 (1) (1980).

<sup>35</sup>*Id.*

<sup>36</sup>Brenner, *supra* note 16, at 63.

a suicide or attempted suicide.<sup>37</sup> Otherwise, purposeful aiding and soliciting suicide is a misdemeanor.<sup>38</sup>

Most states classify aiding and abetting suicide as murder or manslaughter.<sup>39</sup> A minority of jurisdictions impose no criminal liability for aiding and abetting suicide.<sup>40</sup>

The landmark Ohio case on the subject is *Blackburn v. State*,<sup>41</sup> decided in 1872. The Ohio Supreme Court reversed the defendant's earlier murder conviction and remanded the case to the lower court, but only because of an evidentiary question which would not have affected the court's reasoning regarding the defendant's culpability.<sup>42</sup>

In *Blackburn*, the defendant was convicted of administering poison to the deceased as part of a suicide pact.<sup>43</sup> The defendant reneged on the pact and never took the poison himself.<sup>44</sup> The court admitted that suicide was no crime in Ohio.<sup>45</sup> Thus, the defendant could not be convicted either as an accessory or as a principle in the second degree of suicide.<sup>46</sup> The court reasoned that the crime in issue was not suicide, but the administration of poison which was specifically prohibited by an Ohio statute.<sup>47</sup> The court explained that the deceased's willingness to take the poison was immaterial.<sup>48</sup> The law prohibited the administration of poison to anyone, regardless of the victim's state of mind.<sup>49</sup>

In *People v. Roberts*,<sup>50</sup> a Michigan court convicted another defendant of first degree murder for supplying his suicidal wife with poison.<sup>51</sup> The defendant argued that he could not be convicted as an accessory before the fact of suicide, since suicide was no crime in Michigan.<sup>52</sup> The court rejected this reasoning, saying the defendant was charged with administering poison, not with

<sup>37</sup> M.P.C. § 210.5 (2) (1980).

<sup>38</sup> *Id.*

<sup>39</sup> See generally Derrick, *Criminal Liability for Death of Another as Result of Another's Attempt to Kill Self or Assist Another's Suicide*, 40 A.L.R. 4th 702, Sec. 6 (1985).

<sup>40</sup> Markson, *supra* note 21, at 473-74.

<sup>41</sup> 23 Ohio St. 146 (1872).

<sup>42</sup> *Id.* at 165-66. The lower court's rejection of testimony which tended to show the deceased's suicidal disposition was held to be reversible error.

<sup>43</sup> *Id.* at 146.

<sup>44</sup> *Id.* at 148-49.

<sup>45</sup> *Id.* at 163.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 163-64.

<sup>48</sup> *Id.* at 162-163.

<sup>49</sup> *Id.*

<sup>50</sup> 211 Mich. 187, 178 N.W. 690 (1920).

<sup>51</sup> *Id.* at 199, 178 N.W. at 694. In *People v. Cambell*, 124 Mich. App. 333, 337, 335 N.W.2d 27, 29 (1983), a lower appellate court held that *Roberts* no longer represented Michigan law and that a defendant who aids and abets suicide cannot be considered a murderer.

<sup>52</sup> *Roberts*, 211 Mich. at 196-97, 178 N.W. at 693.

suicide.<sup>53</sup>

Other states consider aiding and abetting suicide to be manslaughter.<sup>54</sup> In *Persampieri v. Commonwealth*,<sup>55</sup> the court upheld the defendant's conviction of involuntary manslaughter for recklessly encouraging his wife's suicide.<sup>56</sup> The defendant told his wife he wanted a divorce and she threatened suicide.<sup>57</sup> Instead of discouraging his wife, the defendant dared her to kill herself, loaded the household rifle, and taught her how to pull the trigger.<sup>58</sup> The defendant knew his wife had been drinking and was emotionally upset.<sup>59</sup> The court felt the jury could reasonably conclude that the defendant's actions constituted reckless disregard for life and upheld the defendant's involuntary manslaughter conviction.<sup>60</sup>

In a similar case, an Iowa court upheld the defendant's conviction for involuntary manslaughter for preparing and providing the suicide weapon.<sup>61</sup> Again, the victim was known to be intoxicated and suicidal.<sup>62</sup> The court felt the defendant's actions fit the state statute's definition of involuntary manslaughter, since the actions were "likely to cause death or serious injury."<sup>63</sup> Defendant argued that he was not criminally liable, since suicide was not a crime under Iowa law.<sup>64</sup> The court rejected this defense, saying that the defendant could be convicted of homicide without being considered an accessory or principle in the second degree to suicide.<sup>65</sup>

A few states impose no criminal liability for aiding and abetting suicide.<sup>66</sup> In *Sanders v. State*,<sup>67</sup> a Texas court held that supplying a suicide victim with poison was not criminal, but that one who actually administers such poison to the suicide victim is guilty of murder.<sup>68</sup>

<sup>53</sup> *Id.* See the following cases where the court considered aiding and abetting suicide to be murder. *Commonwealth v. Hicks*, 118 Ky. 637, 82 S.W. 265 (1904); *State v. Jones*, 86 S.C. 17, 67 S.E. 160 (1910); *Aven v. State*, 102 Tex. Crim 478, 277 S.W. 1080 (1925).

<sup>54</sup> *See, e.g.,* *People v. Kent*, 41 Misc. 191, 83 N.Y.S. 948 (1903); *State v. Ludwig*, 70 Mo. 412 (1879), *overruled on other grounds*, *State v. Fitzgerald*, 130 Mo. 407, 32 S.W. 1113 (1895).

<sup>55</sup> 343 Mass. 19, 175 N.E.2d 387 (1961).

<sup>56</sup> *Id.* at 23, 175 N.E.2d at 390.

<sup>57</sup> *Id.* at 22, 175 N.E.2d at 389.

<sup>58</sup> *Id.* at 22-23, 175 N.E.2d at 389.

<sup>59</sup> *Id.* at 22, 175 N.E.2d at 389.

<sup>60</sup> *Id.* at 23, 175 N.E.2d at 390.

<sup>61</sup> *State v. Marti*, 290 N.W.2d 570, 583 (Iowa 1980).

<sup>62</sup> *Id.* at 575.

<sup>63</sup> *Id.* at 583.

<sup>64</sup> *Id.* at 582.

<sup>65</sup> *Id.* at 584.

<sup>66</sup> *See, e.g.,* *Grace v. State*, 44 Tex. Crim 193, 69 S.W. 529 (1902); *People v. Cambell*, 124 Mich. App. 333, 335 N.W.2d 27 (1983) (rejecting *People v. Roberts*, 211 Mich. 187, 178 N.W. 690 (1920)).

<sup>67</sup> *Sanders v. State*, 54 Tex. Crim. 101, 108-110, 112 S.W. 68, 72-73 (1908), *overruled on other grounds*, *Aven v. State*, 102 Tex. Crim 478, 277 S.W. 1080 (1925)).

<sup>68</sup> *Id.* at 109, 112 S.W. at 72-73. Published by JdeExchange@JJAkron, 1988

Participating in a suicide pact is part suicide, which is not illegal, and part aiding or causing suicide, which most states consider criminal. Joining a suicide pact differs from suicide, because it provides support and encouragement to other pact members to carry through with their suicidal plans. Still, a suicide pact survivor differs from one who aids or causes suicide, because the survivor could have also been a potential victim.<sup>69</sup>

A suicide pact does not excuse the defendant who actually performs the act which causes death, such as shooting, stabbing, poisoning or drowning the victim.<sup>70</sup> In the landmark case of *People v. Matlock*,<sup>71</sup> the California Supreme Court held that a defendant who actively performed the lethal act was guilty of murder, and thus was not entitled to jury instructions on the lesser included offense of aiding and abetting suicide.<sup>72</sup>

At first blush, the reasons against punishing single suicide survivors would seem to apply to suicide pact survivors.<sup>73</sup> Yet, upon a more thorough analysis, one sees that suicide pacts are more than multiple independent suicides. The rationale for punishing suicide pact survivors stems from the encouragement and support a suicide victim derives from the pact.<sup>74</sup> The suicide pact member relies on the other members' resolve to kill themselves.<sup>75</sup> In *State v. Webb*,<sup>76</sup> a couple entered into a suicide pact, but the husband later told his wife that he changed his mind.<sup>77</sup> Nonetheless, the wife shot the husband and then herself.<sup>78</sup> The lower court convicted the husband of manslaughter.<sup>79</sup> That court charged the jury that the defendant was guilty unless the husband knew for sure that the wife abandoned the suicide pact when the husband reneged, and acted on her own sole volition when she killed herself.<sup>80</sup> The Supreme held that the lower court's charge was erroneous, since it ignored the defendant's right to renounce his suicidal plan, and wrongly placed upon the defendant the burden of establishing his own innocence.<sup>81</sup>

Lawmakers advance other reasons for punishing suicide pact survivors.

<sup>69</sup> See generally Markson, *supra* note 21.

<sup>70</sup> *State v. Bouse*, 199 Or. 676, 702-03, 264 P.2d 800, 812 (1953), *overruled on other grounds*, *State v. Fischer*, 232 Or. 558, 376 P.2d 418 (1962).

<sup>71</sup> 51 Cal.2d 682, 694, 336 P.2d 505, 511 (1959).

<sup>72</sup> *Id.* at 694, 336 P.2d at 511.

<sup>73</sup> Markson, *supra* note 21, at 479.

<sup>74</sup> Brenner, *supra* note 16, at 85.

<sup>75</sup> *Id.*

<sup>76</sup> *State v. Webb*, 216 Mo. 378, 115 S.W. 998 (1909).

<sup>77</sup> *Id.* at 385, 115 S.W. at 1000.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 383, 115 S.W. at 999.

<sup>80</sup> *Id.* at 386, 115 S.W. at 1000.

<sup>81</sup> *Id.* at 390, 115 S.W. at 1001.

The mere fact that one pact member survives, or reneges on the agreement, suggests that the survivor may have entered the pact in bad faith.<sup>82</sup> One could feign interest in a suicide pact with the sole intent to cause another's death.

California courts have examined the issue of unequal resolve to commit suicide among pact members. In *People v. Matlock*,<sup>83</sup> the California Supreme Court attached different criminal liability to defendants depending on whether they took active or passive roles in the suicide.<sup>84</sup> In *In Re Joseph G.*,<sup>85</sup> the same court refused to ritualistically apply the *Matlock* holding to suicide pact situations.<sup>86</sup> The defendant in *Joseph G.* was a minor suicide pact survivor who drove a car off a cliff, resulting in another pact member's death.<sup>87</sup> Although the deceased's death proximately resulted from the defendant's act, the court held that the defendant was guilty of aiding and abetting suicide rather than murder.<sup>88</sup> It reasoned that both suicide participants agreed to commit suicide using the same instrumentality, namely driving the car off the cliff.<sup>89</sup> The driver's intent to commit suicide was as sincere as the passenger's.<sup>90</sup> The driver survived only because of a fluke, not because he entered the pact in bad faith.<sup>91</sup> Thus, the court felt that the traditional reasons for convicting a suicide pact survivor of murder did not apply when suicides are undertaken together using a single instrumentality.<sup>92</sup>

#### IMPLICATIONS OF THE *SAGE* DECISION

Prior to the *Sage* decision, lawyer's found it difficult to discern Ohio's stance on suicide related acts. In deciding *Sage*, the Ohio Supreme Court correctly disregarded the *Blackburn* decision and turned to the Ohio Revised Code for guidance.<sup>93</sup> After this, the court's logic deteriorated.

True, suicide is no crime in Ohio. Yet the court's next conclusion, that acts that aid and abet suicide are not criminal, is unsubstantiated. No Ohio statute specifically uses the words "aid and abet suicide." Still, acts performed in the course of aiding and abetting suicide may well fall under those acts pro-

<sup>82</sup>Brenner, *supra* note 16, at 86.

<sup>83</sup>51 Cal. 2d 682, 336 P.2d 505 (1959).

<sup>84</sup>*Id.* at 694, 336 P.2d at 511. The court held that defendants who furnish means of suicide are guilty of aiding suicide. Those who's actions actually cause the victim's death are guilty of murder. *Matlock* did not involve a suicide pact.

<sup>85</sup>34 Cal 3d. 429, 667 P.2d 1176, 194 Cal. Rptr. 163 (1983).

<sup>86</sup>*Id.* at 441, 667 P.2d at 1180-81, 194 Cal. Rptr. at 170.

<sup>87</sup>*Id.* at 433-34, 667 P.2d at 1178, 194 Cal. Rptr. at 164-65.

<sup>88</sup>*Id.* at 440-41, P.2d at 1182-83, 194 Cal. Rptr. at 170.

<sup>89</sup>*Id.*

<sup>90</sup>*Id.*

<sup>91</sup>*Id.* at 441, 667 P.2d at 1180-81, 194 Cal. Rptr. at 170.

<sup>92</sup>*Id.*

<sup>93</sup>O.R.C. § 2901.03 (A) (Baldwin 1987) abrogates common law offenses. Unless the code defines an offense as a crime, it is no crime.



hibited under other Ohio statutes.<sup>94</sup> One who strongly encourages an incompetent or unstable person to commit suicide could feasibly "cause the death of another" within the meaning of Ohio Revised Code Sections 2903.01 (aggravated murder), 2903.02 (murder), 2903.03 (voluntary manslaughter), 2903.04 (involuntary manslaughter) or 2903.05 (negligent homicide).<sup>95</sup>

Although the *Blackburn* decision no longer represents Ohio law,<sup>96</sup> the court's reasoning remains valid. When *Blackburn* was decided, there was no Ohio law which expressly prohibited aiding and abetting suicide.<sup>97</sup> Yet, the *Blackburn* court correctly reasoned that a defendant could be convicted of administering poison, even though he did so in the course of aiding and abetting suicide.<sup>98</sup> Other jurisdictions convict defendants for crimes performed in the course of aiding and abetting suicide, in the absence of aiding and abetting suicide statutes.<sup>99</sup>

Suppose a couple enters into a pact, where a man agrees to shoot and kill his wife, and then commit suicide. Both partners sincerely intend to go through with the plan, and both voluntarily concur. The man shoots his wife, who dies. He then shoots himself and survives. Conceivably, this man may have violated Section 2903.01 of the Ohio Revised Code, by "purposely, and with prior calculation and design, caus[ing] the death of another."<sup>100</sup> The Ohio Supreme Court failed to address this issue. The court held that the existence of a mutual suicide pact is a complete defense to aggravated murder.<sup>101</sup> It did not distinguish between suicide pacts where each member agrees to commit suicide, and suicide-murder pacts where one person agrees to commit suicide and the other person consents to murder.<sup>102</sup>

On the surface, the *Sage* holding appears to favor defendants who assert the suicide defense. The holding represents just the opposite. By saying that

<sup>94</sup> See discussion below regarding how one's participation in a suicide-murder pact may be prohibited under Section 2903.01 of the Ohio Revised Code.

<sup>95</sup> See, e.g., *Persampieri v. Commonwealth*, 343 Mass. 19, 175 N.E.2d 387 (1961) and *State v. Marti*, 290 N.W.2d 570 (Iowa 1980) where other jurisdictions held that defendants who recklessly encouraged suicide "caused" the victims' deaths, and thus were guilty of involuntary manslaughter.

<sup>96</sup> See note 93.

<sup>97</sup> *Blackburn*, 23 Ohio St. at 163.

<sup>98</sup> *Id.* at 163-64.

<sup>99</sup> See, e.g., *People v. Roberts*, 211 Mich 187, 178 N.W. 690 (1920); *Aven v. State*, 102 Tex. Crim. 478, 277 S.W. 1080 (1925) (where defendants were convicted of administering poison to their wives) and *Persampieri v. Commonwealth*, 343 Mass. 19, 175 N.E.2d 387 (1961); *State v. Marti*, 290 N.W.2d 570 (Iowa 1980) (where the courts felt the defendants' reckless behavior caused the victims' death, and thus fell under the states' involuntary manslaughter statutes).

<sup>100</sup> See O.R.C. § 2903.01 (A) (Baldwin 1987). See also *People v. Matlock*, 51 Cal. 2d 682, 336 P.2d 505 (1959) for a similar line of reasoning from the California Supreme Court.

<sup>101</sup> *Sage*, 31 Ohio St.3d at 179, 510 N.E.2d at 347.

<sup>102</sup> See the following cases which distinguish between defendants who take an active role and those who take passive roles in aiding and abetting suicide. *People v. Matlock*, 51 Cal. 2d 682, 336 P.2d 505 (1959); *In Re Joseph G.*, 34 Cal. 3d 429, 667 P.2d 1176, 194 Cal. Rptr. 163 (1983).

a mutual suicide pact acts as a complete defense to criminal liability, the court conveniently rationalized the trial court's refusal to charge on a lesser included offense. Hence, Sage was either guilty of aggravated murder or nothing at all. A jury's decision may better match the evidence when the jury receives instructions on both aggravated murder and a lesser included offense. Juries faced with an "all or nothing" aggravated murder instruction may be tempted to wrongly convict a suicide pact survivor with aggravated murder, rather than see a suspicious defendant set free.<sup>103</sup>

Under Ohio's aggravated murder statute,<sup>104</sup> there is no liability when two people each voluntarily take their own lives. That statute prohibits causing another's death, not causing one's own death.<sup>105</sup> However, one can cause another's death by forcing that person to commit suicide, and thus commit aggravated murder.<sup>106</sup> The Sage court was correct to emphasize that a suicide pact must be mutual to act as a complete defense to aggravated murder. Unfortunately, the Ohio legislature offers little guidance in this area. Virtually all Ohio homicide statutes require that the defendant "cause the death of another" to impose criminal liability.<sup>107</sup> At some point encouraging another's suicide may cause another's death.

Perhaps this paradox requires legislative action. As discussed earlier, there are several good reasons to punish those who aid and abet suicide, including those who offer support through suicide pacts. Yet the punishment should fit the crime. Aiding and abetting suicide should not be punished as severely as murder. Until the legislature acts, courts should be cautious in applying the Sage holding to other aiding and abetting suicide cases. The suicide pact defense should be limited to those cases where all members entered into the pact voluntarily, and the pact involves agreements to commit suicide. Never should the existence of a suicide pact act as a defense in the suicide-murder situation, where one member consents to murder.

### CONCLUSION

*State v. Sage*<sup>108</sup> represents the Ohio Supreme Court's most recent stance on the treatment of suicide pact survivors. The court held that the existence of a mutual suicide pact acts as a complete defense to criminal liability.<sup>109</sup> Future

<sup>103</sup> See generally V. HANS & N. VIDMAR, *JUDGING THE JURY*, 131-48 (1986) for a discussion of how subjective prejudice affects the jury's verdict. See also R. LEMPART & S. SALTZBURG, *A MODERN APPROACH TO EVIDENCE*, 162-65 (1984) for a discussion about how jurors feel less regret for convicting a defendant whom they perceive to be basically evil, regardless of how the facts fit the presented jury instructions.

<sup>104</sup> O.R.C. § 2903.01 (A) (Baldwin 1987).

<sup>105</sup> *Id.*

<sup>106</sup> See, e.g., *Bowen*, 13 Mass. 356; Brenner, *supra* note 16.

<sup>107</sup> See O.R.C. §§ 2903.01, 2903.02, 2903.03, 2903.04, 2903.05, 2906.06, and 2903.07 (Baldwin 1987).

<sup>108</sup> *Sage*, 31 Ohio St.3d at 174, 510 N.E.2d at 343.

<sup>109</sup> *Id.* at 179, 510 N.E.2d at 347.

courts must be cautious when applying the *Sage* holding to other fact patterns. The court's opinion limits the suicide pact defense to situations involving mutual suicide pacts where all members agree to commit suicide. It does not excuse murder by consent.

The *Sage* decision places Ohio in the minority of states who do not impose criminal sanctions for aiding and abetting suicide. Perhaps, the Ohio Legislature should consider enacting a statute prohibiting aiding and abetting suicide, providing graduated punishments that correlate with the offender's culpability. Although many valid reasons exist against punishing suicide, the same reasons rarely apply to one who encourages another's suicide.

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