

2017

Deadly Speech: Encouraging Suicide and Problematic Prosecutions

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Recommended Citation

Sean Sweeney, *Deadly Speech: Encouraging Suicide and Problematic Prosecutions*, 67 Case W. Res. L. Rev. 941 (2017)
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— Note —

DEADLY SPEECH:
ENCOURAGING SUICIDE AND
PROBLEMATIC PROSECUTIONS

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INTRODUCTION

Recently, several criminal cases involving individuals who successfully encouraged other people to commit suicide have received prominent media attention.¹ These cases are often quite disturbing. In one

1. *Former Nurse Helped Instruct Man on How to Commit Suicide, Court Rules*, THE GUARDIAN (Dec. 28, 2015, 2:38 PM), <http://www.theguardian.com/us-news/2015/dec/28/minnesota-suicide-conviction-william-melchert-dinkel-mark-drybrough> [<https://perma.cc/YDA3-YNSK>] (discussing the court of appeals’s “rul[ing] that there was sufficient evidence to convict William Melchert-Dinkel . . . of assisting the 2005 death of Mark Drybrough” after the Supreme Court of Minnesota struck down Minnesota’s statute criminalizing encouraging suicide and remanded the case for further proceedings); *Nurse Is Accused of Using Internet to Encourage Suicides*, N.Y. TIMES (Oct. 17, 2009), <https://www.nytimes.com/2009/10/18/us/18suicides.html> [<https://perma.cc/CQS9-UZ26>] (discussing the investigation that eventually led to the criminal prosecution of William Melchert-Dinkel); Kathy McCabe, *Mass. Woman Must Stand Trial in Teen Friend’s Suicide*, BOS. GLOBE (July 1, 2016), <https://www.bostonglobe.com/metro/2016/07/01/sjc-rules-teen-charged-with-cajoling-friend-commit-suicide-must-stand-trial/J6bZdTPL6MNIaJ4iTINLAJ/story.html> [<https://perma.cc/CD4U-9UGA>] (discussing the decision by the Massachusetts Supreme

recent case, Michelle Carter, a Massachusetts teenager, reportedly encouraged Conrad Roy, her boyfriend, to commit suicide.² Her text messages and phone calls went beyond mere encouragement, however, as Carter named specific methods by which her boyfriend could commit suicide and encouraged him to use them.³ In July 2014:

Carter assisted Conrad's suicide by counseling him to overcome his doubts, devising a plan to run a combustion engine within his truck in order to poison him with carbon monoxide, and . . . direct[ed] him to go back in his truck after he exited it, when he became frightened that the plan was working.⁴

Carter also told her boyfriend that he would be her “beautiful guardian angel forever and ever (smiley face)” and that she would “always smile up at [him] knowing that [he wasn't] far away.”⁵

Similarly, a Minnesota man responded to postings on several suicide websites while “[p]osing as a depressed and suicidal young female nurse.”⁶ While posting online, William Melchert-Dinkel contacted several suicidal individuals and “feigned caring and understanding to win the trust of the victims while encouraging each to hang themselves,

Judicial Court permitting Michelle Carter's trial to go forward); Simon McCormack, *Teen Faces Charges for Encouraging Friend to Commit Suicide: Cops*, HUFFINGTON POST (Feb. 27, 2015, 4:51 PM), http://www.huffingtonpost.com/2015/02/27/teen-encouraged-friend-to-commit-suicide_n_6771964.html [<https://perma.cc/B5RF-5JM5>] (discussing the charges filed against Michelle Carter); Abby Phillip, ‘Get Back In’: Teen Charged with Pressuring Boyfriend to Commit Suicide, WASH. POST (Mar. 2, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/03/02/get-back-in-there-teen-charged-with-persuading-boyfriend-to-commit-suicide/> [<https://perma.cc/NM4B-YQAY>] (describing the events leading to the suicide in *Commonwealth v. Carter*).

2. Commonwealth's Response to Defendant's Motion to Dismiss, *Commonwealth v. Carter*, No. 15YO0001NE (New Bedford Juv. Ct. Aug. 21, 2015), <http://www.wcvb.com/blob/view/-/34888334/data/1/-/3mh04m/-/MichelleCarterCourtDocs082415.pdf> [<https://perma.cc/P6F3-U64D>]. Many of the documents in *Commonwealth v. Carter* are not available online, as the case is in juvenile court.
3. Memorandum of Decision and Order on Defendant's Motion to Dismiss Indictment at 2, *Commonwealth v. Carter*, No. 15YO0001NE (New Bedford Juv. Ct. Sept. 22, 2015) (“Phone records revealed that the victim and defendant also spoke by phone to each other during the time it is believed the victim sat in his truck inhaling the carbon monoxide fumes. At some point, the defendant told the victim to ‘get back in his truck’ when he exited because he was ‘scared that it was working.’”).
4. Commonwealth's Response to Defendant's Motion to Dismiss, *supra* note 2, at 1.
5. *Id.* at 2.
6. *State v. Melchert-Dinkel*, 844 N.W.2d 13, 16 (Minn. 2014).

falsely claiming that he would also commit suicide.”⁷ Melchert-Dinkel also “attempt[ed] to persuade them to let him watch the hangings via webcam.”⁸ Melchert-Dinkel successfully encouraged at least two people to commit suicide throughout the course of his postings online.⁹

Unlike physician-assisted suicide, which has received a significant amount of legal and academic attention, encouraging suicide has received far less news coverage.¹⁰ Currently, encouraging suicide is not specifically prohibited in many jurisdictions, and jurisdictions that do specifically prohibit it do so through statutes of dubious constitutionality, likely due to the issue’s relative obscurity.¹¹ Many people want this sort of behavior to be illegal,¹² and there are currently a number of

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7. *Id.*
 8. *Id.*
 9. *Id.* at 16–17 (describing the facts behind the two suicides that Melchert-Dinkel successfully encouraged).
 10. For a thorough discussion about the legal issues behind physician-assisted suicide, see Margaret P. Battin, *Physician-Assisted Dying and the Slippery Slope: The Challenge of Empirical Evidence*, 45 WILLAMETTE L. REV. 91 (2008) (discussing the competing policy rationales behind legalizing physician-assisted suicide and behind outlawing or heavily regulating it); Katherine A. Chamberlain, Note, *Looking for a “Good Death”: The Elderly Terminally Ill’s Right to Die by Physician-Assisted Suicide*, 17 ELDER L.J. 61, 62 (2009) (arguing for a “constitutional right to choose physician-assisted suicide as a way to end [someone’s life]”); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (upholding Washington’s ban on assisted suicide as rationally related to a legitimate government interest). In fact, encouraging suicide has occasionally been considered alongside assisted suicide or aiding a suicide attempt with material support. See Donald W. Grieshaber, Comment, *SUICIDE—Criminal Aspects*, 1 VILL. L. REV. 316, 321 (1956) (considering encouraging suicide along with material support arguably constituting assisting suicide).
 11. See *infra* Part III.B (discussing the constitutional issues underlying current statutes prohibiting encouraging suicide).
 12. See Kayleigh Green, *There Should Be No Defense for Encouraging Suicide*, COLLEGIATE TIMES (Sept. 6, 2015, 11:00 AM), http://www.collegiatetimes.com/opinion/there-should-be-no-defense-for-encouraging-suicide/article_12b82a38-5294-11e5-b0e0-f359f4e7cf07.html [https://perma.cc/9P7J-VF4Q] (portraying Michelle Carter as “a young sociopath . . . [who hid] behind her right of speech in order to bully one of the people who trusted her the most while he was in a dark place”); Stephanie Slifer, *Is It a Crime to “Encourage Suicide”? Teens’ Texts Under Scrutiny*, CBS NEWS (Mar. 3, 2015, 6:00 AM), <http://www.cbsnews.com/news/is-it-a-crime-to-encourage-suicide-unusual-massachusetts-case-of-conrad-roy-and-michelle-carter/> [https://perma.cc/EJL6-TDCH] (“People shouldn’t manipulate and coerce mentally vulnerable victims. There should be some way that society punishes this behavior.”); *#JusticeForConrad Hashtag Surfaces After Texts Appear to Show Teen Urging Boyfriend to Kill Himself*, WTVR (Aug. 30, 2015, 3:33 PM), <http://wtvr.com/2015/08/30/michelle-carter-justiceforconrad-hashtag-surfaces-after-messages-appear-to-show-teen-urging-boyfriend-to-kill-himself/>

methods to charge someone for encouraging another to commit suicide.¹³ Most of these options, however, have significant drawbacks. Encouraging suicide cases present extremely emotional issues and a very legitimate question of whether the victim would still be alive but for the encourager's actions. Indeed, encouraging someone to commit suicide can be fatal.¹⁴ These cases often involve people taking advantage of victims who are mentally unstable and susceptible to encouragement to commit suicide.¹⁵ Nevertheless, it is unclear whether encouraging suicide is actually illegal in many jurisdictions. Solving this problem will likely prove difficult, as any legislative solution intended to address the full scope of the problem will encounter potentially fatal problems.¹⁶

Part I of this Note provides a brief history of attitudes towards suicide in Western civilization and notes that, while society's attitudes towards suicide have changed slightly over time, most still condemn suicide as a practice. Although the act of suicide itself is no longer punished directly, it is still strongly discouraged, as evidenced by continuing suicide prevention efforts and broad criminalization of physician-assisted suicide—although legalization efforts have made some progress.¹⁷ Part II of this Note attempts to define the concept of encouraging suicide and suggests that a bright line demarcating encouraging suicide from other forms of conduct simply does not exist. Part III describes the various types of prosecutions for encouraging suicide that are currently available to prosecutors, including involuntary manslaughter, prosecutions under specific statutes prohibiting encouraging suicide, alternatively prosecuting encouraging suicide as assisting suicide, and prosecuting under a theory of incitement to commit a crime. Finally, Part IV notes that no current type of prosecution described in Part III passes muster and proposes crafting a new statute to prohibit encouraging suicide directly. Part IV further discusses problems with crafting specific legislation and discusses how

[<https://perma.cc/H6PU-NKUN>] (noting the viral spread of the hashtag #JusticeForConrad in the wake of Conrad Roy's suicide).

13. See *infra* Part III.
14. R.B. Brandt, *The Morality and Rationality of Suicide*, in A HANDBOOK FOR THE STUDY OF SUICIDE 61, 74 (Seymour Perlin ed., 1975) ("It is often important to one who is contemplating suicide to go over his thinking with another, and to feel that a conclusion, one way or the other, has the support of a respected mind.").
15. See *infra* notes 68–70 (describing how the victim in *Commonwealth v. Carter* may have been susceptible to Michelle Carter encouraging him to commit suicide).
16. See *infra* Part IV (discussing obstacles facing new legislation in this area).
17. For more information about efforts to legalize physician-assisted suicide, see *infra* note 33.

best to balance the competing policy interests of discouraging suicide and protecting free speech.

I. SUICIDE IN WESTERN CULTURE

Throughout Western civilization, suicide has been widely condemned as a practice.¹⁸ Much of the condemnation of suicide has religious roots, as “Christianity since the time of Augustine has declared suicide a violation of the divine injunction against killing.”¹⁹ However, “[n]either the Hebrew Bible nor the New Testament prohibits suicide.”²⁰ Although the Bible itself does contain several instances of suicide, the most prominent Biblical suicides were not done out of despair, but were instead done to achieve some sort of purpose.²¹ Nevertheless, it is clear

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18. Irwin N. Perr, *Legal Aspects of Suicide*, in SUICIDE: THEORY AND CLINICAL ASPECTS 91, 91 (L.D. Hankoff & Bernice Einsidler eds., 1979) (noting that Blackstone “considered suicide to be a double crime—against both the king and God”); GEORGES MINOIS, HISTORY OF SUICIDE: VOLUNTARY DEATH IN WESTERN CULTURE 3 (Lydia G. Cochrane trans., 1999) (“Society has never been indifferent to [suicide]. On rare occasions acclaimed as an act of heroism, suicide has more often been subject to social reprobation because it was considered an insult to God, who gave us life, and to society, which provides for the well-being of its members.”); *id.* at 7–9 (listing a number of historical suicides, the reasons for them, and for some, their punishment).
19. John Moskop & H. Tristram Engelhardt, Jr., *The Ethics of Suicide: A Secular View*, in SUICIDE: THEORY AND CLINICAL ASPECTS, *supra* note 18, at 49. For descriptions of the religious rationale condemning suicide, see MINOIS, *supra* note 18, at 3 (“If we exist, it is because we must exist in order to glorify God and to make ourselves useful in society.”); *id.* at 72 (“Martin Luther considered suicide to be a murder committed by the devil”); *id.* at 73 (“In England, Anglicans and Puritans diabolized suicide”); *id.* at 55 (“The absolute prohibition on taking one’s own life became firmly established in the Roman Empire under barbarian rule. Formalized by the scholastics during the Middle Ages, prohibition eventually became an integral part of the basic structures of Christian thought.”); RONALD W. MARIS, ALAN L. BERMAN & MORTON M. SILVERMAN, COMPREHENSIVE TEXTBOOK OF SUICIDOLOGY 480 (2000) (“St. Augustine . . . vigorously expressed Christianity’s unequivocal rejection of suicide as a violation of the sixth commandment: ‘Thou shalt not kill.’ Suicide was a mortal sin, the consequence of which was hell, not heaven.”).
20. George Rosen, *History*, in A HANDBOOK FOR THE STUDY OF SUICIDE, *supra* note 14, at 3, 4.
21. *See id.* (“There are only five instances [of suicide] reported in the Hebrew Bible and one in the New Testament.”); L.D. Hankoff, *Judaic Origins of the Suicide Prohibition*, in SUICIDE: THEORY AND CLINICAL ASPECTS, *supra* note 18, at 3, 5–7 (listing Biblical references to suicide, as well as noting their similarities, including that all “offered the reader an understandable explanation for the self-destruction,” that “[a]ll were males in a state of physical stress or apt to be in mortal danger very shortly,” and that “[a]ll but one . . .

that “the religious ban on suicide has remained unquestioned throughout religious history.”²²

In addition to being widely condemned as a practice from a religious perspective, suicide has historically been subject to steep legal penalties.²³ In the Middle Ages, suicide could be punished with a shameful burial “at the crossroads with a stake through the heart” instead of in a cemetery with traditional religious rites.²⁴ Suicide was considered “a *felo de se*, a ‘felony against the self’” and someone who committed suicide could “forfeit[] his goods to the state,” harming the family he or she left behind.²⁵ The United States has only decriminalized suicide in the past hundred years, as suicide was held to be an indictable offense as late as 1937.²⁶ In the past, several states “have held suicide to be a crime but not punishable if accomplished.”²⁷

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.²⁸ Society has instead decided to deal with the issue of

were prominent people whose positions of leadership were seriously damaged or threatened”).

22. Hankoff, *supra* note 21, at 20. However, “acts of suicide, particularly martyrdoms, have occurred and been adjudged religiously acceptable.” *Id.*
23. See MARIS ET AL., *supra* note 19, at 481 (“The state soon echoed these arguments by providing civil mandates against suicide.”).
24. *Id.* “In 1824 burial in the highway was ended in England by a parliamentary act,” but burials for suicide were still not afforded religious ceremonies. Perr, *supra* note 18, at 92.
25. MARIS ET AL., *supra* note 19, at 481. A suicide caused by “madness, transient insanity, or young age” did not necessarily trigger the punishments regularly attached to suicide, however. *Id.*
26. Perr, *supra* note 18, at 92–93 (listing two New Jersey cases considering suicide to be “a criminal offense committed in the lifetime of the offender” and “an indictable offense,” as well as noting that “possible prosecution for attempted suicide” was only eliminated in New Jersey by statute in 1972). *But see id.* at 92 (“New York considered suicide a ‘grave public wrong’ but not a crime. Illinois stated it ‘had never regarded the English laws as to suicide as applicable to the spirit of our institutions.’”) (citation omitted); N.C. GEN. STAT. § 14-17.1 (2015) (abolishing the common-law crime of suicide in North Carolina in 1973).
27. Perr, *supra* note 18, at 92. The states were Alabama, Massachusetts, New Jersey, and South Carolina. *Id.*
28. *In re Joseph G.*, 667 P.2d 1176, 1178 (Cal. 1983) (“Currently no state, including California, has a statute making a successful suicide a crime, nor does the Model Penal Code recognize suicide as a crime.”); see MARIS ET AL., *supra* note 19, at 481 (discussing the gradual elimination of legal punishments associated with suicide); Catherine D. Shaffer, Note, *Criminal Liability for Assisting Suicide*, 86 COLUM. L. REV. 348, 350 (1986) (“A survey of the criminal codes of the fifty states and three United States territories reveals that no jurisdiction defines suicide, by statute, as a

suicide in a more rehabilitative manner, with a large variety of resources available to help anyone who is at risk of suicide.²⁹ For instance, courts have held that prisoners are entitled to mental health treatment and protection from suicide attempts while in prison.³⁰

Nevertheless, the condemnation and stigma attached to suicide have not abated, and society still wants to discourage suicide as an act that has significant negative moral implications.³¹ Even though the legal punishments have gradually been eliminated, suicide can still have

criminal act. Nor does any state, by statute, criminalize attempts to commit suicide.”) (citation omitted).

29. In the wake of the media coverage of Robin Williams’s suicide, internet views of suicide prevention materials increased significantly, as did calls to suicide prevention hotlines. Liz Szabo, *Calls to Crisis Hotlines Surge After Williams’ Suicide*, USA TODAY (Aug. 15, 2014, 3:16 PM), <http://www.usatoday.com/story/news/nation/2014/08/14/suicide-hotline-calls-surge/14053415/> [<https://perma.cc/32JF-CK6P>]. Furthermore, states such as West Virginia have enacted statutes requiring schools and universities “to offer suicide awareness and prevention programs to their students.” *WVU Implements ‘Jamie’s Law’ to Increase Suicide Prevention Awareness*, W. VA. U. (Aug. 25, 2015), <http://wvutoday.wvu.edu/n/2015/08/25/wvu-implements-jamie-s-law-to-increase-suicide-prevention-awareness> [<https://perma.cc/MWR9-S9KT>]. Today, a number of resources exist that are designed to help people who are considering suicide. See AM. FOUND. FOR SUICIDE PREVENTION, <http://afsp.org/> [<https://perma.cc/5NTB-4GJ3>] (last visited Mar. 9, 2016) (providing support and resources to individuals considering suicide and those who are concerned about another’s well-being, as well as raising money for suicide prevention); *Lifeline Crisis Chat*, NAT’L SUICIDE PREVENTION LIFELINE, <http://suicidepreventionlifeline.com/> [<https://perma.cc/EZ3R-7VAD>] (last visited Mar. 9, 2016) (hosting a hotline for individuals considering suicide to get the support that they need); VETERANS CRISIS LINE, <https://www.veteranscrisisline.net/> [<https://perma.cc/XY99-W3JV>] (last visited Mar. 9, 2016) (providing a suicide hotline targeted at veterans and people concerned about veterans); LIFELINE CRISIS CHAT, <http://www.crisischat.org/> [<https://perma.cc/J2KH-GTU3>] (last visited Mar. 9, 2016) (providing an online chat service directed towards suicide prevention); CRISIS TEXT LINE, <http://www.crisistextline.org/> [<https://perma.cc/5YVE-VSJ8>] (last visited Mar. 9, 2016) (providing a suicide prevention hotline in the form of a text messaging service).
30. See COLUM. HUM. RTS. L. REV., *JAILHOUSE LAWYER’S MANUAL* 814–15 (10th ed. 2011), <http://blogs2.law.columbia.edu/jlm/viewprevious/> [<https://perma.cc/Y48L-7QS5>] (last visited Oct. 30, 2016) (“One application of the right to mental health care is the right to protection from self-harm and suicide.”); see also *Elliott v. Cheshire Cty.*, 940 F.2d 7, 10 (1st Cir. 1991) (holding that prison officials can be held liable for failing to provide mental health treatment to prevent a prisoner’s suicide under a deliberate indifference standard).
31. See *MARIS ET AL.*, *supra* note 19, at 481 (“Surviving family members continue to feel stigmatized by suicide, sometimes pressuring coroners to change determinations to protect the family from a feared social condemnation.”).

significant emotional and financial impacts on the surviving family.³² In addition, as suicide is still widely—but not universally—condemned, many states criminalize conduct by third parties that could lead to suicide, most notably assisted suicide.³³ Recently, the social condemnation of suicide has manifested as prosecutions for encouraging suicide.

II. ENCOURAGING SUICIDE DEFINED

Specifically defining the concept of encouraging suicide is not a simple task. It is both difficult and fact-intensive to find the line between relatively innocent conduct that society does not want to punish and encouraging suicide, which—as evidenced by the recent trend in criminal prosecutions—society does want to punish. The boundaries between general advocacy for the right to suicide, encouraging suicide, and assisting suicide are extremely blurred, and conduct often does not fit neatly into just one category. Mere advocacy for the right to commit suicide is not something that society generally seeks to punish. Occasionally, some speech can look quite a bit like encouraging or assisting suicide, which are controversial, if not widely condemned, practices. For example, Derek Humphry, the author of the controversial suicide instruction manual *Final Exit*, “was once accused by an angry young woman of causing the suicide death of her college roommate, who was found dead with an open copy of *Final Exit* in her lap.”³⁴ Although there is no evidence that Humphry came into direct contact with the

32. Perr, *supra* note 18, at 101 (“The law no longer punishes those who kill themselves or attempt to do so, although vestiges of that tradition remain.”); MARIS ET AL., *supra* note 19, at 481 (noting that life insurance policies “usually contain clauses excluding benefits for death due to suicide within 1 or 2 years of the date the application was made”).

33. Assisted suicide is illegal in most states, but several states have passed legislation permitting physician-assisted suicide. *Take Action: Death with Dignity Around the U.S.*, DEATH WITH DIGNITY, <https://www.deathwithdignity.org/take-action/> [<https://perma.cc/2T89-AKD4>] (last visited Mar. 8, 2016) (noting that five states—California, Colorado, Oregon, Vermont, and Washington (as well as the District of Columbia)—have statutes legalizing physician-assisted suicide, a number of others are considering legalizing the practice, and one state—Montana—has legalized physician-assisted suicide by a court decision); Lisa Aliferis, *California to Permit Medically Assisted Suicide as of June 9*, NPR, (Mar. 10, 2016, 6:58 PM), <http://www.npr.org/sections/health-shots/2016/03/10/469970753/californias-law-on-medically-assisted-suicide-to-take-effect-june-9> [<https://perma.cc/5PYW-MAWQ>] (noting that the California statute legalizing physician-assisted suicide went into effect on June 9, 2016). For a number of resources discussing legal issues surrounding physician-assisted suicide, see *supra* note 10.

34. MARIS ET AL., *supra* note 19, at 456; see *infra* text accompanying notes 35–44 (discussing *Final Exit* and the specific instructions it gives on how to go about committing suicide).

roommate, it is easy to see why the young woman might lay some blame at Humphry's feet.

Final Exit is a 1991 *New York Times* bestseller that “advis[es] terminally ill people how to commit suicide.”³⁵ The book describes when a person might consider suicide,³⁶ how to find a doctor to assist in the suicide,³⁷ and even explains—in great detail—several ways in which someone might commit suicide without a doctor, including asphyxiation in an automobile,³⁸ suffocation with a plastic bag,³⁹ and the inhalation of inert gases, such as helium.⁴⁰ As the book includes a number of careful statements advising readers to consult with others before deciding on suicide, it is certainly debatable whether *Final Exit* actually encourages anyone to commit suicide.⁴¹ While “some mental-health experts warned that an explosion of suicides” would follow the publication of *Final Exit*, this did not appear to be the case.⁴² For instance, one study examining the impact of *Final Exit* on suicides in New York City found that the overall suicide rate in New York City in the year after the book was published did not change.⁴³ Instead, it appears that the publication of *Final Exit* may have merely influenced the *method* by which people

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35. Lawrence K. Altman, *How-to Book on Suicide Is atop Best-Seller List*, N.Y. TIMES (Aug. 9, 1991), <http://www.nytimes.com/1991/08/09/us/how-to-book-on-suicide-is-atop-best-seller-list.html> [<https://perma.cc/2EUS-S9HW>]. The book issues a disclaimer to potential users advising them of the intended audience: “If you are thinking of ending your life because you are depressed, or cannot cope with the pressures of this difficult world, do not use this book. It is for dying individuals who need such information and will find it a great solace. I ask people with suicidal thoughts to share them with family or friends and if this does not help to call one of the hot lines or help lines listed in their local telephone book. Please respect the true intentions of *Final Exit*: the right of a terminally ill person with unbearable suffering to know how to choose to die.” DEREK HUMPHRY, FINAL EXIT: THE PRACTICALITIES OF SELF-DELIVERANCE AND ASSISTED SUICIDE FOR THE DYING xxix (3d ed. 2002).
36. HUMPHRY, *supra* note 35, at 1.
37. *Id.* at 9–14.
38. *Id.* at 121–23.
39. *Id.* at 124–29.
40. *Id.* at 130–40. This section also includes a diagram illustrating how to use this method properly to commit suicide. *Id.* at 134.
41. See *supra* note 35 and accompanying text (discussing *Final Exit*'s disclaimer).
42. Sandra G. Boodman, *Book Didn't Push Up Number of Suicides, Study Finds*, SUN SENTINEL (Dec. 9, 1993), http://articles.sun-sentinel.com/1993-12-09/lifestyle/9312080665_1_suicide-rate-final-exit-suicide-method [<https://perma.cc/2RW6-N4DP>].
43. Peter M. Marzuk et al., *Increase in Suicide by Asphyxiation in New York City After the Publication of Final Exit*, 329 NEW ENG. J. MED. 1508, 1510 (1993).

chose suicide, as “the number of asphyxiations by plastic bag increased from 8 to 33,” an increase of 313%.⁴⁴ Nevertheless, the contents of *Final Exit* differ substantially from the events at issue in *Commonwealth v. Carter* and *State v. Melchert-Dinkel*, and however distasteful the book might be, it would be a significant stretch to classify it as encouraging suicide.

It is also important to distinguish encouraging suicide from other behaviors that can lead to suicide. Bullying, whether online or in person, can sometimes lead to suicide.⁴⁵ This sort of behavior, while reprehensible, is often significantly different from what this Note contemplates as encouraging suicide, and should be treated that way. People have been criminally charged for bullying that leads to suicide on grounds other than encouraging suicide in the past.⁴⁶ Encouraging suicide can arise in any number of contexts outside of bullying, and as a result, it should be examined independently, even though bullying and encouraging suicide may sometimes occur at the same time.⁴⁷

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44. *Id.* at 1509. The study notes that suffocation “is one of the most lethal means” of suicide and that “[f]rom this study, we cannot determine whether *Final Exit* persuaded people already intent on suicide to use different lethal methods or induced some people who were only marginally suicidal to commit a fatal self-destructive act. Our data are compatible with both hypotheses.” *Id.* at 1510.
45. For examples of how bullying can lead someone to contemplate and commit suicide, see Jeff Dunn, *The Time a Child Made Me Contemplate Suicide Over Xbox Live*, UNWINNABLE (May 21, 2012), <http://www.unwinnable.com/2012/05/21/contemplating-suicide-over-xbox-live/> [<https://perma.cc/9MYP-FRYB>]; Megan Pospychala, *Teen Kills Himself After Being Bullied, Heartbroken Mother Pleads “Don’t Let Anyone Be Treated Like My Son,”* FOX6 (May 28, 2015, 8:16 PM), <http://fox6now.com/2015/05/28/teen-kills-himself-after-being-bullied-heartbroken-mother-pleads-dont-let-anyone-be-treated-like-my-son/> [<https://perma.cc/3BSM-JTWA>].
46. Kayla Webley, *Teens Who Admitted to Bullying Phoebe Prince Sentenced*, TIME (May 5, 2011), <http://newsfeed.time.com/2011/05/05/teens-who-admitted-to-bullying-phoebe-prince-sentenced/> [<https://perma.cc/4BTD-RV93>] (observing that teenagers who had bullied a girl to the point that she committed suicide were initially charged with a variety of crimes, including criminal harassment, stalking, and felony civil rights violations); Kari Huus, *Bullied Girl’s Suicide Has Ongoing Impact*, NBC NEWS (Dec. 28, 2011, 5:50 PM), http://usnews.nbcnews.com/_news/2011/12/28/9781587-bullied-girls-suicide-has-ongoing-impact [<https://perma.cc/YU7E-YFG3>] (noting that Phoebe Prince’s suicide helped motivate lawmakers to pass broad anti-bullying legislation in Massachusetts).
47. See Pospychala, *supra* note 45 (“One day, one of Daniel’s bullies sent him a text saying, ‘Why don’t you take one of your precious guns and do the world a favor and go kill yourself.’ [When Daniel said that he was going to commit suicide, the bully said] ‘put up or shut up.’”). For more discussion of why bullying and encouraging suicide should be addressed separately, see *infra* notes 187–190.

In addition, conduct that begins as encouraging suicide can gradually start to look quite a bit like assisting a suicide, complicating the definition of encouraging suicide even more. For example, in *Commonwealth v. Carter*, what started as Michelle Carter encouraging her boyfriend to commit suicide gradually became what could be considered assisting suicide, including giving him specific advice on how to carry out the suicide, such as “advice on the plan’s technical aspects.”⁴⁸ Carter gave significant advice and counsel regarding carbon monoxide poisoning and the most efficient ways to go about committing suicide in that manner, including advice on using various generators.⁴⁹ Similarly, in *State v. Melchert-Dinkel*, the online conversations between Melchert-Dinkel and the several suicidal people he spoke with contained more than mere encouragement to commit suicide.⁵⁰ Melchert-Dinkel also asked to watch their suicides on webcam and provided advice about committing suicide.⁵¹ In both cases, what began as encouragement became something appearing to be far more substantial in nature.

For the purposes of this Note, I will limit my definition of encouraging suicide to written or verbal statements intended to coax or inspire another to commit suicide, however forceful the statements may be.⁵² This Note will address both general encouragement—encouraging a person to commit suicide in general terms and not suggesting anything specific, such as the method or time—and specific encouragement—encouraging a person to commit suicide in a specific time, place, or manner. Specific encouragement can often border on aiding or assisting suicide, and is particularly problematic as it is far more concrete than general encouragement and helps to provide a means to the suicidal person’s contemplated ends.⁵³ It is important to note that the facts

48. Commonwealth’s Response to Defendant’s Motion to Dismiss, *supra* note 2, at 6. See also *id.* at 1–17 (providing a substantial record of text messages between Michelle Carter and Conrad Roy).

49. *Id.* at 6–11.

50. See *State v. Melchert-Dinkel*, 844 N.W.2d 13, 16–17 (Minn. 2014) (discussing the contents of Melchert-Dinkel’s conversations with the two individuals who committed suicide after talking to him).

51. *Id.* (“Drybrough described practicing the hanging method Melchert-Dinkel taught him . . .”).

52. The Supreme Court of Minnesota used a similar definition of encouraging suicide in *State v. Melchert-Dinkel*. As the Minnesota statute at issue did not define encouraging suicide, the court used the ordinary meaning of encourage—“to [g]ive courage, confidence, or hope.” *Id.* at 23.

53. Specific encouragement may also turn encouraging suicide into something more akin to assisted suicide. See *infra* Part III.C (discussing the possibility of prosecuting for encouraging suicide under existing statutes prohibiting aiding or assisting suicide).

available in some cases suggest that encouraging suicide, whether generally or—more frequently—specifically, may permit prosecutions for aiding or assisting suicide.⁵⁴ Nevertheless, not all instances of encouraging suicide can realistically be punished, as the current patchwork of legislation criminalizing encouraging suicide is imperfect.⁵⁵

III. TYPES OF PROSECUTIONS FOR ENCOURAGING SUICIDE

While some states have similarly worded statutes prohibiting “aid[ing], or advis[ing], or encourag[ing] another to commit suicide,” many states have significantly different legal frameworks surrounding suicide.⁵⁶ As a result, prosecutors pursuing charges for encouraging suicide currently have a variety of options available to them, depending on their jurisdiction. None of these options are ideal, however, and many have potentially fatal flaws preventing them from being effectively or reliably used to prosecute for encouraging suicide.⁵⁷

A. *Involuntary Manslaughter*

One way to pursue criminal charges for encouraging suicide is to charge defendants with involuntary manslaughter, as in the case of *Commonwealth v. Carter*.⁵⁸ Since Massachusetts does not have a specific statute prohibiting encouraging suicide, the prosecutors in this case chose to charge Michelle Carter with involuntary manslaughter.⁵⁹

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54. Prosecutions under these sets of facts will be discussed more fully in Part III.C.
55. The current legality of encouraging suicide is very much in question, and it is prosecuted under a patchwork of legal frameworks. *See infra* Part III (discussing how encouraging suicide is currently prosecuted). In order for a statute to constitutionally limit speech and criminalize encouraging suicide, it must pass strict scrutiny, and that requires narrowly tailoring the statute, limiting its reach. *See infra* Part IV (discussing limitations that must be put on a statute prohibiting encouraging suicide in order to pass constitutional muster).
56. CAL. PENAL CODE § 401 (West 2016); *see also infra* note 85 (listing several other state statutes prohibiting encouraging suicide).
57. For an example of a legal theory that is completely unavailable to prosecutors, *see infra* Part III.D (discussing prosecuting encouraging suicide under a theory of incitement to commit a crime).
58. *See supra* note 2 and accompanying text (discussing *Commonwealth v. Carter* in greater detail); Memorandum of Decision and Order on Defendant’s Motion to Dismiss Indictment, *supra* note 3, at 7 (denying the defense motion to dismiss the indictment).
59. Defendant’s Memorandum in Support of Motion to Dismiss at 2, *Commonwealth v. Carter*, No. 15YO0001NE (New Bedford Juv. Ct. Aug. 10, 2015); *see also* Slifer, *supra* note 12 (“It’s not cyberbullying, it’s not harassment, it’s not stalking. So the prosecutor says, ‘This is reprehensible conduct, disgusting conduct, must-be-punished conduct,’ so he goes forward

Under Massachusetts common law, “[i]nvoluntary manslaughter is ‘an unlawful homicide unintentionally caused by an act which constitutes such a disregard of probable harmful consequences to another as to amount to wanton or reckless conduct.’”⁶⁰ Wanton or reckless conduct may be established “by either the commission of an intentional act or an ‘omission where there is a duty to act.’”⁶¹ The elements of involuntary manslaughter based on an intentional act are: “[(1) t]he defendant caused the victim’s death; [(2) t]he defendant intended the conduct that caused the victim’s death; [(3) t]he defendant’s conduct was wanton and reckless.”⁶² When involuntary manslaughter is based on a failure to act, the elements are:

1. [t]here was a special relationship between the defendant and the victim that gave rise to a duty of care, or the defendant created a situation that posed a grave risk of death or serious injury to another;
2. [t]he defendant’s failure to act caused the victim’s death;
3. [t]he defendant intentionally failed to act;
4. [t]he defendant’s failure to act was wanton and reckless.⁶³

The prosecution in *Commonwealth v. Carter* is pursuing involuntary manslaughter under both of these common law theories.⁶⁴

and says, ‘Let’s call this involuntary manslaughter.’ Does it neatly fit in that definition? Not so much.”); *see also infra* Part III.B and Part III.C (discussing alternative methods of prosecution available when specific provisions criminalizing either encouraging suicide or aiding or assisting suicide are available).

60. *Commonwealth v. Godin*, 371 N.E.2d 438, 442 (Mass. 1977) (quoting *Commonwealth v. Vanderpool*, 328 N.E.2d 833, 836 (Mass. 1975)) (In Massachusetts, “[t]here is no statutory definition of manslaughter,” so “[t]he elements of the crime are derived from the common law.”); *see also* MODEL PENAL CODE § 210.3 (AM. LAW INST., Official Draft 1985) (“Criminal homicide constitutes manslaughter when: (a) it is committed recklessly; or (b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.”).
61. *Commonwealth v. Pugh*, 969 N.E.2d 672, 685 (Mass. 2012) (emphasis omitted) (quoting *Commonwealth v. Welansky*, 55 N.E.2d 902, 910 (Mass. 1944)).
62. Memorandum of Decision and Order on Defendant’s Motion to Dismiss Indictment, *supra* note 3, at 3.
63. *Id.*; *see also* MODEL PENAL CODE § 210.3 (setting forth the Model Penal Code’s definition of manslaughter, which differs from the common law definition of manslaughter in Massachusetts).
64. Commonwealth’s Response to Defendant’s Motion to Dismiss, *supra* note 2, at 24–37.

Under any theory of involuntary manslaughter, however, the main problem facing prosecutions for encouraging suicide is causation. “[P]roximate cause is a cause which in the natural and continuous sequence produces the death and without which the death would not have occurred.”⁶⁵ Simply put, it is not always clear whether or not the victim’s final decision to commit suicide and the act itself is actually the result of the encouragement to commit suicide. For instance, according to the prosecution in *Commonwealth v. Carter*, the main argument for why Michelle Carter caused Conrad Roy’s death is summarized as follows:

[W]ithout Carter’s encouragement, Conrad would not have committed suicide. Her counsel convinced him to move past his doubts about the plan, his reservations that his death would harm his loved ones, and that additional time for reflection would not improve his situation Carter led Conrad to procure a combustion engine, which produced carbon monoxide. She then suggested that he drive to a parking lot during the day and run that engine within his truck. When Conrad followed this advice, became afraid that it was working, and removed himself to a safe area, she told him to get back in the truck and finish the job.⁶⁶

The defense, however, contests the idea of causation, arguing that “at no time did the defendant ‘create’ a situation that posed a grave risk of death or injury to the defendant [sic—probably decedent].”⁶⁷ The defense alleges that “the decedent desired to take his own life and, that prior to even meeting the defendant, had previously attempted suicide and had been hospitalized and received mental health treatment on several different occasions.”⁶⁸ According to the defense, these suicidal

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65. *Commonwealth v. Askew*, 536 N.E.2d 341, 343 (Mass. 1989) (quoting *Commonwealth v. Rhoades*, 401 N.E.2d 342, 351 (Mass. 1980)); see also Paul H. Robinson, *The Model Penal Code’s Conceptual Error on the Nature of Proximate Cause, and How to Fix It*, 51 CRIM. L. BULL. 1311, 1312 (2015) (“In the classic example used to illustrate [proximate cause], the defendant shoots at the victim but misses, the victim flees, and twenty blocks later is killed when a piano being hoisted to an upper window falls on him. The victim would not have been killed *but for* the defendant’s earlier conduct in shooting at him, which sent him running to the spot where the falling piano would hit, but all agree that the strength of the causal connection is too weak to be a basis for the defendant’s causal accountability for the death.”).
66. Commonwealth’s Response to Defendant’s Motion to Dismiss, *supra* note 2, at 34–35.
67. Defendant’s Memorandum in Support of Motion to Dismiss, *supra* note 59, at 9.
68. *Id.* At least some form of a preexisting desire to commit suicide appears to be common in cases involving encouraging suicide. For instance, in *State v. Melchert-Dinkel*, the defendant “[p]os[ed] as a depressed and suicidal young female nurse . . . respond[ing] to posts on suicide websites” where the first of

impulses persisted and did not go away.⁶⁹ In addition, the Massachusetts Supreme Judicial Court noted that Conrad Roy “had been receiving treatment for mental health issues since 2011” and “attempted to commit suicide by overdosing on acetaminophen” in 2013.⁷⁰ Newly discovered evidence also indicates that Roy was prescribed medication that “may cause suicidal thoughts in some young people.”⁷¹

Most importantly, the defense argues that Conrad Roy made the decision to commit suicide “on his own.”⁷² Conrad Roy “alone drove to the parking lot, brought the portable generator, and then ran the generator while inside his vehicle that ultimately led to his death by inhalation of carbon monoxide.”⁷³ In addition, the timeline surrounding Conrad Roy’s death is unclear, and newly discovered evidence suggests that more than eight hours may have passed between his suicide and his last contact with Michelle Carter.⁷⁴ This raises significant causation

his eventual victims described his “life [as] so miserable he wanted to end it” and where the second was “asking for advice on suicide methods.” *State v. Melchert-Dinkel*, 844 N.W.2d 13, 16–17 (Minn. 2014).

69. Defendant’s Memorandum in Support of Motion to Dismiss, *supra* note 59, at 9–12.
70. *Commonwealth v. Carter*, 52 N.E.3d 1054, 1057 (Mass. 2016).
71. David Linton, *Suicide Texting Trial of Plainville Woman Further Delayed*, SUN CHRON. (Feb. 3, 2017), http://www.thesunchronicle.com/news/local_news/suicide-texting-trial-of-plainville-woman-further-delayed/article_50d189e4-ea47-11e6-a5c8-936c7afc23d3.html [<https://perma.cc/Z4YC-636H>] (noting that both Carter and Roy were prescribed Celexa, a drug that can cause suicidal thoughts as a side effect).
72. Defendant’s Memorandum in Support of Motion to Dismiss, *supra* note 59, at 11 (emphasis omitted) (“Unnamed Party: ‘So what are you gonna do then? Keep being all talk and no action and everyday go thru saing [sic] how badly you wanna kill yourself? Or are you gonna try to get better?’ Conrad Roy: ‘I can’t get better I already made my decision.’”). Michelle Carter and Conrad Roy spoke in a follow-up conversation about a week later: “Conrad Roy: ‘if you were in my position. honestly what would you do.’ Michelle Carter: ‘I would get help. That’s just me tho. When I have a serious problem like that, my first instinct is to get help because I know I can’t do it on my own[.]’ Conrad Roy: ‘Well it’s too late I already gave up[.]’” *Id.*
73. *Id.* at 14.
74. See Curt Brown, *Defense: New Information in Michelle Carter Case Raises Possible Questions about Timeline*, SOUTHCOASTTODAY (Jan. 23, 2017, 7:33 PM), <http://www.southcoasttoday.com/news/20170123/defense-new-information-in-michelle-carter-case-raises-possible-questions-about-timeline> [<https://perma.cc/3EF9-LZXA>] (stating that police did not see Conrad Roy’s pickup truck in the parking lot when they drove through more than eight hours after Roy’s last contact with Michelle Carter). The case is still ongoing, and as a result of this newly discovered evidence, the trial date is scheduled for after the publication of this Note. Curt Brown, *Judge Moves Trial Date to June 5 in Michelle Carter Case*, SOUTHCOASTTODAY (Feb. 3, 2017, 8:49 PM), <http://www.southcoasttoday.com/news/20170203/judge>

issues, as Conrad Roy “might have driven around and contemplated what he was going to do.”⁷⁵

When denying the defense’s motion to dismiss the indictment, the court held that “[t]he Grand Jury could find probable cause that the defendant’s acts created a grave risk of death to the victim, and indeed, lead [sic] to his death, similar to starting a fire and walking away from it.”⁷⁶ The Massachusetts Supreme Judicial Court agreed, holding that:

[T]here was probable cause to show that the coercive quality of the defendant’s verbal conduct overwhelmed whatever willpower the eighteen year old victim had to cope with his depression, and that but for the defendant’s admonishments, pressure, and instructions, the victim would not have gotten back into the truck and poisoned himself to death.⁷⁷

In its decision, the court looked to two previous cases where it upheld involuntary manslaughter convictions “against a defendant where the death of the victim is self-inflicted.”⁷⁸ In *Commonwealth v. Atencio*,⁷⁹ the court upheld an involuntary manslaughter conviction against a surviving member of a group playing Russian roulette.⁸⁰ In *Persampieri v. Commonwealth*,⁸¹ the court affirmed the involuntary manslaughter conviction of a man who, when his wife threatened to commit suicide, “said she was ‘chicken—and wouldn’t do it.’”⁸² He then had his wife get a .22-caliber rifle from the kitchen, loaded it for her and ensured that the safety was off, at which point his wife fatally shot herself.⁸³ In both cases, however, the defendants were both physically present at the scene of the suicide and physically assisted with some aspect of the suicide.

moves-trial-date-to-june-5-in-michelle-carter-case [https://perma.cc/8XBL-F2PZ] (granting the defense’s motion for a continuance in light of significant amounts of newly discovered evidence).

75. Curt Brown, *Defense: New Information in Michelle Carter Case Raises Possible Questions about Timeline*, *supra* note 74.
76. Memorandum of Decision and Order on Defendant’s Motion to Dismiss Indictment, *supra* note 3, at 5. Similarly, in *State v. Melchert-Dinkel*, the issue of causation was critical in the Supreme Court of Minnesota’s strict-scrutiny analysis of Minnesota’s assisted-suicide statute. *State v. Melchert-Dinkel*, 844 N.W.2d 13, 23–24 (Minn. 2014).
77. *Commonwealth v. Carter*, 52 N.E.3d 1054, 1064 (Mass. 2016).
78. *Id.* at 1062.
79. 189 N.E.2d 223 (Mass. 1963).
80. *Id.* at 224, 226.
81. 175 N.E.2d 387 (Mass. 1961).
82. *Id.* at 389.
83. *Id.*

As previously discussed, Michelle Carter's connection to Conrad Roy's suicide is far more attenuated, with no physical presence at the scene and no physical assistance, only verbal. Whether Michelle Carter's actions were actually the proximate cause of Conrad Roy's suicide is very much an unanswered question. While the issue of causation is central to a prosecution for involuntary manslaughter, many of the same problems with other types of prosecutions for encouraging suicide—as described later in this Note—apply to this type of charge as well.⁸⁴

B. Specific Provisions Criminalizing Encouraging Suicide

Several states specifically criminalize encouraging suicide.⁸⁵ Generally, states that currently have specific legislation criminalizing encouraging suicide do so as part of a broader prohibition against assisted suicide. These statutes tend to share much of their operative language. Mississippi, for instance, prohibits “advis[ing], encourag[ing], abet[ting], or assist[ing]” a suicide.⁸⁶ Although each of the statutes de-

84. See *infra* Part III.B and Part IV (discussing the First Amendment concerns present in prosecutions for encouraging suicide under specific statutes).

85. CAL. PENAL CODE § 401 (West 2010) (“Every person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony.”); LA. STAT. ANN. § 14:32.12 (2016) (“Criminal assistance to suicide is: (1) The intentional advising or encouraging of another person to commit suicide or the providing of the physical means or the knowledge of such means to another person for the purpose of enabling the other person to commit or attempt to commit suicide. (2) The intentional advising, encouraging, or assisting of another person to commit suicide, or the participation in any physical act which causes, aids, abets, or assists another person in committing or attempting to commit suicide.”); MINN. STAT. § 609.215 (West 2009) (“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.”); MISS. CODE ANN. § 97-3-49 (West 2014) (“A person who willfully, or in any manner, advises, encourages, abets, or assists another person to take, or in taking, the latter’s life, or in attempting to take the latter’s life, is guilty of felony and, on conviction, shall be punished by imprisonment in the penitentiary not exceeding ten years”); OKLA. STAT. tit. 21, § 813 (2011) (“Every person who willfully, in any manner, advises, encourages, abets, or assists another person in taking his own life, is guilty of aiding suicide.”); S.D. CODIFIED LAWS § 22-16-37 (2006) (“Any person who intentionally in any manner advises, encourages, abets, or assists another person in taking or in attempting to take his or her own life is guilty of a Class 6 felony.”); V.I. CODE ANN. tit. 14, § 2141 (1990) (“Whoever deliberately aids, advises or encourages another to commit suicide, shall be imprisoned not more than 5 years.”).

86. § 97-3-49. For other slight variations on the statutory language, see *supra* note 85.

finances encouraging suicide as a felony, the degrees of punishment somewhat vary.⁸⁷ Furthermore, it is clear that, following the logic of the Supreme Court of Minnesota, these statutes are at least partially unconstitutional.

In *State v. Melchert-Dinkel*, the Supreme Court of Minnesota struck down in part the Minnesota statute prohibiting “intentionally advis[ing], encourag[ing], or assist[ing] another in taking the other’s own life.”⁸⁸ The court only struck down the statute as it pertained to encouraging suicide, and it upheld the portion of the statute prohibiting assisting suicide.⁸⁹ The court based its reasoning on First Amendment grounds, holding that “the State’s unprotected-speech arguments [were] unavailing.”⁹⁰ The court considered several exceptions to the First Amendment, holding that none of them applied to the case at hand.⁹¹

The Minnesota Supreme Court first considered whether the statute “proscribes speech that falls under the ‘speech integral to criminal conduct’ exception to the First Amendment,” and found that it did not.⁹² In doing so, the court noted that the Minnesota legislature decriminalized suicide in 1911.⁹³ Although suicide may well be “harmful conduct that the state opposes as a matter of public policy,” it is not illegal.⁹⁴ Since suicide is not a crime in Minnesota, the court would not extend the “‘speech integral to criminal conduct’ exception to harmful conduct.”⁹⁵ The court reasoned that this exception is only intended to cover “speech integral to conduct ‘in violation of a valid criminal statute,’” and without any criminal statute, the exception could not apply.⁹⁶

87. See *supra* note 85 (Minnesota—not more than 15 years in prison; Mississippi—not more than 10 years in prison; Virgin Islands—not more than 5 years in prison).

88. § 609.215; *State v. Melchert-Dinkel*, 844 N.W.2d 13, 24 (Minn. 2014).

89. *Melchert-Dinkel*, 844 N.W.2d at 24.

90. *Id.* at 21.

91. *Id.* at 19–21.

92. *Id.* at 19.

93. *Id.*

94. *State v. Melchert-Dinkel*, 816 N.W.2d 703, 714 (Minn. Ct. App. 2012).

95. *Melchert-Dinkel*, 844 N.W.2d at 19–20.

96. *Id.* (emphasis omitted) (citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)). The court also rejected Minnesota’s argument that the conduct prohibited by § 609.215 “is an integral part of the criminal conduct of physically assisting suicide.” The court stated that “the statute, on its face, does not require a person to physically assist the suicide. In the absence of a physical-assistance requirement, the analysis proposed by the state is circular because it effectively upholds the statute on the ground that the speech

Similarly, the court also found that the statute did not “proscribe[] speech that falls under the ‘incitement’ exception to the First Amendment.”⁹⁷ The court noted that “[t]he First Amendment only allows states to forbid advocating for someone else to break the law when such advocacy is both ‘directed to inciting or producing imminent *lawless* action’ and it is ‘likely to incite or produce such action.’”⁹⁸ Again, as it did with the speech integral to the criminal conduct exception, the court noted that “the State’s argument fails because suicide is not unlawful and cannot be considered ‘lawless action.’”⁹⁹ Accordingly, for the same underlying reasons, the court held that the incitement exception to the First Amendment did not apply under these circumstances.¹⁰⁰

After finding that the statute prohibited speech protected by the First Amendment, the court found that the prohibitions against advising and encouraging suicide did not survive strict scrutiny.¹⁰¹ A “restriction passes ‘strict scrutiny’” when it “(1) is justified by a compelling government interest and (2) is narrowly drawn to serve that interest.”¹⁰² In this case, the prohibitions against advising and encouraging suicide did not pass strict scrutiny, as the court found that the ordinary meanings given to the advising and encouraging provisions had overly broad interpretations.¹⁰³ Furthermore, the court noted that “nothing in the definitions of ‘advise’ or ‘encourage’ requires a direct, causal connection to a suicide,” meaning that the statute was not

prohibited by section 609.215 is an integral part of a violation of section 609.215.” *Melchert-Dinkel*, 844 N.W.2d at 20 (emphasis omitted).

97. *Id.*

98. *Id.* (emphasis added) (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

99. *Id.* at 21.

100. *Id.* Due to the unique facts of the case, the Minnesota Supreme Court also considered and rejected Minnesota’s argument that Melchert-Dinkel’s conduct fell within the fraud exception to the First Amendment. Minnesota argued that, because Melchert-Dinkel’s conduct involved “the fact that he lied to his victims” about his identity, it is not protected by the First Amendment. The court disagreed, stating that while “the government can restrict speech when false claims are made to ‘gain a material advantage,’” § 609.215 prohibits speech beyond just that used to “gain a material advantage.” Furthermore, there was no evidence that Melchert-Dinkel gained any sort of material advantage through his speech. As such, Minnesota’s argument that Melchert-Dinkel’s speech fell under the fraud exception to the First Amendment was rejected. *Id.* (quoting *United States v. Alvarez*, 132 S. Ct. 2537, 2548 (2012)).

101. *Id.* at 23–24.

102. *Id.* at 21.

103. *Id.* at 23–24.

narrowly tailored to serve the compelling government interest in that area.¹⁰⁴ The Minnesota Supreme Court held, however, that the provision of § 609.215 prohibiting *assisting* suicide passed strict scrutiny analysis.¹⁰⁵

While *State v. Melchert-Dinkel* is only binding in Minnesota, its reasoning is highly persuasive regarding each of the state statutes prohibiting encouraging suicide, as the wording for each statute is quite similar.¹⁰⁶ Regardless of its precedential value, *State v. Melchert-Dinkel* accurately illustrates many of the difficulties with specific legislation prohibiting encouraging suicide: it is hard to justify these statutes in the face of the First Amendment and it is difficult for these statutes to survive strict scrutiny. In addition to the constitutional issues present in § 609.215, the broad wording of the statute could criminalize far more conduct than intended.¹⁰⁷ Although the Minnesota Supreme Court did not strike down the provision of § 609.215 prohibiting assisting suicide, not all instances of encouraging suicide have facts that would support a charge of assisting suicide.¹⁰⁸ As discussed in the next Section, however, some instances of encouraging suicide may also support charges of aiding or assisting suicide.

C. *Aiding or Assisting the Suicide*

In states with statutes prohibiting assisting suicide,¹⁰⁹ prosecutors may elect to charge defendants with aiding or assisting in the suicide attempt instead choosing one of the previously mentioned avenues for prosecuting encouraging suicide. This determination will necessarily be somewhat dependent on the facts of any given case. In some cases where a defendant encourages a victim to commit suicide, the facts may also support a charge of assisting the victim's suicide if the encouragement

104. *Id.* at 23.

105. *Id.* at 21–23. This holding will be discussed in greater detail in Part IV.

106. *See supra* note 85 (listing states that have specific statutes criminalizing encouraging suicide).

107. *See infra* Part IV.A (discussing the difficulties inherent in narrowly tailoring a statute prohibiting encouraging suicide).

108. *Melchert-Dinkel*, 844 N.W.2d at 23–25 (specifying what portions of Minnesota's assisted suicide statute survived strict scrutiny). Part IV discusses problems with creating new legislation to prohibit encouraging suicide in more detail.

109. For a list of several states with statutes prohibiting assisting suicide, see *supra* note 85; see also Derek Humphry, *Assisted Suicide Laws in United States*, EUTHANASIA RES. & GUIDANCE ORG., https://finalexit.org/assisted_suicide_laws_united_states.html [<https://perma.cc/4KY2-8Q95>] (last updated Sept. 7, 2013) for further discussion of these statutes.

goes beyond general encouragement and becomes specific encouragement constituting actual assistance with the suicide.¹¹⁰ For instance, courts in California have held that “[a]lthough on its face the statute [criminalizing encouraging suicide] may appear to criminalize simply giving advice or encouragement to a potential suicide, the courts have—again by analogy to the law of aiding and abetting—required something more than mere verbal solicitation of another person to commit a hypothetical act of suicide.”¹¹¹ California instead requires “the direct aiding and abetting of a specific suicidal act . . . ‘contemplat[ing] some participation in the events leading up to the commission of the final overt act.’”¹¹²

It is quite likely that a person who offers material assistance specific to an instance of suicide, such as instructions or advice about how to commit suicide, could be found guilty of assisting suicide under an assisted suicide statute. For instance, a jury in Minnesota recently found the Final Exit Network, a non-profit company advocating for a right to die, guilty of a felony by aiding in the 2007 suicide of Doreen Dunn.¹¹³ Members of the Final Exit Network advised Ms. Dunn on how to commit suicide using helium asphyxiation, were present when she committed suicide, and removed equipment from the scene afterwards to make the death appear as if it were a result of natural causes.¹¹⁴

110. See *In re Ryan N.*, 112 Cal. Rptr. 2d 620, 640–41 (Cal. Ct. App. 2001) (reversing the conviction of a minor under California’s assisted suicide statute and remanding to the trial court for a “disposition to reflect a finding of attempted violation of [the statute],” reasoning that since the suicide in question was not actually successful, the defendant could only be liable for the lesser offense of attempting to assist a suicide).

111. *Id.* at 632.

112. *McCullum v. CBS, Inc.*, 249 Cal. Rptr. 187, 197–98 (Cal. Ct. App. 1988) (quoting *In re Joseph G.*, 667 P.2d 1176, 1180 (Cal. 1983)) (listing examples including “furnishing the means for bringing about the death—the gun, the knife, the poison, or providing the water, for the person who himself commits the act of self-murder”).

113. Docket, *State v. Final Exit Network*, No. 19HA-CR-12-1718 (Minn. Dist. Ct., May 16, 2012) (showing the disposition of the case at the trial court level as convictions for “Suicide-Aiding,” and “Interference With Dead Body-Concealing Evidence”); see also David Bailey, *Minnesota Jury Convicts Final Exit Group of Assisting 2007 Suicide*, REUTERS (May 14, 2015, 4:28 PM), <http://www.reuters.com/article/us-usa-minnesota-finalexit-idUSKBN0NZ2AI20150514> [<https://perma.cc/KH7R-T9LY>] (describing the circumstances surrounding the conviction).

114. See *Right-to-Die Group Indicted by Minn. Grand Jury*, CBS MINNESOTA (May 14, 2012, 7:27 PM), <http://minnesota.cbslocal.com/2012/05/14/right-to-die-group-indicted-by-minn-grand-jury/> [<https://perma.cc/VKC5-TYCN>] (describing how the Final Exit Network assists in suicides); Bailey, *supra* note 113 (stating that Doreen Dunn died of helium asphyxiation while two members of the Final Exit Network were present).

Although the available facts do not state whether this incident involved encouraging suicide or not, it stands to reason that a person who provides a similar level of assistance while encouraging someone to commit suicide could face criminal liability for encouraging *and* assisting the suicide.

If Massachusetts had a specific statute prohibiting aiding or assisting a suicide attempt, prosecutors in *Commonwealth v. Carter* may well have chosen to proceed under this sort of theory instead of under a theory of involuntary manslaughter.¹¹⁵ Prosecutors could certainly argue that Michelle Carter went beyond mere general encouragement, as she repeatedly badgered her boyfriend into committing suicide, especially when he expressed hesitation to do so.¹¹⁶ Carter also encouraged her boyfriend to look into various types of devices to produce carbon monoxide, and she gave advice about how to set up the machine.¹¹⁷ Finally, Carter also spoke with her boyfriend on the phone immediately before he committed suicide.¹¹⁸ In a text message to a friend after her boyfriend's suicide, Carter stated:

Sam, his death is my fault. Like, honestly I could have stopped it. I was the one on the phone with him and he got out of the car because he [sic—it] was working and he got scared and I fucken told him to get back in, Sam, because I knew he would do it all over again the next day and I couldn't have him live that way

115. See Humphry, *supra* note 109 (“Massachusetts . . . ha[s] no enactments which criminalize aiding, abetting, assisting or counseling suicide.”).

116. See Commonwealth's Response to Defendant's Motion to Dismiss, *supra* note 2, at 12 (“CARTER: You're so hesitant because you keeping [sic] over thinking it and keep pushing it off. You just need to do it, Conrad. The more you push it off, the more it will eat at you. You're ready and prepared. All you have to do is turn the generator on and you will be free and happy. No more pushing it off. No more waiting. CONRAD: You're right. CARTER: If you want it as bad as you say you do it's time to do it today. CONRAD: Yup. No more waiting. CARTER: Okay. I'm serious. Like you can't even wait 'till tonight. You have to do it when you get back from your walk.”).

117. *Id.* at 6 (“Yeah, it will work. If you emit 3200 ppm, of it for five or ten minutes you will die within a half hour. You lose consciousness with no pain. You just fall asleep and die. You can also just take a hose and run that from the exhaust pipe to the rear window in your car and seal it with duct tape and shirts, so it can't escape. You will die within, like, 20 or 30 minutes all pain free.”); *id.* at 8 (“Yes, I think it will work. You say generators produce a lot of CO, so you just turn it on in your car, take some Benadryls before just in case and then you'll breath it in and pass out and die very quickly and peacefully with no pain at all. There is no way you can fail.”).

118. *Id.* at 17.

the way he was living anymore. I couldn't do it. I wouldn't let him.¹¹⁹

While Carter did not engage in any physical acts of assistance, she did provide substantial verbal support and advice to her boyfriend that specifically discussed how to commit suicide when he was hesitant to continue.¹²⁰ It is clear from Michelle Carter's actions that she encouraged her boyfriend to commit suicide, and there is a colorable argument that she assisted his suicide as well.

State v. Melchert-Dinkel provides an even clearer example of an instance where prosecutors can attempt to charge a defendant with assisting suicide instead of encouraging suicide. While the Minnesota Supreme Court struck down the statutory provisions prohibiting advising or encouraging another person to commit suicide, the court specifically upheld the provision prohibiting assisting suicide.¹²¹ As a result, since "[t]he district court . . . made no findings as to whether Melchert-Dinkel's actions also constituted assisting the victims in taking their own lives," the Minnesota Supreme Court remanded the case for further proceedings on that issue.¹²² In late 2014, Melchert-Dinkel was convicted of one count of assisting suicide and one count of attempting to assist a suicide, although the conviction for attempting to assist a suicide was later reversed on appeal.¹²³

119. *Id.* at 21. Carter went on to express regret and state that "it's all my fault because I could have stopped him but I fucken didn't and all I had to say was I love you and don't do this one more time and he'd still be here." *Id.*

120. Conrad Roy expressed hesitation to commit suicide on multiple occasions. He once expressed hesitation because he was worried that the carbon monoxide would kill someone else. In response, Carter told her boyfriend "You're over thinking. They will see the generator and realize you breathed in CO too," and "You could write on a piece of paper and tape it on saying carbon monoxide or something if you're scared." *Id.* at 14–15.

121. *See supra* Part III.B (discussing prosecutions for encouraging suicide under specific statutory provisions).

122. *State v. Melchert-Dinkel*, 844 N.W.2d 13, 25 (Minn. 2014).

123. *State v. Melchert-Dinkel*, No. A15-0073, 2015 WL 9437531, at *1 (Minn. Ct. App. Dec. 28, 2015) ("On remand . . . [t]he district court then found Melchert-Dinkel guilty of assisting Drybrough's suicide and of the lesser-included offense of attempting to assist Kajouji's suicide."). Melchert-Dinkel's conviction for attempting to assist a suicide was reversed on appeal for insufficient evidence. *Id.* at *11 ("The state argues that Melchert-Dinkel attempted to provide Kajouji with what she needed: 'a confidant, a suicide partner, strength, knowledge, assistance, and eventually death.' But assisting suicide under the statute requires more than 'providing general comfort or support' and more than merely providing information, 'courage, confidence, or hope' There is therefore no evidence of any substantial step of assistance.").

In *State v. Melchert-Dinkel*, it is easily arguable that Melchert-Dinkel went beyond mere passive assistance and general encouragement to commit suicide. While he did not provide physical assistance to the victims, he provided specific advice and assistance in the course of encouraging his victims to commit suicide.¹²⁴ In one instance, Melchert-Dinkel provided a victim with information about how to hang himself.¹²⁵ In another, “Melchert-Dinkel tried repeatedly to dissuade [the victim] from her plan and convince her instead to hang herself.”¹²⁶ While Melchert-Dinkel provided no physical assistance in the suicides he encouraged, as he was several countries away, the advice he provided was specific and tailored directly to how the victims could commit suicide.¹²⁷ Following the second conviction, the Court of Appeals noted that there was a “direct, causal relationship because Melchert-Dinkel communicated directly with [the victim] and [the victim] followed Melchert-Dinkel’s instructions.”¹²⁸

Nevertheless, the court glossed over several significant causation issues. Melchert-Dinkel argued that the victim “had already decided to commit suicide by hanging before communicating with Melchert-Dinkel.”¹²⁹ The court dismissed the argument, stating that since the victim followed up by asking a question about other methods for committing suicide, he was “someone who was considering more than one suicide method, not someone who was fully committed to suicide by hanging before communicating with Melchert-Dinkel.”¹³⁰ Since the victim did not even hang himself in the specific manner suggested by Melchert-Dinkel, however, the court’s distinction between considering multiple methods for suicide and being settled on one method is disingenuous.¹³¹ Furthermore, as the victim “also received hanging instructions from another individual,” there does not appear to be a “direct, causal link[] between speech and the suicide” as stated by the court

124. *Melchert-Dinkel*, 844 N.W.2d at 16–17.

125. *Id.* at 16 (“Melchert-Dinkel described how to commit suicide by hanging by tying a rope to a doorknob and slinging the rope over the top of the door.”).

126. *Id.* at 17. The victim did not hang herself, but instead was found in a river six weeks later with ice skates on. *Id.*

127. *Id.* at 16–17. The victims in the charges Melchert-Dinkel faced were from Ottawa, Canada, and Coventry, England. *Id.*

128. *Melchert-Dinkel*, 2015 WL 9437531, at *7 (internal quotations omitted).

129. *Id.*

130. *Id.*

131. *Id.*

and, more importantly, as required by the statute.¹³² Convicting Melchert-Dinkel for assisting a suicide under the statute appears problematic, as the relationship between his actions and the eventual suicide appears rather tenuous.

Prosecuting for aiding or assisting a suicide may not be nearly as attractive to prosecutors as prosecuting for encouraging suicide, however. In some cases, a set of facts that clearly constitutes encouraging suicide may not clearly establish assisting suicide. A person who encourages another to commit suicide might not take that next step and give specific advice or material assistance to carry out the act. For instance, if Michelle Carter had not provided specific advice regarding how her boyfriend should commit suicide, the facts may not have been present to consider an assisting suicide charge, were one available to the prosecutors.¹³³ In *State v. Melchert-Dinkel*, it is possible that, had Melchert-Dinkel refrained from offering specific advice on how his victims should hang themselves, he may not have been convicted for assisting suicide in his second trial. Furthermore, while Melchert-Dinkel was initially convicted of two counts of aiding suicide, one of those was lowered to attempting to assist suicide on remand and was subsequently vacated on appeal.¹³⁴ The prosecutors were unable to charge Melchert-Dinkel with encouraging the victim to commit suicide, and they had insufficient evidence to support a conviction for attempting to assist a suicide, as there was no evidence that Melchert-Dinkel took a “substantial step of assistance” that was “more than ‘providing general comfort or support’ and more than merely providing information, ‘courage, confidence, or hope.’”¹³⁵ This lack of evidence is a problem that other similar prosecutions for encouraging suicide may face as well.

D. *Incitement to Commit a Crime*

A final potential method for prosecuting someone for encouraging suicide is under a theory of inciting someone to commit a crime. If suicide were still a crime in the United States, someone who encouraged

132. *Id.* (alteration in original). The court held that “causation does not require Melchert-Dinkel’s assistance to be the sole cause of the suicide.” *Id.* at *18–19 (internal quotations omitted).

133. Even if Michelle Carter’s actions had constituted assisting suicide, however, she may not have been subject to criminal liability in Massachusetts. See Humphry, *supra* note 109 (noting that Massachusetts has no assisted-suicide statute, but that “the United States contends that case law in . . . Massachusetts . . . indicates that assisting suicide may nevertheless be prosecuted”).

134. *State v. Melchert-Dinkel*, 844 N.W.2d 13, 17–18 (Minn. 2014); *Melchert-Dinkel*, 2015 WL 9437531, at *1, *11.

135. *Melchert-Dinkel*, 2015 WL 9437531, at *11; see *Melchert-Dinkel*, 844 N.W.2d at 24 (holding Minnesota’s statute prohibiting encouraging suicide unconstitutional).

suicide could potentially be prosecuted, as he or she would be encouraging someone to break the law.¹³⁶ In *Brandenburg v. Ohio*,¹³⁷ the Supreme Court held “that the constitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy of . . . law violation *except where such advocacy is directed to inciting or producing imminent lawless action* and is likely to incite or produce such action.”¹³⁸ Here, prosecutors with an applicable statute—any statute from Part III.B—could invoke the incitement exception to the First Amendment so long as they are able to distinguish advocacy and general encouragement from “incitement to imminent lawless action.”¹³⁹

The obvious problem, however, is that suicide is no longer a crime in the United States. Prosecuting someone for encouraging suicide under an incitement theory would require a major expansion of current constitutional law and, almost certainly, a Supreme Court decision. In *State v. Melchert-Dinkel*, for instance, the Supreme Court of Minnesota stated that “[i]t is difficult to articulate a rule consistent with the First Amendment that punishes an individual for ‘inciting’ activity that is not actually ‘lawless action.’”¹⁴⁰ A zealous prosecutor could potentially argue that, while no longer a crime, suicide is a “grave public wrong” that still faces widespread societal condemnation and that the incitement exception should still apply, even though suicide is not, strictly speaking, lawless action.¹⁴¹ Such an argument, however, seems unlikely to succeed. Further, the incitement exception only covers incitement as it pertains to “imminent lawless action,” not incitement to commit socially undesirable conduct.¹⁴² With states considering and adopting assisted suicide legislation, as well as the decriminalization of suicide and the increased resources and public awareness for the problem of suicide, it is difficult to effectively argue that suicide is as widely condemned as it once was.¹⁴³

Furthermore, even if suicide were still a crime anywhere in the United States, a prosecutor would still have to prove that the person

136. See *supra* note 28 and accompanying text (noting that the underlying act of suicide is no longer illegal in the United States).

137. 395 U.S. 444 (1969).

138. *Id.* at 447 (emphasis added).

139. *Id.* at 448–49.

140. *Melchert-Dinkel*, 844 N.W.2d at 20–21. The court also noted “that suicide is no longer a criminal act in any jurisdiction relevant to this matter.” *Id.*

141. Historically, “New York considered suicide a ‘grave public wrong’ but not a crime.” Perr, *supra* note 18, at 92; see also *supra* Part I (discussing in greater detail the historical attitudes towards suicide in Western civilization).

142. *Brandenburg*, 395 U.S. at 447.

143. See *supra* Part I (discussing the modern attitudes towards suicide).

encouraging suicide was inciting *imminent* lawless action in order for the exception to apply.¹⁴⁴ It is not enough for speech to advocate “illegal action at some indefinite future time,” for it must also “incit[e] or produc[e] imminent lawless action.”¹⁴⁵ Whether a case involving encouraging suicide includes incitement of imminent lawless action is fact-dependent and is certainly contestable. As a result, this would certainly not be a preferable method of prosecution, even if suicide were still illegal.¹⁴⁶

IV. PROBLEMS WITH SPECIFIC LEGISLATION CRIMINALIZING ENCOURAGING SUICIDE

As each of the four previously discussed methods for prosecuting someone for encouraging suicide has its own difficulties and potential pitfalls, specific legislation to prohibit encouraging suicide appears necessary.¹⁴⁷ Encouraging suicide is a problem that, generally speaking, society seems to want to address.¹⁴⁸ Victims like Conrad Roy might

144. *Brandenburg*, 395 U.S. at 447.

145. *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (emphasis omitted).

146. In *State v. Melchert-Dinkel*, for instance, the Supreme Court of Minnesota seemingly expressed skepticism that Melchert-Dinkel’s actions could be considered inciting *imminent* unlawful activity. *State v. Melchert-Dinkel*, 844 N.W.2d 13, 20–21 (Minn. 2014) (“Even if that were true . . .”).

147. It is worth noting that the same proximate causation issues discussed in Part III.A would likely be present for any statute prohibiting encouraging suicide, as they would with any prosecution for encouraging suicide under any theory described in this Note. An advantage with prosecuting under a specific statute criminalizing encouraging suicide, however, is that even if the causation of the suicide is debatable, a defendant can still be convicted of a lesser-included offense of attempting to encourage suicide. On remand in *State v. Melchert-Dinkel* for one of the remaining counts, “the district court acquitted Melchert-Dinkel of assisting Kajouji’s suicide because Kajouji did not use Melchert-Dinkel’s suicide method and convicted him of the lesser-included offense of attempting to assist her suicide.” *State v. Melchert-Dinkel*, No. A15-0073, 2015 WL 9437531, at *10 (Minn. Ct. App. Dec. 28, 2015). The court of appeals vacated that conviction for attempting to assist the suicide due to the Supreme Court of Minnesota’s striking down portions of the statute at issue. *Id.* at *10–11.

148. See *supra* note 12 (discussing the outrage and societal disgust towards Michelle Carter’s interactions with Conrad Roy); Aaron Rugar, *Suicide-Encouraging Nurse Melchert-Dinkel is “Very Decent Human Being,” Lawyer Says*, CITY PAGES (Mar. 21, 2014), <http://www.citypages.com/news/suicide-encouraging-nurse-melchert-dinkel-is-very-decent-human-being-lawyer-says-6541659> [<https://perma.cc/86VV-3WYA>] (noting that Melchert-Dinkel’s lawyer, even while defending his client as “a very decent human being,” had to admit that “[he wasn’t] arguing that [Melchert-Dinkel’s] actions should be condoned or that they should be considered anything other than what they were—unsavory, depraved perhaps”); *Online Suicide Advice: Free Speech?*, CBS MINNESOTA (Oct. 28, 2010, 6:37 AM), <https://minnesota.cbslocal.com/>

already be suicidal and find themselves turning to the wrong person for help.¹⁴⁹ Despite the slowly increasing legalization of physician-assisted suicide,¹⁵⁰ the vast amount of suicide prevention resources indicate that society still wants to discourage suicide, albeit less vindictively than it once did.¹⁵¹

As previously mentioned, a number of states have statutes prohibiting encouraging suicide, but the statutes' constitutionality is questionable.¹⁵² Legislation in this area has previously been introduced at the federal level, but it has not passed. One piece of legislation, known informally as Suzy's Law, has been introduced three times but has never passed.¹⁵³ Suzy's Law was originally proposed in 2007 after a young college student committed suicide after suffering from depression and speaking with anonymous people through online message boards.¹⁵⁴ Suzy's Law would not have prohibited encouraging suicide directly. Instead, it would have prohibited "teach[ing] a particular person how to commit suicide, knowing that the person so taught is likely to use that teaching to commit suicide" or "provid[ing] a particular person with material support or resources to help such person commit suicide, knowing that the person is likely to use the support to commit suicide."¹⁵⁵ Suzy's Law would punish offenders with a fine or "imprison[ment] [of] not more than 5 years, or both, but if the death of any person is caused by the offense, the term of imprisonment that may be imposed for the offense is any term of years or for life."¹⁵⁶ Suzy's Law

2010/10/28/online-suicide-advice-free-speech/ [https://perma.cc/3WNQ-UF84] (noting that "[Melchert-Dinkel] said he stopped after about five years because he knew it was wrong" and that "Melchert-Dinkel also called his own actions 'disgusting'").

149. *See supra* notes 68–70 and accompanying text (describing Conrad Roy's alleged mental state prior to him meeting Michelle Carter, as well as the behavior of William Melchert-Dinkel's victims).
150. *See supra* note 33 (listing the states that have legalized physician-assisted suicide, and noting that a number of others are considering legalizing the practice).
151. *See supra* note 29 (discussing a small selection of resources available for suicide prevention).
152. *See supra* note 85 (listing states that criminalize encouraging suicide).
153. Suzanne Gonzales Suicide Prevention Act of 2007, H.R. 940, 110th Cong. (2007); Suzanne Gonzales Suicide Prevention Act of 2009, H.R. 853, 111th Cong. (2009); Suzanne Gonzales Suicide Prevention Act of 2011, H.R. 1183, 112th Cong. (2011).
154. C. Jerome Crow, *Suicide Leads to Suzy's Law*, RED BLUFF DAILY NEWS (Feb. 20, 2007, 12:01 AM), <http://www.redbluffdailynews.com/article/ZZ/20070220/NEWS/702209780> [https://perma.cc/4AY9-PQGA].
155. H.R. 1183 § 1123.
156. *Id.*

never made it out of committee during the three times it was introduced.¹⁵⁷

Current state legislation specifically prohibiting encouraging suicide appears woefully inadequate in light of *State v. Melchert-Dinkel* and the variety of other difficulties facing prosecutions for encouraging suicide.¹⁵⁸ These prosecutions face problems including difficulties in establishing causation,¹⁵⁹ as well as constitutional problems.¹⁶⁰ Furthermore, any new piece of legislation may face additional problems from a policy perspective, including an overbroad scope.¹⁶¹ The remaining sections of the Note seek to illustrate problems that new legislation seeking to prohibit encouraging suicide will likely run into and potential ways to address them. These solutions are not intended to be final or comprehensive but are instead intended as starting points to address problems that will almost certainly face any such legislation.

A. *Constitutional Problems and Strict Scrutiny*

As discussed in Part III.B, since encouraging suicide necessarily involves speech, the First Amendment poses a significant hurdle to creating a statute that prohibits encouraging suicide. No established exception to the First Amendment applies to speech underlying encouraging suicide. For instance, since suicide is no longer illegal in the United States—as the Supreme Court of Minnesota noted in *State v. Melchert-Dinkel*—encouraging suicide is not “inciting or producing imminent lawless action.”¹⁶² For the same reason, encouraging suicide does not fall under the “speech integral to criminal conduct exception.”¹⁶³

157. For a more detailed explanation of Suzy’s Law and the circumstances leading up to Suzanne Gonzales’s suicide, see Mike Gonzales, *Suzy’s Law*, http://rce.csuchico.edu/sites/default/files/professional-development/connect-learn-engage/MediasiteMaterials/Suzy's_Law.pdf [<https://perma.cc/GR3Z-HSYG>] (last visited Feb. 2, 2017) (transcript of a talk given by Suzanne Gonzales’s father, Mike Gonzales, about Suzy’s Law).

158. Many current statutes prohibiting encouraging suicide have similar language to the statute declared unconstitutional in *State v. Melchert-Dinkel*. See *supra* Part III.B (discussing the difficulties facing prosecutions for encouraging suicide under existing state statutes criminalizing it).

159. See *supra* Part III.A (discussing problems with prosecuting encouraging suicide as involuntary manslaughter).

160. See *supra* Part III.B and *infra* Part IV.A (noting the First Amendment problems with statutes designed to target encouraging suicide).

161. See *infra* Part IV.B (discussing difficulties with tailoring a statute criminalizing encouraging suicide narrowly enough to survive strict scrutiny).

162. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); see *supra* Part III.D (discussing the relationship between encouraging suicide and incitement in greater detail).

163. *State v. Melchert-Dinkel*, 844 N.W.2d 13, 19–20 (Minn. 2014) (internal quotations omitted); see *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490,

Since a statute prohibiting encouraging suicide is likely not covered by an exception to the First Amendment, it must instead pass strict scrutiny.¹⁶⁴ Under strict scrutiny, a content-based restriction can still “proscribe protected speech if it can show . . . that the law (1) is justified by a compelling government interest and (2) is narrowly drawn to serve that interest.”¹⁶⁵ Strict scrutiny is a notoriously difficult standard for statutes to pass, and although the Supreme Court has attempted to repudiate the notion that strict scrutiny is “strict in theory, but fatal in fact,” the standard remains quite difficult to satisfy, especially in the context of the First Amendment.¹⁶⁶ It is uncontroversial that preventing suicide is a compelling government interest.¹⁶⁷ Nevertheless, it is important to note that even though preventing suicide is a compelling government interest, the interest may not remain as compelling in the future.

498 (1949) (“It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now.”).

164. *See* *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (“For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”); *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (“The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.”); *Melchert-Dinkel*, 844 N.W.2d at 21 (“The fact that the State’s unprotected-speech arguments are unavailing does not end our inquiry. The government can still proscribe protected speech if it can show that the restriction passes ‘strict scrutiny’”). *But see* Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1996) (arguing that strict scrutiny of content-based speech restrictions is problematic and produces flawed results, and proposing several alternatives to strict scrutiny analysis); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124–25 (1991) (“Borrowing the compelling interest and narrow tailoring analysis is ill advised when all that is at issue is a content-based restriction This said, it must be acknowledged that the compelling interest inquiry has found its way into our First Amendment jurisprudence of late”).
165. *Melchert-Dinkel*, 844 N.W.2d at 21.
166. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2421 (2013) (“Strict scrutiny must not be ‘strict in theory, but fatal in fact.’”); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (“Finally, we wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’”); Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007) (discussing the historical origins of strict scrutiny and the complex practice of applying the test).
167. *Melchert-Dinkel*, 844 N.W.2d at 22 (“[T]he State has a compelling interest in preserving human life.”); *see also* *Roe v. Wade*, 410 U.S. 113, 162–63 (1973) (discussing the compelling interest the government has in “protecting the potentiality of human life”).

With the increase in states considering or even permitting physician-assisted suicide, societal attitudes condemning suicide may be shifting.¹⁶⁸ Given the continuous condemnation of suicide throughout history, however, it is difficult to imagine that preventing suicide is not a compelling government interest.¹⁶⁹

In order for a statute to pass strict scrutiny, it must also be narrowly tailored to the compelling government interest.¹⁷⁰ To do so, it must meet several criteria.¹⁷¹ First, it must actually advance the compelling government interest.¹⁷² Second, it must be the least restrictive method of achieving the compelling government interest.¹⁷³ This component is especially important, as it focuses the inquiry on the necessity of the restriction of speech, and not on whether or not the restriction serves the stated purpose.¹⁷⁴ Furthermore, the statute also cannot be overinclusive, meaning it prohibits more speech than is necessary to achieve the government's compelling interest.¹⁷⁵ Although this seems quite similar to the requirement that the statute must be the least restrictive means of advancing the compelling government interest, "the prohibition against overinclusiveness suggests that a statute might be condemned for lack of narrow tailoring even if no less

168. *See supra* note 33 (listing the states that have enacted physician-assisted suicide statutes).

169. *See supra* Part I (discussing the historical attitudes towards suicide in Western civilization).

170. *Melchert-Dinkel*, 844 N.W.2d at 21.

171. *See* Volokh, *supra* note 164, at 2422–23 (describing four components of the narrow tailoring prong of strict scrutiny); Fallon, *supra* note 166, at 1326–32 (describing four components courts consider when analyzing whether a statute is narrowly tailored).

172. *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 226 (1989) (stating that the government interest at issue, "maintaining a stable political system," is certainly compelling, but also that "California . . . never adequately explains how banning parties from endorsing or opposing primary candidates advances that interest").

173. *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004) ("The purpose of the test is not to consider whether the challenged restriction has some effect in achieving Congress' goal The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal").

174. *Id.*

175. *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 500–01 (1985) (holding that the statute was so overbroad as to constitute a "wholesale restriction of clearly protected conduct"); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121–22 (1991) (holding that a New York law, intended to keep criminals from profiting off of their crimes, "is significantly overinclusive," and would encompass too much speech).

restrictive alternative existed.”¹⁷⁶ Likewise, a statute cannot be under-inclusive, restricting significantly less speech than the compelling government interest requires.¹⁷⁷ Underinclusiveness is closely tied to whether the statute actually advances the compelling government interest and, if present, “diminish[es] the credibility of the government’s rationale for restricting speech in the first place.”¹⁷⁸

The narrowly tailored requirement would be the most difficult for such a statute to meet in seeking to survive strict scrutiny. A significant problem with any legislation intending to prohibit encouraging suicide is that it runs a substantial danger of being overinclusive and criminalizing otherwise innocent conduct. Current statutes prohibiting encouraging suicide, such as those discussed in Part III.B, are so broadly written as to make it unclear what conduct is covered by the legislation. For instance, the California statute states that “[e]very person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony.”¹⁷⁹ Aiding, advising, and encouraging are not defined in the statute and are left somewhat ambiguous, so it is not initially clear exactly what those terms mean and what conduct is prohibited.

In *State v. Melchert-Dinkel*, when confronted with a similarly worded statute that did not define the key terms, the Supreme Court of Minnesota gave the “statutory terms their common and ordinary meanings.”¹⁸⁰ After consulting a dictionary, the court determined that the ordinary meaning of the word “encourage” is to “[g]ive courage, confidence or hope” and that the ordinary meaning of the word “advise,” which is also not defined, is to “[i]nform.”¹⁸¹ The Supreme Court of Minnesota went on to hold that the portion of the statute that criminalized advising and encouraging suicide did not survive strict scrutiny as those “prohibitions [were] not narrowly drawn to serve the State’s compelling interest in preserving human life.”¹⁸² The court noted that “a prohibition on advising or encouraging includes speech that is more tangential to the act of suicide and the State’s compelling interest

176. Fallon, *supra* note 166, at 1328.

177. *City of Ladue v. Gilleo*, 512 U.S. 43, 52–53 (1994); *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002).

178. *Gilleo*, 512 U.S. at 52.

179. CAL. PENAL CODE § 401 (West 2010). *See supra* note 85 (listing jurisdictions that have statutes prohibiting encouraging suicide).

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

181. *Id.* (alterations in original).

182. *Id.* at 23–24 (“While the prohibition on assisting covers a range of conduct and limits only a small amount of speech, the common definitions of ‘advise’ and ‘encourage’ broadly include speech that provides support or rallies courage.”).

in preserving life than is speech that ‘assists’ suicide.”¹⁸³ The court also voiced concern that the prohibitions at issue “are broad enough to permit the State to prosecute general discussions of suicide with specific individuals or groups.”¹⁸⁴

While it is important to ensure that the full problem of encouraging suicide is addressed by any new legislation, it is equally important to ensure that other conduct is not caught up in a statute that is not intended to address the conduct. A statute prohibiting encouraging suicide that also prohibits otherwise innocent conduct would be problematic at best, and counterproductive and harmful at worst. A family member attempting to talk someone out of suicide by using “tough love” with the best of intentions could be prosecuted under a poorly worded statute.¹⁸⁵ It is not difficult to imagine a scenario in which a family member, however misguided, says something that, without context, seems to encourage a loved one to kill himself while intending the exact opposite effect. A poorly worded statute could also make more established suicide prevention strategies, such as telephone hotlines, more difficult to implement. Even if this sort of conduct is not actually criminalized, it still has the potential to chill speech and discourage people from engaging in otherwise lawful conduct for fear of being punished.¹⁸⁶

A poorly worded statute could also criminalize or chill undesirable activity that, while certainly not desirable, is not meant to be criminalized. For instance, poor wording could outlaw telling someone in jest to take a long walk off a short pier or even an immature teenager in a video game telling someone to kill themselves in real life. Bullying and harassment are certainly undesirable in their own right, and these can occasionally take the form of telling people to kill themselves.¹⁸⁷ In one instance, “constant transphobia on the internet” combined with

183. *Id.*

184. *Id.* at 24.

185. See *Enabling..*, SUICIDE GRIEF SUPPORT FORUM, <http://suicidegrief.com/viewtopic.php?f=18&t=2554> [<https://perma.cc/S83L-47TE>] (last visited Mar. 10, 2016) (providing an example of tough love and the potential reasoning for why people might choose to use it).

186. See generally Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect,”* 58 B.U. L. REV. 685 (1978) (discussing the concept of the chilling effect and the underlying policy considerations underlying the Supreme Court’s decisions in this area).

187. For examples of how bullying can lead someone to contemplate suicide, see *supra* note 45.

“anonymous trolls goad[ing] [the victim] to kill herself” led to the suicide of a transgender video game developer.¹⁸⁸ One anonymous commenter posted “DO IT, if you’re such a weak willed thin skinned dips— then f—— do it.”¹⁸⁹ While this conduct is certainly reprehensible, and even though society may well have an interest in criminalizing it, this sort of conduct is best addressed under new or existing bullying and harassment statutes, as it can often differ significantly from the instances of encouraging suicide that this Note contemplates.¹⁹⁰

B. Narrowly Tailoring a Statute Criminalizing Encouraging Suicide

Despite the difficulty inherent in creating a statute prohibiting encouraging suicide, a carefully constructed statute could well survive strict scrutiny so long as it is narrowly tailored, as discussed earlier. One way to potentially address an overbroad statute is to explicitly include a high *mens rea*, such as knowingly. Under the Model Penal Code:

A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.¹⁹¹

Alternatively, a statute could include the *mens rea* of purposely:

A person acts purposely with respect to a material element of an offense when:

188. Michael E. Miller, ‘*Killed Myself. Sorry.*’: *Transgender Game Developer Jumps Off Bridge After Online Abuse*, WASH. POST (Apr. 28, 2015) (internal quotation marks omitted), <https://www.washingtonpost.com/news/morning-mix/wp/2015/04/28/killed-myself-sorry-transgender-game-developer-jumps-off-bridge-after-online-abuse/> [<https://perma.cc/42JA-7W65>].

189. *Id.* While some comments were supportive, others were abusive. One commenter wrote, “[j]umping off a bridge is not rocket science.” *Id.*

190. *But see* Pospychala, *supra* note 45 (showing that bullying can often take the form of encouraging suicide). *See also* Emily F. Suski, *Beyond the Schoolhouse Gates: The Unprecedented Expansion of School Surveillance Authority Under Cyberbullying Laws*, 65 CASE W. RES. L. REV. 63 (2014) (discussing problems with cyberbullying statutes under the First and Fourth Amendments).

191. MODEL PENAL CODE § 2.02(2)(b) (AM. LAW INST., Proposed Official Draft 1985).

(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.¹⁹²

A high *mens rea* would ensure that some of the previously mentioned examples in Part IV.A would not be covered under the statute, as many of them, such as “tough love” and online harassment, would likely not meet the standard for either *mens rea*.

In addition, some level of interaction between the defendant and the victim should be required. This level of interaction between the defendant and the victim should not simply be a minor conversation between the defendant and the victim, but should instead be some substantial conversation and interaction about committing suicide and—as a result of the conversation, whether in whole or in part—the victim is in imminent danger of committing suicide. Encouraging suicide generally has some level of interaction between the defendant and the victim before the victim commits suicide.¹⁹³ With this requirement, unsolicited online comments and harassment, while undesirable, would be excluded from the encouraging suicide statute, as those problems are better addressed with different legislation. Further, requiring that the conduct at issue results in imminent danger of committing suicide helps exclude conduct with significant causation issues.

Another way to narrowly tailor the scope of a statute criminalizing encouraging suicide so as not to be overinclusive would be to require prosecutors to show that the defendant both subjectively intended for his conduct to result in a suicide and that, objectively, the victim’s suicide was a reasonably foreseeable result of the defendant’s conduct. Requiring prosecutors to prove both subjective and objective components would help ensure that otherwise innocent speech would not be barred. For example, the Supreme Court of California has held that prosecutions for attempted criminal threats “require proof that the defendant had a subjective intent to threaten *and* that the intended threat under the circumstances was sufficient to cause a reasonable

192. *Id.* § 2.02(2)(a).

193. *State v. Melchert-Dinkel*, 844 N.W.2d 13, 16–17 (Minn. 2014) (noting that communication between the victims and Melchert-Dinkel took the form of several online conversations); Commonwealth’s Response to Defendant’s Motion to Dismiss, *supra* note 2 (noting throughout that communication between the defendant and the victim took the form of extensive text message conversations and telephone calls).

person to be in sustained fear.”¹⁹⁴ Furthermore, in *Elonis v. United States*, the Supreme Court held that a federal threat statute requires a jury to be instructed about the defendant’s mental state in addition to whether “a reasonable person would regard Elonis’s communications as threats.”¹⁹⁵ Using a subjective and objective component in a statute criminalizing encouraging suicide would ensure both that a defendant intended to encourage the victim to commit suicide and that the victim’s suicide was an objectively foreseeable result of the defendant’s speech. These requirements would help keep the statute narrowly tailored and inclusive of only the intended conduct.

CONCLUSION

While it is undoubtedly desirable to prosecute someone for encouraging suicide, such prosecutions, whatever form they may take, face a number of practical challenges that may prove fatal. Western society has a long history of condemning and punishing suicide, and it is certainly something that governments have a compelling interest in preventing. Although the act itself is no longer punished directly, suicide is still highly discouraged, as evidenced by continuing suicide prevention efforts.

Even though prosecutors currently have several different options with which to prosecute encouraging suicide—potentially even successfully—none of these options are ideal, and several have problems so severe that the options might as well not exist. In addition, the severe underlying problems with the current methods for prosecuting encouraging suicide may well chill prosecutors from bringing charges for conduct that realistically should be criminalized. Fortunately, however, a well-constructed statute criminalizing encouraging suicide might well survive strict scrutiny analysis. While strict scrutiny is a notoriously difficult standard, narrowly tailoring such a statute does not appear to be an impossible task.

Encouraging suicide is only recently receiving increased media attention, and the legal issues surrounding it will only continue to grow in number and complexity as the problem is more closely scrutinized. Furthermore, given the relative novelty of encouraging suicide in the digital age, it is not clear whether this problem is best addressed by

194. *People v. Chandler*, 332 P.3d 538, 548–49 (Cal. 2014) (“Accordingly, when a defendant is charged with attempted criminal threat, the jury must be instructed that the offense requires not only that the defendant have an intent to threaten but also that the intended threat be sufficient under the circumstances to cause a reasonable person to be in sustained fear.”).

195. *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015) (“Federal criminal liability generally does not turn solely on the results of an act without considering the defendant’s mental state.”).

specific legislation criminalizing it or instead through alternative means designed to combat the underlying issues surrounding suicide in a non-criminal manner. As the problem continues to receive media coverage and grow in prominence, it is important to remember not to adopt a solution hastily, but instead to address the problem thoughtfully and deliberately so as to thoroughly address the problem and to avoid the almost inevitable legal challenges.

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