

ARTICLE

## Speech and Suicide—The Line of Legality

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### Abstract

While physician-assisted suicide legislation is being drafted and passed across the United States, a gray-area continues to exist in regard to the legality of a lay person's assistance with suicide. Several high-profile cases have been covered in the media, namely that of Michelle Carter in Massachusetts and William Melchert-Dinkel in Minnesota, but there is also a growing volume of anonymous pro-suicide materials online. Pro-suicide groups fly under the radar and claim to help those desiring to take their own lives. This paper aims to identify the point at which an individual or group can be held civilly or criminally liable for assisting suicide and discusses how the First Amendment can be used to shield authors from such liability.

**Keywords:** speech; suicide; ethics; First Amendment

### I. Introduction

On July 12, 2014, 18-year-old Conrad Roy drove to a K-Mart, assembled a gasoline-powered water pump in the back seat of his truck, and poisoned himself with carbon monoxide.<sup>1</sup> In the week leading up to Roy's death, his 17-year-old girlfriend, Michelle Carter, researched methods for committing suicide, pressured him, and counseled him to overcome his fears.<sup>2</sup> At times when Roy changed his mind about his desire to kill himself, Carter complained that he always had an excuse for not following through. On the night that he died, Roy was on the phone with Carter for 47 minutes.<sup>3</sup> In a panic after his death, Carter texted a friend that Roy had gotten out of the truck after he got scared and she ordered him back in.<sup>4</sup> The court focused on how Carter took advantage of Roy's mental vulnerability; he had been treated for depression for several years following a suicide attempt several years prior.<sup>5</sup> Knowing he was suicidal, Carter used her words to cultivate an environment likely to result in harm to Roy, which established a duty to prevent such injury.<sup>6</sup> Rather than mitigating the danger or rendering aid, however, she allowed

<sup>1</sup>C.M. Frankie, *The Death of Conrad Roy: Michelle Carter's 'Virtual Presence' and 'Failure to Act' in Texting Case*, A&E (March 28, 2022), <https://www.aetv.com/real-crime/michelle-carter-conrad-roy> [<https://perma.cc/3TMY-RD6R>]; Michelle Williams, *Michelle Carter Trial: In Days Before Conrad Roy's Death, Teens Shared Suicidal Plan, Selfies*, MASS LIVE (June 9, 2017), [https://www.masslive.com/news/2017/06/michelle\\_carter\\_trial\\_in\\_days.html](https://www.masslive.com/news/2017/06/michelle_carter_trial_in_days.html) [<https://perma.cc/E8BG-A5WL>].

<sup>2</sup>Carla Zavala, *Manslaughter by Text: Is Encouraging Suicide Manslaughter?*, 47 SETON HALL L. REV. 297, 298 (2016).

<sup>3</sup>*Id.* at 298.

<sup>4</sup>Clay Calvert, *The First Amendment and Speech Urging Suicide*, 94 TUL. L. REV. 79, 82 (2019).

<sup>5</sup>*Commonwealth v. Carter*, 52 N.E.3d 1054, 1057 (Mass. 2016); Guyora Binder & Luis Chiesa, *The Puzzle of Inciting Suicide*, 56 AM. CRIM. L. REV. 65, 72 (2019).

<sup>6</sup>*Id.* at 77; see also ABC News, *Judge Announces Verdict in Texting Suicide Trial*, FACEBOOK (June 16, 2017), [https://www.facebook.com/watch/live/?ref=watch\\_permalink&v=10155909880378812](https://www.facebook.com/watch/live/?ref=watch_permalink&v=10155909880378812) [<https://perma.cc/SX99-6959>]; AJ Willingham, *The 5 Reasons for the Verdict in the Michelle Carter Trial*, CNN (June 16, 2017, 5:51 PM), <https://www.cnn.com/2017/06/16/us/michelle-carter-guilty-involuntary-manslaughter-texting-suicide-trnd/> [<https://perma.cc/W9BV-KGPC>].

him to proceed, later texting a friend, “I could’ve easily stopped him or called the police, but I didn’t.”<sup>7</sup> By taking advantage of Roy’s diminished capacity for choice and subsequently failing to rescue, Carter’s words played an integral role in his death. The Commonwealth argued that Carter’s “wanton and reckless conduct” resulted in a high likelihood that “substantial harm would result to another,” thereby satisfying the elements for involuntary manslaughter.<sup>8</sup> Based on the determination that a “reasonable person would have realized that they could have influenced Roy to kill himself,” Carter was convicted of involuntary manslaughter in juvenile court in Massachusetts.<sup>9</sup>

What if Carter had instead given Roy a book explaining how to commit suicide, such as *Five Last Acts*—*The Exit Path* to guide him? *Five Last Acts* is an informational guide to suicide.<sup>10</sup> In the 800-page book, the author provides suicide methods and includes the pros and cons of each approach, as well as photos and diagrams to ensure a successful attempt. Other books and websites exist to provide similar guidance and instruction as well.<sup>11</sup> Would Carter’s liability in Roy’s death differ if she instead gave him a book and bookmarked the chapter on carbon monoxide poisoning? While Roy had already found information online regarding carbon monoxide as a potential suicide method, Carter shared additional research as to how to effectively take his own life.<sup>12</sup> What if she had relayed him to a pro-suicide website that did the same thing?

As cell phones, computers, and social media have created environments ripe for harmful speech, there is a need to reconsider whether this type of information should be readily available to the public. While it is unclear how Michelle Carter learned about the specifics of carbon monoxide poisoning (among other methods), one can assume that she found the information on the internet or in a book similar to *Five Last Acts*. Without access to this information, it is less likely that Carter could have convinced Roy to take his own life.

There exists a careful distinction between legal and illegal conduct in this area of the law because there is a meaningful difference between abstract speech and accessory liability for a death.<sup>13</sup> Assisting or encouraging suicide raises the legal questions of intent and foreseeability, while also implicating the constitutional right to free speech. This paper will attempt to locate the fine line of criminal liability when assisting someone with suicide, with a focus on distinguishing *Commonwealth v. Carter*<sup>14</sup> from the book *Five Last Acts*.<sup>15</sup> In addition, this paper will discuss the possibilities for mitigating harm from the publications and speech that enable these suicides. The cyber environment facilitates this public health problem, and steps should be taken to mitigate further assisted suicides. This must be done carefully, however, as to not chill the freedom of speech and violate the First Amendment.

As the law exists currently, it is difficult, if not impossible, to hold authors accountable for their contributions to suicides. Mitigation would come at the expense of First Amendment freedoms, which to

(quoting Judge Moniz’ finding that Carter “fail[ed] to act where she had a self-created duty to Mr. Roy, since she had put him into that toxic environment”).

<sup>7</sup>Kristine Phillips, *Her Texts Pushed Him to Suicide, Prosecutors Say. But Does That Mean she Killed Him?*, WASH. POST (June 6, 2017, 3:34 PM), <https://www.washingtonpost.com/news/morning-mix/wp/2017/06/06/just-do-it-babe-woman-accused-of-pushing-her-boyfriend-to-kill-himself-is-on-trial-this-week/> [<https://perma.cc/Z5R2-AV52>].

<sup>8</sup>See Kaitlin M. Phillips, *Sticks and Stones May Break Your Bones, but Words Can Also Kill: Limiting Criminal Liability for Words*, 2019 U. ILL. L. REV. 1741, 1757 (2019).

<sup>9</sup>She served eleven months out of her fifteen-month sentence. Eric Levenson, *Michelle Carter, Convicted in Texting Suicide Case, Released from Prison*, CNN (Jan. 23, 2020, 11:25 AM), <https://www.cnn.com/2020/01/23/us/michelle-carter-text-suicide-release/index.html> [<https://perma.cc/G4M3-9ZTN>]; Binder & Chiesa, *supra* note 5, at 75.

<sup>10</sup>CHRIS DOCKER, *FIVE LAST ACTS—THE EXIT PATH* (2d ed. 2015).

<sup>11</sup>E.g., Paul Wong et al., *Accessing Suicide-Related Information on the Internet: A Retrospective Observational Study of Search Behavior*, 15 J. MED. INTERNET RSCH 1, 7 (2013) (two pro-suicide websites analyzed included churchofeuthanasia.org and suicidemethods.net); see also BOUDEWIJN CHABOT, *DIGNIFIED DYING: A GUIDE* (2015); DORIS PORTWOOD, *COMMON SENSE SUICIDE: THE FINAL RIGHT* (1984); BOUDEWIJN CHABOT, *STOPPING EATING AND DRINKING: A GUIDE* (2015).

<sup>12</sup>Phillips, *supra* note 7.

<sup>13</sup>*Commonwealth v. Carter*, 115 N.E.3d 559, 571 (New Bedford Juv. Ct. Aug. 21, 2015) (No. 15YO0001NE).

<sup>14</sup>See generally *id.* Because Carter’s case was in juvenile court, some of the documents in *Commonwealth v. Carter* are not available online.

<sup>15</sup>DOCKER, *supra* note 10.

many is not an acceptable tradeoff. The victims affected are especially vulnerable and deserve protection, but any action taken must be balanced with individual liberty. Examples of potential interventions will be described throughout. By simply identifying more precisely where the line of criminal liability for encouraging or assisting suicide falls, there may be a positive effect on public health. For instance, someone may think twice about “helping” a friend commit suicide if they are aware of the consequences.

Section II provides an explanation of suicide assistance as a public health issue. Section III describes the criminalization of suicide, both historically and in the modern day. This section will provide examples of suicides (1) through physical assistance, (2) by remote communications, and (3) through static publications in books or online. Section IV will explain the First Amendment protections of pro-suicide speech. Lastly, Section V will conclude with final thoughts and offer future directions, bearing in mind the preservation of the individual right to free speech.

## II. Suicide Assistance as a Public Health Problem

Suicide is the eleventh leading cause of death in the United States<sup>16</sup> and the third leading cause of death among young people.<sup>17</sup> Depression and other mental disorders are considered contributing circumstances or risk factors for suicide.<sup>18</sup> Stressful life events and stressors such as bullying may contribute to suicide risk as well.<sup>19</sup> Unfortunately, from its associated neurobiology and pathophysiology, little is understood about suicide and what makes suicide prevention programs effective.<sup>20</sup> The “inability to predict suicide likely stems from the strongly opportunistic nature of suicide among adolescents, because feelings about suicide require a unique constellation of opportunity factors to be realized.”<sup>21</sup> Evidence-based interventions are available to help those at risk, but it is difficult to tell who will act on suicidal thoughts.<sup>22</sup>

Some research correlates the vocalization of suicidal ideations with an increased likelihood of an attempt; some type of suicidal communication precedes about eighty-percent of adolescent suicide attempts.<sup>23</sup> However, other researchers discovered that “telling someone about the suicide plan” had no impact on the medical severity of the attempt.<sup>24</sup> Furthermore, additional investigators identified a higher risk for lethality with less communication of suicide plans.<sup>25</sup> Regardless, in instances where teens do express ideations but their feelings are invalidated, their likelihood for attempting suicide increases.<sup>26</sup> Thus, where friends or family encourage the suicide as opposed to assisting the individual in seeking

<sup>16</sup>*Suicide Statistics*, AM. FOUND. FOR SUICIDE PREVENTION, <https://afsp.org/suicide-statistics/> [<https://perma.cc/LFL7-S4S4>] (last visited Jan. 27, 2022).

<sup>17</sup>S. J. Cash & J. A. Bridge, *Epidemiology of Youth Suicide and Suicidal Behavior*, 21 CURRENT OP. IN PEDIATRICS 613, 614 (2009).

<sup>18</sup>Deborah M. Stone et al., *Vital Signs*, 67 MORBIDITY AND MORTALITY WKLY. REP. 617, 618 (June 8, 2018); see also *Suicide Prevention*, NAT'L INST. OF MENTAL HEALTH, [https://www.nimh.nih.gov/health/topics/suicide-prevention#part\\_2351](https://www.nimh.nih.gov/health/topics/suicide-prevention#part_2351) [<https://perma.cc/F7JP-GNQV>] (last visited Jan. 27, 2022).

<sup>19</sup>Evelina Landstedt & Susanne Persson, *Bullying, Cyberbullying, and Mental Health in Young People*, 42 SCANDINAVIAN J. OF PUB. HEALTH 393, 393 (2014); see also *Suicide Prevention*, NAT'L INST. OF MENTAL HEALTH, [https://www.nimh.nih.gov/health/topics/suicide-prevention#part\\_2351](https://www.nimh.nih.gov/health/topics/suicide-prevention#part_2351) [<https://perma.cc/F7JP-GNQV>] (last visited Jan. 27, 2022).

<sup>20</sup>Barbara D'Orio & Steven J. Garlow, *Suicide Prevention: A Vital National Public Health Issue*, 27 J. OF HEALTH AND HUM. SERV. ADMIN. 123, 125 (2004).

<sup>21</sup>Peter S. Bearman & James Moody, *Suicide and Friendships Among American Adolescents*, 94 AM J. PUB. HEALTH 89, 94 (2004).

<sup>22</sup>*Id.*

<sup>23</sup>Michael Handwerk et al., *The Relationship Between Lethality of Attempted Suicide and Prior Suicidal Communications in a Sample of Residential Youth*, 21 J. OF ADOLESCENCE 407, 407-414 (1998).

<sup>24</sup>Monica Swahn & Lloyd Potter, *Factors Associated with the Medical Severity of Suicide Attempts in Youths and Young Adults*, 32 SUICIDE AND LIFE-THREATENING BEHAV. 21, 27-28 (2002).

<sup>25</sup>Handwerk et al., *supra* note 23.

<sup>26</sup>Ronnie Cohen, *Parent and Peer Disapproval can Lead to Teen Suicide*, REUTERS (Oct. 20, 2014, 5:32 PM), <https://www.reuters.com/article/us-teen-suicide-risks/parent-and-peer-disapproval-can-lead-to-teen-suicide-idUKKCN0I92B320141020> [<https://perma.cc/ZV8V-4DHX>].

mental health assistance, there may be an increased risk of attempt. This increased risk of a suicide attempt supports the need for stricter restrictions on pro-suicide speech.

In addition to suicide as a problem on its own, *assisting* suicide poses an additional public health concern. Research focuses on “the critical unknown,” which is “that factor (or factors) that differentiates the person with mental illness who does not commit suicide from the person with mental illness who eventually completes suicide.”<sup>27</sup> Assistance or encouragement have the potential to be one of those factors. The World Health Organization (WHO) emphasizes that “most people who engage in suicidal behavior are ambivalent about wanting to die, and suicides can be impulsive responses to acute stressors.”<sup>28</sup> A person contemplating suicide may follow through when given directions or support from an outside force. Because those who assist with suicide intervene at a critical tipping point, their involvement poses a perilous scenario.

Technology makes it easy to hide behind a computer or phone screen and encourage harmful behavior.<sup>29</sup> To analogize, in the military, some may say it is easier for someone to kill while remotely piloting a drone than it is to pull the trigger on the battlefield.<sup>30</sup> A similar type of moral disengagement occurs behind a computer screen.<sup>31</sup> The physical detachment between the two parties removes the reality and emotion.<sup>32</sup>

Where involvement in the suicide is apparent, those like Michelle Carter have the potential to be convicted. However, the question remains: where did Carter get the instructions for carbon monoxide poisoning that ultimately contributed to Roy’s death? Those who provide the information to facilitate suicide are a degree removed from the death and, as such, are often afforded protection from criminal liability. Yet, without them, some deaths may not occur. By providing easy-to-access and easy-to-follow information, pro-suicide books and websites may be the deciding factor for those contemplating whether to act on suicidal ideations. Research suggests that the incidence of suicide can be lowered in many ways: by decreasing the availability of means, increasing crisis intervention programs available, treating psychiatric illness, among others.<sup>33</sup> In the case of assisted suicide, there exists an additional angle for intervention. Approaching suicide prevention by banning outsiders’ help could be a unique tactic for mitigation. This paper will discuss whether these authors should be held accountable.

### III. Assisting Suicide as a Crime

At the most fundamental level, a crime requires (1) a guilty mind and (2) a guilty act.<sup>34</sup> For a crime to take place, one must have the mindset or *mens rea*, and then perform the prohibited act, or *actus reus*.<sup>35</sup> Criminal statutes define the elements needed to fulfill the offense, including the required *mens rea*.<sup>36</sup> Some crimes, like first degree murder, require purposeful, malicious intent.<sup>37</sup> Other crimes, such as

<sup>27</sup>D’Orio, *supra* note 20, at 125.

<sup>28</sup>LIVE LIFE: PREVENTING SUICIDE, WORLD HEALTH ORG. (Sept. 3, 2018).

<sup>29</sup>Arlin Cuncic, *The Psychology of Cyberbullying*, VERY WELL MIND (Feb. 19, 2022), <https://www.verywellmind.com/the-psychology-of-cyberbullying-5086615> [<https://perma.cc/35BZ-7NBG>]; see generally Kathryn L. Modecki et al., *Bullying Prevalence Across Contexts: A Meta-Analysis Measuring Cyber and Traditional Bullying*, 55 J. ADOLESCENT HEALTH 602, 611 (2014) (estimating that 15% of teens suffer from cyberbullying).

<sup>30</sup>Brett Reichert, *Moral Disengagement and Support for Military Force: A Review*, 12 BUS. & PUB. ADMIN. STUDS. 37, 38 (Feb. 19, 2019).

<sup>31</sup>Chris Cole, Mary Dobbing & Amy Hailwood, *Convenient Killing: Armed Drones and the ‘Playstation’ Mentality*, THE FELLOWSHIP OF RECONCILIATION (Sept. 20, 2010), <https://dronewarsuk.files.wordpress.com/2010/10/conv-killing-final.pdf> [<https://perma.cc/83SS-ZV8M>].

<sup>32</sup>This is known as the “online disinhibition effect.” John Suler, *The Online Disinhibition Effect*, in 7 CYBERPSYCHOLOGY & BEHAV. 321 (2004).

<sup>33</sup>Brian L. Mishara, *Suicide: A Public Health Concern?*, 84 CANADIAN J. OF PUB. HEALTH 222, 223 (1993).

<sup>34</sup>See, e.g., *State v. Eaton*, 143 Wash. App. 155, 160 (2008).

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

<sup>36</sup>See Criminal Intent, Black’s Law Dictionary (11th ed. 2019).

<sup>37</sup>See, e.g., *State v. Guthrie*, 461 S.E.2d 163, 181 (W. Va. 1995).

involuntary manslaughter, require recklessness which is a lack of regard for the consequences of one's actions.<sup>38</sup> For Michelle Carter, the Commonwealth had to prove Carter committed an unlawful homicide unintentionally caused by an act (*actus reus*) which constituted such a disregard of probable harmful consequences to another as to amount to wanton or reckless conduct (*mens rea*).<sup>39</sup>

Historically, suicide was considered murder.<sup>40</sup> Because the murderer was dead, however, they could not be penalized directly. Instead, the punishment was the forfeiture of personal property to the king, thereby penalizing the decedent's family.<sup>41</sup> In some instances, assisting in suicide was considered murder as well.<sup>42</sup> However, this type of killing could be prosecuted as aiding and abetting, as opposed to outright murder.<sup>43</sup> Those physically present at the scene of the suicide were charged more harshly than those who were not.<sup>44</sup>

Such harsh punishments did not translate from English law to the colonies.<sup>45</sup> Originally, a majority of the American colonies retained the common law classification of suicide as a felony.<sup>46</sup> However, beginning in the late 1700s, states eliminated penalties for suicide one by one.<sup>47</sup> The rationale for such eliminations was evidenced in a 1796 treatise by Zephaniah Swift, which explained that states eliminated the legal prohibitions against suicide to avoid punishing the victim's family and *not* because that individual had a right to kill himself.<sup>48</sup>

Today, only South Carolina and Alabama still consider suicide a crime, although there has been no prosecution for suicide in these states.<sup>49</sup> Assisting suicide, however, has remained a crime.<sup>50</sup> Others propose that, under common law, accountability for assisting suicide is established under a theory of accomplice liability.<sup>51</sup> Assisting suicide extends liability for the conduct of another. It is important to recognize that accomplices can be punished just as harshly as the principal perpetrators they assist.<sup>52</sup>

"Today, when an accomplice assists in the commission of an offense, the accomplice becomes derivatively responsible for that crime, even though someone else ... committed it."<sup>53</sup> The actions required for accomplice liability can be traditional aiding and abetting, but also "counseling ... advising ... [or] ordering," more generally.<sup>54</sup> As such, the accomplice does not need to be present at the scene.<sup>55</sup> Regardless, the accomplice must intend to help, though "intent" means different things in different jurisdictions.<sup>56</sup> For example, the Model Penal Code (MPC), adopted by some states, says that an accomplice must act "with the purpose of promoting or facilitating the commission of the offense."<sup>57</sup> In contrast, other states only require knowledge that their actions will assist in the commission of the crime.<sup>58</sup>

<sup>38</sup>See, e.g., *People v. Williams*, 688 N.E.2d 320, 323 (Ill. App. Ct. 1997).

<sup>39</sup>*Commonwealth v. Gonzalez*, 443 Mass. 799, 808, 824 N.E.2d 843 (2005), quoting *Commonwealth v. Godin*, 374 Mass. 120, 126, 371 N.E.2d 438 (1977); see also Calvert, *supra* note 4, at 85-86.

<sup>40</sup>Zavala, *supra* note 2, at 305.

<sup>41</sup>David S. Markson, *The Punishment of Suicide – A Need for Change*, 14 VILL. L. REV. 463, 465 (1969).

<sup>42</sup>*Id.* at 473.

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

<sup>44</sup>Donald M. Wright, *Criminal Aspects of Suicide in the United States*, 7 N.C. CENT. L. REV. 156, 161 (1975).

<sup>45</sup>Alex B. Long, *Abolishing the Suicide Rule*, 113 Nw. U. L. REV. 767, 776 (2019).

<sup>46</sup>Suzanne M. Alford, *Is Self-Abortion a Fundamental Right?*, 52 DUKE L. J. 1011, 1027 (2003).

<sup>47</sup>*Id.*

<sup>48</sup>*Id.*; see also Thomas J. Marzen, et al., *Suicide: A Constitutional Right?*, 24 DUQ. L. REV. 1, 68 (1985).

<sup>49</sup>Wright, *supra* note 44, at 157.

<sup>50</sup>Zavala, *supra* note 2, at 18.

<sup>51</sup>Zavala, *supra* note 2, at 13.

<sup>52</sup>JENS DAVID OHLIN, *CRIMINAL LAW: DOCTRINE, APPLICATION, AND PRACTICE* 535 (2d ed. 2018).

<sup>53</sup>*Id.*

<sup>54</sup>*Id.* at 536.

<sup>55</sup>*Id.* at 535.

<sup>56</sup>*Id.* at 536-37.

<sup>57</sup>MODEL PENAL CODE § 2.06(3)(a) (AM. L. INST., 1962); OHLIN, *supra* note 50, at 537.

<sup>58</sup>OHLIN, *supra* note 52, at 119.

Over time, assisting suicide shifted from that of murder to manslaughter, reflecting a change in the “moral values of the present day.”<sup>59</sup> Massachusetts, for instance, once considered assisting suicide as murder, but has since altered their perspective, considering it to be more aligned with involuntary manslaughter.<sup>60</sup> At common law, involuntary manslaughter is the “unintentional killing of another with a ... conscious disregard of ... a substantial and unjustifiable risk.”<sup>61</sup> Like Massachusetts, states may choose to adopt these common law elements of involuntary manslaughter or they may alter them in their statutory code.

In many states, however, there is no need to rely on murder or manslaughter statutes because there are specific statutes for assisting suicide.<sup>62</sup> As of 2021, forty-two states had laws criminalizing suicide coercion.<sup>63</sup> The MPC, designed to guide state legislatures in adopting uniform laws, treats “causing suicide” as criminal homicide if the defendant “purposely causes such suicide by force, duress, or deception.”<sup>64</sup> A person who “purposely aids another to commit suicide is guilty of a felony in the second degree if his conduct causes such suicide.”<sup>65</sup>

After Michelle Carter’s case, the legislature attempted to pass Conrad’s Bill.<sup>66</sup> If passed, the bill will codify coerced suicide as its own crime, separate from involuntary manslaughter, punishable by up to five years in prison.<sup>67</sup> The law will require the defendant to know of another’s “propensity for suicidal ideation” and “intentionally ... encourage that person to ... commit suicide.”<sup>68</sup>

Among the dozens of assisting suicide statutes that exist, there are several theories of liability that underpin each. In some jurisdictions, physically providing the means is required (e.g., Arizona, Oklahoma, South Carolina, Idaho),<sup>69</sup> whereas “aid” or “assistance” may suffice in others (e.g., Pennsylvania, New York, Texas, Wisconsin),<sup>70</sup> or “duress” in others still (e.g., Kansas, Maryland),<sup>71</sup> and some may only require “encouragement” (e.g., Arkansas, South Dakota).<sup>72</sup> Whether *information* about suicide methods constitutes encouragement or the promotion of suicide is decided on a state-by-state basis. While Michelle Carter’s conviction points towards acceptance of speech alone as sufficient encouragement,<sup>73</sup> the decision in *State v. Melchert-Dinkel* directly conflicts.<sup>74</sup>

<sup>59</sup>People v. Campbell, 335 N.W.2d 27, 30 (Mich. Ct. App. 1983); see generally William E. Mikell, *Is Suicide Murder?*, 3 COLUM. L. REV. 379, 383-94 (1903).

<sup>60</sup>Zavala, *supra* note 2, at 310.

<sup>61</sup>OHLIN, *supra* note 52, at 279-80.

<sup>62</sup>Phillips, *supra* note 8, at 1742-43.

<sup>63</sup>Amy Sokolow, *Legislators Refile ‘Conrad’s Law’ to Prevent Suicide Coercion*, BOSTON HERALD (June 17, 2021, 7:13 PM), <https://www.bostonherald.com/2021/06/17/legislators-re-file-conrads-law-to-prevent-suicide-coercion/> [https://perma.cc/KA4D-7B79].

<sup>64</sup>MODEL PENAL CODE § 210.5(1) (AM. L. INST. 2007).

<sup>65</sup>*Id.* § 210.5(2).

<sup>66</sup>Eric Levenson, *Massachusetts Lawmakers to Debate ‘Conrad’s Law’ to Make Coerced Suicide a Crime*, CNN (Nov. 12, 2019, 8:09PM), <https://www.cnn.com/2019/11/12/us/conrads-law-suicide-michelle-carter/index.html> [https://perma.cc/T82T-FXUK]; see also S. 2382, 191st Gen. Ct. (Mass. 2019).

<sup>67</sup>*Id.*

<sup>68</sup>*Id.*

<sup>69</sup>E.g., ARIZ. REV. STAT. ANN. § 13-1103(A)(3); OKLA. STAT. tit. 63, § 3141.3(1); S.C. CODE ANN. § 16-3-1090(B)(2)(a); IDAHO CODE § 18-4017(1)(a).

<sup>70</sup>E.g., 18 PA. STAT. AND CONS. STAT. ANN. § 2505(b); N.Y. PENAL LAW § 120.30; TEX. PENAL CODE ANN. § 22.08(a); WIS. STAT. ANN. § 940.12.

<sup>71</sup>E.g., KAN. STAT. ANN. § 21-5407(a)(1); MD. CODE ANN., CRIM. LAW § 3-102 (1).

<sup>72</sup>E.g., ARK. CODE ANN. § 5-10-107(c); S.D. CODIFIED LAWS § 22-16-37.

<sup>73</sup>Commonwealth v. Carter, 52 N.E.3d 1054, 1056 (Mass. 2016) (“The principal question we consider in this case is whether the evidence was sufficient to warrant the return of an indictment for involuntary manslaughter where the defendant’s conduct did not extend beyond words. We conclude that, on the evidence presented to the grand jury, the verbal conduct at issue was sufficient ...”).

<sup>74</sup>State v. Melchert-Dinkel, 844 N.W.2d 13, 20 (Minn. 2014) (“Accordingly, we reject the State’s argument that the ‘speech integral to criminal conduct’ exception to the First Amendment applies here.”)(to be discussed later)

Some states have statutes that are short and simple to apply, like the MPC. For instance, in New Mexico, “assisting suicide consists of deliberately aiding another in the taking of the person’s own life.”<sup>75</sup> In South Dakota, a person aids and abets suicide when they “intentionally in any manner advise, encourage, abet, or assist another person in taking or attempting to take his own life.”<sup>76</sup> In Arkansas, one commits the offense of encouraging suicide if “the person uses persistent language, either spoken or written, to purposely encourage another person to commit suicide,” and “as a proximate result of the [encouragement]” they make or complete such attempt.<sup>77</sup> Other states have more elaborate laws. In Illinois, a person commits inducement to commit suicide when he:

knowingly coerces another to commit suicide and the [victim] commits ... suicide as a direct result of the coercion, and [the non-victim] exercises substantial control over the [victim] through (i) control of the [victim’s] physical location or circumstances; (ii) use of psychological pressure; or (iii) use of ... religious, political, social, philosophical, or other principles.<sup>78</sup>

Here, rather than “assisting,” the defendant must have acted in a more specific way. Not only does the defendant need to knowingly *coerce* the victim, but they also must exercise substantial control over them leading to suicide as a *direct* result. On one hand, the numerous “options” for assisting seemingly provide multiple avenues for liability. On the other, the distinct and precise language limits flexibility in the types of behaviors that can be charged, as opposed to a statute that merely requires “assistance.” Here, encouragement by text or phone call might satisfy the required elements, whereas a statute that enumerates different kinds of assistance may inadvertently exclude communications such as instant messaging.<sup>79</sup>

Lastly, it is important to mention that in addition to assisting suicide statutes that criminalize involvement, there is also medically assisted suicide, which is currently legal in ten states, as well as the District of Columbia.<sup>80</sup> While the statutory specifics differ by jurisdiction, in Oregon and the District of Columbia for example, terminally ill individuals with fewer than six months to live can voluntarily request prescription medication to hasten death.<sup>81</sup> Prescribing physicians are immune from liability if they adhere to the statutory requirements.<sup>82</sup> These cases are exempt from discussion in this paper.

Determining a person’s level of culpability depends on their involvement in the suicide. Someone may provide physical assistance by mercy killing or by purchasing a weapon, while others may coach or convince the suicidal party in real-time from afar by phone. There are infinite ways in which someone could involve themselves in another’s suicide. Criminality is fact dependent. Identifying how aware an individual is of another’s mental state is difficult to prove.

### 1. Physical Assistance: Murder

In cases where friends and family members have “assisted” in suicides, for instance, by pulling the trigger when someone begs to be killed, they have been held liable for murder. For example, in Florida, in *Gilbert*

<sup>75</sup>N.M. STAT. ANN. § 30-2-4(A) (West 2021) (assisting suicide is a fourth-degree felony; the law provides an exception for those acting in accordance with the End-of-Life Options Act).

<sup>76</sup>S.D. CODIFIED LAWS § 22-16-37 (2023).

<sup>77</sup>ARK. CODE ANN. § 5-10-107 (West 2019) (an attempt must result in “serious physical injury”).

<sup>78</sup>720 ILL. COMP. STAT. ANN. 5/12-34.5(a) (West 2011).

<sup>79</sup>KAN. STAT. ANN. 21-5407 (West 2023). The statute enumerates only duress or physical assistance, leaving little room for communications through channels like instant messaging.

<sup>80</sup>*State Statutes, DEATH WITH DIGNITY*, <https://deathwithdignity.org/states/> [<https://perma.cc/M5BH-BASS>] (last visited Sept. 20, 2023).

<sup>81</sup>OR. STAT. ANN. §127.800; D.C. CODE ANN. § 7-661.01.

<sup>82</sup>See PUB. HEALTH DIV., OR. HEALTH AUTH., DEATH WITH DIGNITY ACT REQUIREMENTS, <https://www.oregon.gov/oha/ph/providerpartnerresources/evaluationresearch/deathwithdignityact/Documents/requirements.pdf> [<https://perma.cc/7ZU9-FPN4>] (last visited Sept. 20, 2023); *Introduction to California’s End of Life Option Act*, UCLA HEALTH, <https://www.uclahealth.org/patient-resources/support-information/advance-directive/introduction-california-end-life-option-act-eoloa> [<https://perma.cc/98P8-XY96>] (last visited Sept. 20, 2023); VT. AGENCY OF HUM. SERVS., DEP’T OF HEALTH, REPORT CONCERNING PATIENT CHOICE AT THE END OF LIFE 2 (2022).

*v. State*, a husband was found guilty of first-degree murder for shooting his wife of fifty-one years to “end her suffering” from osteoporosis and Alzheimer’s Disease.<sup>83</sup> He testified that she begged him to “help her” and he was the only one who could.<sup>84</sup> Because he deliberately thought out the killing before acting, the elements of first-degree murder were satisfied.<sup>85</sup>

In New Mexico, in *State v. Sexson*, the defendant was convicted of second-degree murder for “holding a gun to the victim’s head and pulling the trigger.”<sup>86</sup> The existence of a suicide pact between the victim and defendant was irrelevant.<sup>87</sup> The defendant admitted to holding the gun in a position “calculated to assure the victim’s death.”<sup>88</sup> The court found that, “that action transcends merely providing the victim a means to kill herself and becomes active participation in the death of another.”<sup>89</sup> The evidence that the defendant actively performed the act resulting in death was sufficient to support a murder conviction, rather than a conviction for assisting suicide. Where the “assisting” individual is the direct cause of the death, the death is considered a homicide.<sup>90</sup>

In other instances, the assistant may not perform the killing but may provide the weapon. Suppose the assistant supplies a gun or mixes a poison for consumption at the victim’s request while knowing the victim’s suicidal intent. In that case, they may be held liable.<sup>91</sup> For example, in *Persampieri v. Commonwealth*, the defendant loaded the gun for his wife and “made suggestions that would make it easier for her to discharge the gun.”<sup>92</sup> The affirmative act of loading the gun and encouraging the suicide were enough to indict the defendant with murder.

In *People v. Roberts*, the defendant was convicted of murder for making a “potion of water and poison.”<sup>93</sup> There was no dispute that his wife asked him to do it, that she took the glass, and drank from it.<sup>94</sup> Here, there was a direct causal link between the assistant’s actions and the death. In 1920 when the case was decided, the court differentiated between principal and accessory accomplice liability.<sup>95</sup> Suicide was not considered a crime, and so the defendant argued that he did nothing illegal.<sup>96</sup> Rather than an accessory to her suicide, the court held that the defendant was guilty of murder as principal in the first degree.<sup>97</sup> Since he mixed the poison and deliberately placed it within her reach, the elements for murder were satisfied, even though she requested the drink.<sup>98</sup>

Lastly, Final Exit Network (FEN)<sup>99</sup> is a nonprofit, right-to-die organization that has been a defendant in three notable prosecutions: the 2007 death of Doreen Dunn in Minnesota, the 2007 death of Jana Van

<sup>83</sup>Gilbert v. State, 487 So. 2d 1185, 1185-86 (Fla. Dist. Ct. App. 1986).

<sup>84</sup>*Id.* at 1187-88. Defendant stated that he shot his wife from behind so that she would not see the gun. He shot her once, but when he still felt her pulse, he went to the garage to re-load the gun and returned to shoot her again.

<sup>85</sup>*Id.*

<sup>86</sup>State v. Sexson, 869 P.2d 301, 301 (N.M. Ct. App. 1994).

<sup>87</sup>*Id.* at 305.

<sup>88</sup>*Id.* at 301.

<sup>89</sup>*Id.* at 305.

<sup>90</sup>*Id.* at 304-05.

<sup>91</sup>See State v. Marti, 290 N.W.2d 570, 583 (Iowa 1980) (holding that “preparing and providing a weapon for one who is unable to do so and is known to be intoxicated and probably suicidal” constitute actions that support the defendant’s conviction of involuntary manslaughter); State v. Bier, 591 P.2d 1115, 1120 (Mont. 1979) (affirming a judgment of negligent homicide for a defendant’s wife’s suicide, where the defendant “threw [a] cocked, loaded firearm within reach of his intoxicated wife, challenged her to use it, and allowed her to take the gun off the bed.”)

<sup>92</sup>Persampieri v. Commonwealth, 175 N.E.2d 387, 389 (Mass. 1961).

<sup>93</sup>People v. Kevorkian No. 1, 517 N.W.2d 293, 295 (Mich. Ct. App. 1994) (describing the events in People v. Roberts, 178 N.W. 690 (Mich. 1920)); see also SUSAN STEFAN, RATIONAL SUICIDE, IRRATIONAL LAWS: EXAMINING CURRENT APPROACHES TO SUICIDE IN POLICY AND LAW 344 (2016).

<sup>94</sup>*Id.*

<sup>95</sup>People v. Roberts, 178 N.W. 690, 692 (Mich. 1920)

<sup>96</sup>People v. Roberts, 178 N.W. 690, 692 (Mich. 1920) (argued on appeal).

<sup>97</sup>*Id.* at 693.

<sup>98</sup>*Id.*

<sup>99</sup>FEN is not to be confused with Exit, a different not-for-profit, right-to-die organization.

Voorhis in Arizona, and the 2008 death of John Celmer in Georgia.<sup>100</sup> In these cases, the organization assigned “guides” to meet with and interview the clients.<sup>101</sup> They coordinated their suicides, provided the materials and “blueprints,” and attended the deaths.<sup>102</sup> For Dunn’s death, a jury convicted FEN of assisting suicide for speech that enabled the suicide and removing the helium tanks that she used from the scene of her death.<sup>103</sup> The court reasoned that Dunn had fine motor skill deficits, rendering her unable to drive, so the absence of the materials necessary for her death by helium asphyxiation “reasonably support[ed] an inference that [the FEN guides] procured or assembled the materials for her, thereby assisting her suicide.”<sup>104</sup> FEN guides then concealed their efforts afterward, further demonstrating their active involvement, which was sufficient for the jury to determine guilt.<sup>105</sup>

Physical assistance is sometimes a requirement to satisfy assisting suicide statutes as well, unlike outright murder or manslaughter.<sup>106</sup> For example, in Oklahoma, a person violates the Assisted Suicide Prevention Act when one “provides the physical means” or “participates in a physical act” by which another person commits or attempts to commit suicide.<sup>107</sup> Numerous states do not require such active participation to satisfy their assisting suicide statutes.

It is important to note that psychological literature calls attention to the idea that “suicide assistance may well be a response to coercion and manipulation exerted by the suicide ‘victim’ against the assailant” but “current suicide statutes take no account of this possibility.”<sup>108</sup> The law punishes the assisting party regardless of *why* they participated. In these examples, assistance is clear through the affirmative actions taken at the scene of the suicide. The steps that the defendants took to “help” their victims were purposeful, intentional, and unequivocal contributions to the victims’ deaths. Where the defendant affirmatively and intentionally provides the means for the suicide, the defendant is charged with murder even though the victim “may have wanted to die anyways.”<sup>109</sup> Physical assistance in these types of scenarios typically satisfies the elements of murder.

## 2. Commonwealth v. Carter: *Manslaughter*

The difference between physically assisting a suicide and *Commonwealth v. Carter* is that Carter did not perform any physical act to kill Roy. Instead, she coached him via telephone from over thirty miles away and was complicit in him carrying out his suicide. Nonetheless, their conversation occurred in real time.<sup>110</sup> When Roy exited the truck after he became scared, Carter told him to get back in.<sup>111</sup> He did, and

<sup>100</sup> *Assisted Suicide Group’s Members Indicted*, NBC News (Mar. 9, 2010 11:50 AM), <https://www.nbcnews.com/health/health-news/assisted-suicide-groups-members-indicted-flna1c9443524> [<https://perma.cc/RPB4-6AWH>]; see also STEFAN, *supra* note 95, at 351.

<sup>101</sup> *Id.* at 472.

<sup>102</sup> See, e.g., *id.*; State v. Final Exit Network, Inc., 889 N.W.2d 296, 300 (Minn. Ct. App. 2016).

<sup>103</sup> *Final Exit Network*, 889 N.W.2d at 302; see also *Right-To-Die Group Fined \$30K in Minnesota Woman’s Suicide*, CBS MINNESOTA (Aug. 24, 2015, 12:10 PM), <https://www.cbsnews.com/minnesota/news/right-to-die-group-heads-for-sentencing-in-womans-suicide/> [<https://perma.cc/N7N6-AUPS>]. FEN was fined \$30,000 and was required to pay Dunn’s family \$3,000 in restitution for funeral expenses. In the other cases, some members of FEN pled guilty to manslaughter or endangerment, others were acquitted, and others had their charges dismissed. See STEFAN, *supra* note 95, at 475–76.

<sup>104</sup> State v. Final Exit Network, Inc., Nos. A13-0563, A13-0564, A13-0565, slip. op. at 17 (Minn. Ct. App. Sept. 30, 2013).

<sup>105</sup> Jessie Van Berkel, *Final Exit Network Fined \$30,000 for Assisting Apple Valley Woman’s Suicide*, STAR TRIBUNE (Aug. 24, 2015, 10:54 PM), <https://www.startribune.com/final-exit-network-fined-30-000-for-assisting-apple-valley-woman-s-suicide/322700141/> [<https://perma.cc/TP8Z-CAWH>].

<sup>106</sup> OKLA. STAT. tit. 63, § 3141.3 (2023).

<sup>107</sup> *Id.*

<sup>108</sup> Catherine D. Shaffer, Note, *Criminal Liability for Assisting Suicide*, 86 COLUM. L. REV. 348, 348 (1986).

<sup>109</sup> Zavala, *supra* note 2, at 313.

<sup>110</sup> Willingham, *supra* note 6.

<sup>111</sup> *Id.*

died as a result. The evidence demonstrated that Carter wanted Roy to die.<sup>112</sup> In the days leading up to his death, she said:

I thought you wanted to do this. The time is right and you're ready, you just need to do it! You can't keep living this way. You just need to do it like you did last time and not think about it and just do it babe. You can't keep doing this every day.<sup>113</sup>

The Commonwealth considered Carter's actions and persuasion "integral to a criminal course of conduct."<sup>114</sup> Though distant, her active role by telephone ultimately caused his death, as there was a high degree of likelihood that substantial harm to Roy would result.<sup>115</sup>

Carter was not the first to face criminal liability for coaxing someone's suicide through telephone or instant messaging communication. In Minnesota, in 2014, in *State v. Melchert-Dinkel*, forty-eight-year-old William Francis Melchert-Dinkel posed as a depressed and suicidal female nurse online and responded to posts on pro-suicide websites.<sup>116</sup> After Melchert-Dinkel's advice, Mark Drybrough in England and Nadia Kajouji in Canada each killed themselves.<sup>117</sup> The victims asked Melchert-Dinkel about methods of suicide and in response Melchert-Dinkel described different means of committing the act.<sup>118</sup> Drybrough ultimately followed Melchert-Dinkel's advice to commit suicide by "tying a rope to a doorknob and slinging the rope over the top of the door."<sup>119</sup> As for Kajouji, Melchert-Dinkel provided advice as to why hanging was a superior method to her plan of jumping into the river and drowning.<sup>120</sup> Because the defendant intentionally advised and encouraged the victims by providing them with instructions and "repeatedly urged hanging as the 'best and surest method,'" the trial court found him guilty of advising, encouraging, and assisting suicide in both cases.<sup>121</sup> While his original conviction was overturned following a finding that the statute he was convicted under was unconstitutional, he was convicted again on remand for Drybrough's death for materially "assisting" suicide by providing information to his victim, as opposed to "advising or encouraging" suicide.<sup>122</sup> Similar to Carter, Melchert-Dinkel purposely took advantage of a specifically targeted, vulnerable individual.<sup>123</sup>

As for his involvement in Kajouji's death, the district court initially found Melchert-Dinkel guilty of both assisting and attempting to assist her suicide, but the Appeals Court of Minnesota reversed.<sup>124</sup> Because her chosen method for suicide was different than what Melchert-Dinkel had recommended and counseled, there was not any "substantial step of assistance" for her suicide necessary to satisfy the elements of the crime and uphold the conviction.<sup>125</sup> The court determined that "the evidence [did] not support the [court's] conclusion that Melchert-Dinkel 'did more than merely prepare to give assistance' to Kajouji through 'detailed and specific' instructions for committing suicide by hanging."<sup>126</sup> The difference between Melchert-Dinkel's involvement in the two suicides is that he provided concrete steps

<sup>112</sup>Phillips, *supra* note 8, at 1768.

<sup>113</sup>Paul LeBlanc, *The Text Messages that led up to Teen's Suicide*, CNN (June 16, 2017, 1:29 PM), <https://www.cnn.com/2017/06/08/us/text-message-suicide-michelle-carter-conrad-roy/index.html> [<https://perma.cc/UM4U-WJN9>].

<sup>114</sup>Calvert, *supra* note 4, at 80.

<sup>115</sup>See LeBlanc, *supra* note 115.

<sup>116</sup>*State v. Melchert-Dinkel*, 844 N.W.2d 13, 16 (Minn. 2014).

<sup>117</sup>*Id.*

<sup>118</sup>*Id.* at 16-17.

<sup>119</sup>*Id.*

<sup>120</sup>*Id.*

<sup>121</sup>The defendant was convicted under a portion of the Minnesota statute that was later found to be unconstitutional. Thus, his conviction was reversed and remanded to determine whether he "assisted" as required by the remaining language of the statute. *State v. Melchert-Dinkel*, No. A15-0073, 2015 WL 9437531, at \*1, \*6 (Minn. Ct. App. Dec. 28, 2015).

<sup>122</sup>*Id.* at \*1.

<sup>123</sup>*State v. Melchert-Dinkel*, 844 N.W.2d 13, 16 (Minn. 2014).

<sup>124</sup>*State v. Melchert-Dinkel*, No. A15-0073, 2015 WL 9437531, at \*1, \*6 (Minn. Ct. App. Dec. 28, 2015).

<sup>125</sup>*Id.* at \*10-11.

<sup>126</sup>*Id.* at \*11.

for Drybrough to follow, which Drybrough did, but in Kajouji's case, he only suggested hanging as a more reliable alternative than her current plan of drowning.<sup>127</sup> Ultimately, Kajouji did not act upon Melchert-Dinkel's advice when she took her own life; she committed suicide by the original plan that she had developed and outlined.<sup>128</sup> She appreciated but disregarded Melchert-Dinkel's advice,<sup>129</sup> rendering his involvement in her suicide unable to reach criminality under the Minnesota statute. This case highlighted the key distinction between providing information versus assistance and the difference in the legal ramifications for each.

In another instance, on December 23, 2021, Boston College student, Inyoung You, plead guilty to involuntary manslaughter for the death of her boyfriend, twenty-two-year-old Alexander Urtula.<sup>130</sup> In 2019, Urtula jumped from a parking garage in Roxbury, Massachusetts, after You sent him text messages urging him to kill himself.<sup>131</sup> Authorities alleged that You instructed Urtula to kill himself hundreds of times over the course of their relationship and that she exercised "total control" over him.<sup>132</sup> In a press release, investigators stated that You was "aware of [Urtula's] spiraling depression and suicidal thoughts that her abuse had brought on, but she persisted in encouraging Urtula to take his own life."<sup>133</sup> The indictment alleged that You's behavior was "wanton and reckless and resulted in overwhelming Mr. Urtula's will to live."<sup>134</sup> Though You did not contribute to Urtula's death in the sense that she physically harmed him, her increasingly aggressive encouragement for suicide through her text messages<sup>135</sup> ultimately led to his death.

In these cases, the defendant was not physically present to coax the suicide, but assisted through speech via phone, text, or e-mail.<sup>136</sup> The encouragement for suicide was targeted at one person — or in Melchert-Dinkel's case, two people — with the intent that they act upon the instructions provided.<sup>137</sup> There was active two-way communication between the parties that directly contributed to the deaths. A link could be ascertained to establish criminal liability.

This causal link is often the most challenging element to establish. The suicide victim commits the traditional *actus reus* by taking their own life, often leaving the assister without clear causal responsibility. However, assisting suicide statutes are commonly written to not require such clear cause-and-effect accountability; verbal encouragement may suffice, though courts have been hesitant to accept non-material help alone as sufficient for liability.<sup>138</sup>

<sup>127</sup>*Id.* at \*9-10.

<sup>128</sup>*Id.* at \*9.

<sup>129</sup>*Id.*

<sup>130</sup>Christine Chung, *Former Boston College Student Gets Suspended Sentence in Boyfriend's Suicide*, N.Y. TIMES (Dec. 23, 2021), <https://www.nytimes.com/2021/12/23/us/inyoung-you-boston-college-suicide-guilty-plea.html> [<https://perma.cc/6WSG-WZRN>].

<sup>131</sup>Nate Raymond, *Former Boston College Student Charged over Boyfriend's Suicide Pleads Guilty*, REUTERS (Dec. 23, 2021, 2:32 PM), <https://www.reuters.com/world/us/former-boston-college-student-charged-over-boyfriends-suicide-pleads-guilty-2021-12-23/> [<https://perma.cc/H7GB-KKLG>].

<sup>132</sup>Brian Vitagliano, *Former Boston College Student Pleads Guilty to Manslaughter in Boyfriend's Suicide, Sentenced to 10 Years' Probation*, CNN (Dec. 23, 2021, 10:21 PM), <https://www.cnn.com/2021/12/23/us/ex-boston-college-student-pleads-guilty/index.html> [<https://perma.cc/ADT9-RPTG>].

<sup>133</sup>Jack Miller & Abby Hunt, *Update: BC Student Facing Involuntary Manslaughter Charge Following Boyfriend's Suicide*, THE HEIGHTS (July 21, 2020, 9:21 PM), <https://www.bcheights.com/2019/10/28/former-bc-student-facing-involuntary-manslaughter-charge-following-boyfriends-suicide/> [<https://perma.cc/SLY4-YZZD>].

<sup>134</sup>*Id.*

<sup>135</sup>Eric Shannon, *Former BC Student Inyoung You Pleads Guilty to Involuntary Manslaughter*, THE HEIGHTS (Dec. 23, 2021, 10:31 PM), <https://www.bcheights.com/2021/12/23/former-bc-student-inyoung-you-pleads-guilty-to-involuntary-manslaughter/> [<https://perma.cc/W6MB-3CX3>].

<sup>136</sup>Megan Kelly, *Inyoung You's Case to Proceed to Trial*, THE HEIGHTS (Jan. 17, 2021, 8:08 PM), <https://www.bcheights.com/2021/01/17/inyoung-you-trial-will-proceed-to-trial/> [<https://perma.cc/7GGQ-LE3L>].

<sup>137</sup>Shannon, *supra* note 138; State v. Melchert-Dinkel, No. A15-0073, 2015 WL 9437531, at \*1, \*6 (Minn. Ct. App. Dec. 28, 2015).

<sup>138</sup>Binder & Chiesa, *supra* note 5, at 115.

For example, in Pennsylvania, the aiding suicide statute provides that “a person may be convicted of criminal homicide for causing another to die by suicide only if he intentionally causes such suicide by force, duress or deception” but further states, “a person who intentionally aids or solicits another to die by suicide is guilty of a felony of the second degree if his conduct causes such suicide or an attempted suicide.”<sup>139</sup> The explicit distinction here demonstrates two theories of liability which hinge on the level of causality that can be established between the victim and the assister.

Nonetheless, where the statutes permit prosecution based on “encouragement” alone, the penalties do not appear to rival those of traditional homicide cases.<sup>140</sup> And even in Carter’s manslaughter prosecution, her sentence, to some, appeared shockingly light.<sup>141</sup>

### 3. Five Last Acts: No Crime

There is a meaningful difference between real-time remote assistance and guides provided on a fixed, static medium. *Five Last Acts*, authored by Chris Docker, the director of Exit, is a step-by-step instructional manual providing methods for committing suicide.<sup>142</sup> Docker aims to serve as a guide. He provides suicide diagrams and shopping lists, to name a few.<sup>143</sup> He encourages practice before an attempt.<sup>144</sup> However, in the introductory chapter, the text warns, “[i]n Britain and most countries, *it is perfectly legal* to buy and own this book. But, if you do pass it on or show it to someone who with your knowledge is at that point thinking of taking their life, you could, in certain circumstances, be open to prosecution.”<sup>145</sup>

Suicide information is not limited to *Five Last Acts*. Other books and websites are available.<sup>146</sup> In fact, the number of pro-suicide websites increased substantially between 2007 and 2014.<sup>147</sup> These websites, “many of which provided explicit how-to information,” tripled during that time period.<sup>148</sup> Sites include personal blogs, public discussion forums, or both. These “web spaces not only allow direct exchange of such information between suicidal individuals, but also have the potential to encourage those ambivalent about suicide to make suicide plans or form suicide pacts with strangers.”<sup>149</sup>

Recently, journalists with the *New York Times* investigated one particular website that could be linked to at least forty-five members’ deaths.<sup>150</sup> The website receives roughly 6,000,000 monthly views; half of its members are under twenty-five-years old.<sup>151</sup> Among the most viewed posts are “goodbye threads,”

<sup>139</sup> 18 PA. STAT. AND CONST. STAT. ANN. § 2505 (West 2021).

<sup>140</sup> E.g., ARK. CODE ANN. § 5-10-107 (2023) (“Encouraging the suicide of another person is a class D felony.”); § 5-4-401 (“For a Class D felony, the sentence shall not exceed six (6) years.”); § 5-10-102 (“Murder in the first degree is a Class Y felony.”); § 5-4-401 (“For a Class Y felony, the sentence shall be not less than ten (10) years and not more than forty (40) years, or life.”).

<sup>141</sup> See Luis Gomez, *Michelle Carter: Does a 15-Month Sentence Fit Her Horrific Crime?*, SAN DIEGO UNION-TRIBUNE (Aug. 3, 2017, 6:40PM), <https://www.sandiegouniontribune.com/opinion/the-conversation/sd-michelle-carter-15-month-sentence-fit-crime-20170803-htmlstory.html> [https://perma.cc/3LQM-4U94].

<sup>142</sup> DOCKER, *supra* note 10; Voluntary Euthanasia Society of Scotland, *Welcome to Exit (the Scottish Voluntary Euthanasia Society)*, <http://www.euthanasia.cc/vess.html> [https://perma.cc/T3GF-W4LM] (last visited Sept. 16, 2023).

<sup>143</sup> See, e.g., DOCKER, *supra* note 10, at 159. For suicide by helium or other inert gas, the author says, “at the time of writing, most items mentioned can be obtained online from Amazon ... try searching for the following items.” *Id.*

<sup>144</sup> *Id.* at 81. “Reading alone is not sufficient. ‘Dress rehearsals’ will make you confident ... practice ahead of time, so that [weak points] can be safely corrected.” *Id.*

<sup>145</sup> *Id.* at 38.

<sup>146</sup> Lucy Biddle et al., *Suicide and the Internet: Changes in the Accessibility of Suicide-Related Information Between 2007 and 2014*, 190 J. OF AFFECTIVE DISORDERS 370, 370 (2016).

<sup>147</sup> *Id.* at 373.

<sup>148</sup> *Id.*

<sup>149</sup> Cho-Yin Huang et al., *Changes in Accessibility of Suicide-Related Information on Websites in Taiwan During 2016 and 2019*, 121 J. FORMOSAN MED. ASS’N 335, 339 (2021).

<sup>150</sup> Megan Twohey & Gabriel J.X. Dance, *Where the Despairing Log on, and Learn Ways to Die*, N.Y. TIMES (Dec. 9, 2021), <https://www.nytimes.com/interactive/2021/12/09/us/where-the-despairing-log-on.html> [https://perma.cc/FJM8-8KH9].

<sup>151</sup> *Id.*

documenting suicides in real-time.<sup>152</sup> However, like Docker in *Five Last Acts*, the site comes with a disclaimer: do not assist and encourage.<sup>153</sup> Instead, users are instructed to provide “‘factual information’ and ‘emotional support.’”<sup>154</sup> Without “assistance,” causality of the death is severed, leaving the only opportunity for liability to be through the criminalization of providing information. This is a slippery slope that would have a broad chilling effect on free speech. The chilling effect should not be taken lightly, though it must be balanced with the consideration that the primary users of the website are a vulnerable population and that the State always has an interest in protecting human life.

If suicide guides are posted online or in print for the public to access, the intent or *mens rea* required to assist suicide in most states may also be eliminated. Authors produce and disseminate the information without one person in mind. Transcribing the information and releasing it to a wide audience does not mandate that anyone actually act on it. There is generally no way to know how many individuals have used *Five Last Acts* to facilitate their suicide. It is nearly impossible to link the publication to the death because there could be limitless intervening or contributory events between receiving the book and committing suicide. Because the publications are not addressed to any one individual, one can argue that there is no purposeful aiding or coercing or specific knowledge of a person’s suicidal intent.

A counterargument is that the author can reasonably foresee someone injuring or killing themselves by following the instructions in the book. Thus, the author may be considered reckless and should be held liable for their lack of regard for the danger of their actions.<sup>155</sup> But others may argue that this type of publication is not reckless, but only negligent, as there is no awareness of a particularized risk.<sup>156</sup> However, even if reckless, recklessness is often not sufficient to satisfy the *mens rea* requirement of assisting suicide statutes.<sup>157</sup> The defendant will argue that their speech was not purposeful or intentional in causing the death and therefore, not illegal. Thus, there is a misalignment between the legal framework and the ethical, but there is no criminality where the *mens rea* is not satisfied. Additional bioethical discussion is necessary to determine if statutes should be amended or intent requirements should be relaxed.

Another counterargument is that complicity with suicide alone should be sufficient for liability. In other words, appreciation for the potential outcome is enough. However, conspirator liability is more convoluted than that, sometimes requiring a common purpose and action, while other times merely requiring knowledge of the outcome.<sup>158</sup> For example, in *U.S. v. Backun*, a case concerning the sale of stolen merchandise, the Fourth Circuit stated that a seller “may not ignore the purpose for which the purchase is made if he is advised of that purpose.”<sup>159</sup> Further, “it is in harmony with the well settled rule that one who, with knowledge of the existence of a conspiracy, aids in carrying out its unlawful design makes himself a party thereto.”<sup>160</sup> Under this interpretation, authors of pro-suicide materials who intend to inform the suicides of their readers cannot claim to lack a contribution. Putting the required information into circulation and waiting complicitly for the outcome carries liability as a co-conspirator. In contrast, however, the Second Circuit held in *U.S. v. Peoni*, that “nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it ... his liability is limited to

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<sup>152</sup>*Id.*

<sup>153</sup>*Id.*

<sup>154</sup>*Id.*

<sup>155</sup>Some will argue that the author’s intention for publishing the book is to have people use it to commit suicide. However, the author could argue that primary purpose is to disseminate knowledge or awareness.

<sup>156</sup>OHLIN, *supra* note 66, at 163.

<sup>157</sup>*E.g.*, ARIZ. REV. STAT. ANN. § 13-1103(A)(3); OKLA. STAT. tit. 63, § 3141.3(1); S.C. CODE ANN. § 16-3-1090(B)(2)(a); IDAHO CODE § 18-4017(1)(a); 18 PA. STAT. AND CONS. STAT. ANN. § 2505(b); N.Y. PENAL LAW § 120.30; TEX. PENAL CODE ANN. § 22.08(a); WIS. STAT. ANN. § 940.12.; KAN. STAT. ANN. § 21-5407(a)(1); MD. CODE ANN., CRIM. LAW § 3-102 (1).

MODEL PENAL CODE § 210.5(1) (AM. L. INST. 2007).

<sup>158</sup>16 AM. JUR. 2D *Conspiracy* § 11 (2023).

<sup>159</sup>*Backun v. United States*, 112 F.2d 635, 637 (4th Cir. 1940).

<sup>160</sup>*Id.*

the common purposes while he remains in it.”<sup>161</sup> Therefore, foreseeability and complicity with a second party’s plan is not sufficient to be held liable as a co-conspirator.

#### 4. The Distinction Between Carter and Five Last Acts

Docker poses in his introduction, “[i]s this book illegal? If not, how does it differ from just giving the same information to a friend?”<sup>162</sup> He continues, “[t]he information provided by Exit, in this book and through workshops, is not directed at a specific person about [how] to use it to end their life ... Exit does not know who they are, and so is not connected to the suicide.”<sup>163</sup> At least not straightforwardly.

While homicide requires direct causation of the death, to satisfy the assisting suicide statutes, intention or knowledge is typically required.<sup>164</sup> Therefore, because he does not know who is reading his book or why, Docker would surely be immune from criminal liability for homicide, as well as likely immune from liability for assisting suicide because his book does not aim to purposely aid any one particular person with suicide. In contrast, if Carter provided Roy with a copy of *Five Last Acts* knowing that he was suicidal, could this be criminalized? Is providing a gun for suicide different than providing a book with step-by-step instructions?

To satisfy causation requirements, the time elapsed between the communication and the injury should be so insignificant that the defendant was practically present at the scene to cause the harm.<sup>165</sup> For instance, “the closer in time the communication occurred to the self-inflicted injury, the less likely an intervening act took place to break the causal chain between the communication and the ultimate harm.”<sup>166</sup> Coaxing the suicidal party over the phone essentially puts that individual at the scene of the suicide. By taking advantage of a victim’s fragile mental state, those like Carter or Melchert-Dinkel create an environment likely to result in harm. Michelle Carter could hear Roy coughing; she could hear the generator.<sup>167</sup> It was almost as if she were physically there. This is enough for assisting suicide and potentially even homicide — as it was in Carter’s case. In contrast, passing along a book and removing oneself from the situation may sever liability. The receiver may never read the book at all. Conversely, exchanging text messages or talking on the phone ensures that the information is internalized in that moment.

By providing Roy with instructions that she knew he would put into action, she facilitated his suicide. Carter said:

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.<sup>168</sup>

As it relates to carbon monoxide poisoning, *Five Last Acts* instructs readers to run a hose from the car exhaust into a semi-closed window and keep the car running,<sup>169</sup> just as Roy did. “Carbon monoxide is

<sup>161</sup>United States v. Peoni, 100 F.2d 401, 403 (2d Cir. 1938).

<sup>162</sup>DOCKER, *supra* note 10, at 31.

<sup>163</sup>*Id.* at 31-32.

<sup>164</sup>See MODEL PENAL CODE § 210.5(1) (AM. L. INST. 2007).

<sup>165</sup>See Phillips, *supra* note 8, at 1764.

<sup>166</sup>*Id.*

<sup>167</sup>LiveNOW from FOX, *Must Watch: Judge Finds Michelle Carter Guilty in Texting Suicide Case in Massachusetts*, YouTube (Jun. 16, 2017), <https://www.youtube.com/watch?v=1wkyxXeOC0k> [<https://perma.cc/7QSH-26LF>].

<sup>168</sup>Nik DeCosta-Klipa, *Read the Text Messages at the Heart of the Michelle Carter Trial*, BOSTON.COM (June 5, 2017), <https://www.boston.com/news/local-news/2017/06/05/read-the-messages-at-the-heart-of-the-michelle-carter-suicide-by-text-manslaughter-trial/> [<https://perma.cc/A6R7-5QRY>].

<sup>169</sup>DOCKER, *supra* note 10, at 421.

tasteless and odorless,” says Docker.<sup>170</sup> “A concentration of even one percent in the air can lead to death. The greater the concentration, the faster death occurs (it can be anything from a minute to two hours).”<sup>171</sup> The information provided is nearly identical in the two communications: run a hose from the exhaust to the window; it should be peaceful because there is no taste or odor; death will come quickly.<sup>172</sup> Carter used the information to direct Roy’s actions. Her directions were targeted and specific in such a way that her involvement met the elements of involuntary manslaughter. The book, however, could not have convinced Roy to get back into the truck once he became scared. An inanimate object cannot coax or compel. It was Carter’s active coercion that caused Roy to follow through with his suicide. Without that immediate pressure to get back into the truck, he may not have taken his own life.

When giving a gun to a suicidal person, there is an obvious act unmistakably connected to the harm. Like *Persampieri v. Commonwealth* mentioned above, the defendant was found guilty of manslaughter for loading a gun and teaching his wife how to use it for her suicide.<sup>173</sup> A gun is unmistakably a weapon designed to inflict harm. By giving his suicidal wife a gun, Persampieri could have only intended one thing. And by not stopping her, he was complicit in her suicide.

Similarly, in a recent California lawsuit, Amazon was accused of selling two teenagers sodium nitrite “at the level of purity” that could only reasonably be used for suicide.<sup>174</sup> Here, one teen from West Virginia and one teen from Ohio committed suicide using sodium nitrite, anti-vomiting drugs, and a suicide handbook purchased from Amazon.<sup>175</sup> Their parents sued under theories of product liability, negligence, and negligent infliction of emotional distress.<sup>176</sup> The *New York Times* investigated and identified ten deaths<sup>177</sup> that could be tied to Amazon’s “suicide kits.”<sup>178</sup> Amazon representatives defended the sales of the compound and stated that, “[l]ike many widely-available consumer products ... [the compound] can unfortunately be misused.”<sup>179</sup> The lawsuit, however, claims that there is no household use for sodium nitrite at 99.6% purity.<sup>180</sup> And even further, upon purchasing the compound, the site recommended that customers purchased a guide on how to properly use the substance to ensure death.<sup>181</sup> Taken together, the suit states that use of these products for suicide was reasonably foreseeable by Amazon.<sup>182</sup>

With a suicide guide alone, if Michelle Carter were to give Roy the book and instruct him to read the specific chapter about carbon monoxide poisoning, she would not be the one *guiding* his suicide attempt step-by-step, even if she were aiding or encouraging it. The instructions would come from the text. In situations like this, there is a better argument for liability under an assisting suicide statute than homicide because the actions are integral to the death, even though the victim could be considered an intervening actor.

In Carter’s case, liability stemmed from her active coaching. When Carter was adjudicated delinquent, Judge Moniz of the Bristol County Juvenile Court focused on the fact that Carter was culpable for

<sup>170</sup>*Id.*

<sup>171</sup>*Id.* (Carbon monoxide poisoning is not one of the five “selected” methods of suicide, so the instructions are far less detailed than other methods.)

<sup>172</sup>See Phillips, *supra* note 8, at 1744–1745; see also DOCKER, *supra* note 10, at 421.

<sup>173</sup>See *Persampieri v. Commonwealth*, 175 N.E.2d 387, 389 (Mass. 1961).

<sup>174</sup>See Joe Hernandez, *A Parents’ Lawsuit Accuses Amazon of Selling Suicide Kits to Teenagers*, NPR (Oct. 9, 2022, 4:44 PM), <https://www.npr.org/2022/10/09/1127686507/amazon-suicide-teenagers-poison> [https://perma.cc/T25G-94HM].

<sup>175</sup>See *id.*

<sup>176</sup>Complaint for Civil Penalties and Demand for a Jury Trial at 4, *McCarthy et al. v. Amazon.com, Inc. et al*, No. 22CV018942 (Cal. App. Dep’t Super. Ct. Sept. 29, 2022), 2022 WL 5185156.

<sup>177</sup>Megan Twohey & Gabriel J.X. Dance, *Lawmakers Press Amazon on Sales of Chemical Used in Suicides*, N.Y. TIMES (Feb. 4, 2022), <https://www.nytimes.com/2022/02/04/technology/amazon-suicide-poison-preservative.html> [https://perma.cc/WPG7-AS4P].

<sup>178</sup>Hernandez, *supra* note 177.

<sup>179</sup>Twohey & Dance, *supra* note 180.

<sup>180</sup>Complaint for Civil Penalties and Demand for a Jury Trial, *supra* note 179, at ¶ 80.

<sup>181</sup>*Id.* at ¶¶ 85–86.

<sup>182</sup>*Id.* at ¶ 210.

instructing Roy to get *back* into his truck during his suicide attempt.<sup>183</sup> In the proposed hypothetical, there would not be liability under that same rationale, since only the book would be “coaching.” The judge acknowledged that Roy took significant steps in his own death, but “[Roy broke] that chain of self-causation by exiting the vehicle.”<sup>184</sup> By exiting, Roy indicated that he decided not to follow through with the suicide. Carter instructed him to get back in the truck, knowing his “ambiguities, fears, and concerns,” to finish what he had begun.<sup>185</sup> By ordering Roy back into the truck, Carter became responsible for his death. Had she just given him a book, the outcome may have been different.

Because the judge’s verdict rested on the fact that Roy followed Carter’s instructions as she gave them, if the facts were changed and Carter had given Roy *Five Last Acts* and nothing more, there would be no criminal liability. In the case, she was held accountable because there was a direct causal link. Alternatively, in the hypothetical, there could have been any number of intervening acts between giving Roy the book and his death. He could have researched a different method for suicide, abandoning the book and Carter’s liability entirely; this is partially what occurred because he ultimately used a gasoline-powered water pump, as opposed to the truck’s exhaust. There would not be such a definite connection.

Michelle Carter attained the information regarding carbon monoxide poisoning from somewhere. She did her research and misused the information that she found by providing it to an actively suicidal individual who trusted her. Such availability indicates that safeguards should be in place to protect those who may be harmed — either by looking it up themselves, or through another individual’s encouragement. The internet makes these instructions available with just a few clicks and those contemplating suicide may act irrationally if given the information at just the right time. Thought must be given as to how to intercept this fatal combination without infringing upon authors’ rights to free speech.

#### IV. The First Amendment Defense

Even if *Five Last Acts* were instrumental in someone’s suicide, Docker has a valid defense available which will likely protect him from criminal penalties. The First Amendment provides the right to freedom of speech and press.<sup>186</sup> Laws cannot censor public expression of opinions. An exception exists in the case of harm or incitement to imminent violence.<sup>187</sup> Docker says himself, “[r]ights of free speech in publishing, and the rights to determine one’s own death must be balanced against duties to protect the vulnerable and even the duty not to cause offence.”<sup>188</sup> *Five Last Acts* and other similar books and websites are most likely protected by the First Amendment.

Legal scholars have criticized Carter’s adjudication for setting a dangerous precedent in which “words, and not just actions” can cause death.<sup>189</sup> Statutes attempting to restrict speech are examined carefully. For example, in *State v. Melchert-Dinkel*, the constitutionality of Minnesota’s encouraging suicide statute was called into question.<sup>190</sup> Minnesota’s criminalization of speech that “advised” and “encouraged” another in taking the other’s life infringed on protected speech and was facially overbroad,

<sup>183</sup>LiveNOW from FOX, *supra* note 170.

<sup>184</sup>Katharine Seelye & Jess Bidgood, *Guilty Verdict for Young Woman Who Urged Friend to Kill Himself*, N.Y. TIMES (June 16, 2017), <https://www.nytimes.com/2017/06/16/us/suicide-texting-trial-michelle-carter-conrad-roy.html>.

<sup>185</sup>*Id.*

<sup>186</sup>U.S. CONST. amend. I.

<sup>187</sup>*Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>188</sup>DOCKER, *supra* note 10, at 619.

<sup>189</sup>Melanie Eversley, *Girlfriend Suicide Texting Case Sets Wrong Precedent, Legal Experts Say*, USA TODAY (Aug. 4, 2017, 8:43 AM), <https://www.usatoday.com/story/news/2017/08/03/michelle-carter-texting-suicide-case-sets-bad-precedent-experts-say/538794001/> [<https://perma.cc/Z8A4-FDAN>].

<sup>190</sup>See generally Case Comment, *Minnesota Supreme Court Determines that False Claims Used to Advise or Encourage Suicide Do Not Fall Within the Alvarez Fraud Exception*: *State v. Melchert-Dinkel*, 128 HARV. L. REV. 1280 (2015).

given the terms' ordinary meaning.<sup>191</sup> Thus, "advising" and "encouraging" were removed from the statute.<sup>192</sup> When *State v. Final Exit Network* was decided two years later by the Minnesota Court of Appeals, Final Exit faced charges only under the "assists" provision.<sup>193</sup> Under Minnesota's interpretation, the court rejected liability based on encouragement alone, requiring a more direct causal link than speech to fall under a First Amendment exception.<sup>194</sup>

In another case involving FEN, the Supreme Court of Georgia found the Georgia assisting suicide statute unconstitutional as well. In 1994, the Georgia legislature enacted OCGA § 16–5–5(b), stating that a person "who publicly advertises, offers, or holds himself or herself out as offering that he or she will intentionally and actively assist another person in the commission of suicide and commits any overt act to further that purpose is guilty of a felony."<sup>195</sup> In this case, which stemmed from several FEN members' indictment in 2010, the court held that "both the object and plain language of [the statute] make it insusceptible to a limiting construction" and "[a]ccordingly, [the statute] restricts speech in violation of the free speech clauses of both the U.S. and Georgia Constitutions."<sup>196</sup> Because the statute was "out of the realm of content neutral regulations"<sup>197</sup> and rendered "a selective restraint on speech with a particular content[.]" it was found "wildly underinclusive when judged against its asserted justification," and it could not survive strict scrutiny.<sup>198</sup>

Furthermore, the Supreme Court in *Giboney v. Empire Storage & Ice Co.* stated, if speech is "an essential and inseparable part of a grave offense," then it receives no constitutional protection.<sup>199</sup> Under these definitions, Carter's speech was not protected. Carter explicitly encouraged Roy to take his own life. Because her speech was integral to Roy's death, it fell outside the protections afforded by the First Amendment. Under this interpretation, however, as the court in *Melchert-Dinkel* argued, the "decriminalization of suicide proved dispositive," because suicide was not considered a crime in and of itself, Melchert-Dinkel's conduct and the statutory language that he was convicted under could not be "morphed" to fit this exception to the First Amendment's protection.<sup>200</sup> As such, tenuous connections between the speech and the death sever liability, but because the "assists" provision remains in the statute, liability is still reserved for cases of more direct causal harm or material assistance.

In contrast, *Five Last Acts* is likely protected. In most cases, there is no way to know whether the book directly guided the suicide. Imminence is lost when the text is published on a fixed, static medium that a party reads at their convenience. In Carter's case, actively pressuring Roy to return to the truck's cab was her legal downfall. Because of the urgency of the scenario and the likelihood of harm, the First Amendment did not protect Carter. With *Five Last Acts*, the information may be material to the suicide, but is likely not the ultimate precipitating factor like Carter's encouragement was. As mentioned previously, the "inability to predict suicide" may "ste[m] from the ... unique constellation" of considerations that cause one to act on suicidal ideations.<sup>201</sup> Facts and information from a static medium may be one of those considerations, but the mere existence of this possibility does not warrant blanket First Amendment restrictions.

<sup>191</sup>See Anthony W. Joyce, *Prosecuting Fatal Speech: What Minnesota's State v. Final Exit Network Means for Assisted-Suicide Laws Across the Country*, 71 OKLA. L. REV. 1229, 1234 (2019); Sean Sweeney, *Deadly Speech: Encouraging Suicide and Problematic Prosecutions*, 67 CASE W. RES. L. REV. 941, 959 (2017).

<sup>192</sup>See Joyce, *supra* note 1947, at 1234–35.

<sup>193</sup>See *id.* at 1236.

<sup>194</sup>*State v. Final Exit Network, Inc.*, 889 N.W.2d 296, 303–05, 307 (Minn. Ct. App. 2016).

<sup>195</sup>GA. CODE ANN. § 16-5-5 (1994).

<sup>196</sup>*Final Exit Network, Inc. v. State*, 722 S.E.2d 722, 725 (Ga. 2012).

<sup>197</sup>*Id.* at 723.

<sup>198</sup>*Id.* at 724 (citing *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786 (2011)).

<sup>199</sup>*Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

<sup>200</sup>Case Comment, *supra* note 193, at 1282.

<sup>201</sup>Bearman & Moody, *supra* note 21.

As a final example, a federal judge in California dismissed a civil lawsuit against Netflix on First Amendment grounds.<sup>202</sup> A wrongful death action is considerably different from a criminal murder charge. Rather than a crime punishable with prison time, the death is caused by a tortious wrong remedied by financial compensation.<sup>203</sup> In this case, a father alleged that the show “13 Reasons Why” contributed to his 15-year-old daughter’s suicide.<sup>204</sup> The television show has been repeatedly accused of glorifying suicide, as the show centers around the suicide of Hannah Baker and its impact on her friends and family after her death.<sup>205</sup> The father claimed that “[Netflix’s] algorithms were designed to ‘target vulnerable children and manipulate them into watching content that was deeply harmful to them.’”<sup>206</sup> The question as to whether this type of “targeting” could hold Netflix liable for wrongful death remains unanswered. The suit was dismissed on January 11, 2022, with the dismissal resting on free-speech protections.<sup>207</sup>

Curtailling “all public discussions about suicide would encroach on an indefinite amount of speech and would fail strict scrutiny.”<sup>208</sup> Strict scrutiny requires that the restriction on speech further a compelling state interest and be narrowly tailored to achieve that interest.<sup>209</sup> States have a compelling interest in preserving life but restricting the free exchange of ideas about suicide is overly broad.<sup>210</sup> Therefore, most — if not all — of the speech in *Five Last Acts* and on pro-suicide websites is covered by the First Amendment, which means that it is accessible to the public without safeguard. Though the authors do not overtly contribute to any one suicide, their words have the ability to cause the ultimate and paramount harm — death — to those who use them. These writings are available for any suicidal individual to seek out and utilize. However, whether one chooses to use them is out of the authors’ control. To chill authors’ speech here entirely would be too significant a demand given the uncertainty of the outcome. Exceptions to the First Amendment must be carved out carefully and, here, should be reserved for cases where there is material assistance or encouragement integral to the death.

Yet free speech is not without limitations. Reckless speech that would incite panic, for example, is not protected by the First Amendment.<sup>211</sup> In contrast, the “mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.”<sup>212</sup> In all, the category of unprotected speech is small. The “imminent lawless action test” was developed in *Brandenburg v. Ohio* to determine whether speech was protected, and is the current general test.<sup>213</sup> Under *Brandenburg*, only speech that encourages the imminent use of violence or lawless action falls outside the protection afforded by the First Amendment; such speech may be explicit or implicit.<sup>214</sup> Some critics still struggle with Carter’s conviction based on words alone, deeming it an “act of defiance against [the] general principle” that speech itself is not “violence” or, as Matthew Segel, Director of the ACLU of Massachusetts suggested, an “[abandonment

<sup>202</sup>Huileng Tan, *Judge Dismisses Lawsuit Against Netflix Brought by Parent of a Teenager Who Died by Suicide After Watching ‘13 Reasons Why,’* BUS. INSIDER (Jan. 12, 2022, 1:14 AM), <https://www.businessinsider.com/judge-dismisses-lawsuit-against-netflix-13-reasons-why-suicide-2022-1> [https://perma.cc/R4GN-TU83].

<sup>203</sup>*Wrongful-Death Action*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>204</sup>Tan, *supra* note 205.8

<sup>205</sup>*See id.*

<sup>206</sup>*Id.* (quoting Amended Complaint at 8, *Estate of B.H. v. Netflix, Inc.*, No. 4:21-cv-06561-YGR (N.D. Cal. Sept. 22, 2021)).

<sup>207</sup>*See* Order Granting Special Motion to Strike Pursuant to California Anti-SLAAP Statute, Cal. Code of Civ. Proc. § 425.16, or, in the Alternative Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) at 1-3, *Estate of B.H.*, No. 4:21-cv-06561-YGR (N.D. Cal. Jan. 12, 2022).

<sup>208</sup>Yixuan Zhang, Note, *If Words Can Kill, How Should Criminal Law Intervene?*, 56 AM. CRIM. L. REV. ONLINE 59, 63 (2019), <https://www.law.georgetown.edu/american-criminal-law-review/wp-content/uploads/sites/15/2019/06/If-Words-Can-Kill-How-Should-Criminal-Law-Intervene.pdf> [https://perma.cc/K7R7-6RN5].

<sup>209</sup>*Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015) (quoting *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011)).

<sup>210</sup>*See* Zhang, *supra* note 211, at 60.

<sup>211</sup>*Schenck v. United States*, 249 U.S. 47, 52 (1919).

<sup>212</sup>*Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002).

<sup>213</sup>*Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969); Calvert, *supra* note 4, at 83.

<sup>214</sup>*Brandenburg*, 395 U.S. at 447-48.

of] the protections of our constitution.”<sup>215</sup> But *Brandenburg* serves as an effective test here because it covers scenarios like Carter’s, where she deliberately fostered an environment likely to result in harm to a vulnerable individual, yet leaves *Five Last Acts* untouched because of the requirement of imminence.

*Five Last Acts* is a book that can be purchased and merely sit on the shelf, collecting dust. Some may buy the book and never read it. Others may buy it and never act. There is no imminent encouragement of suicide. On a pro-suicide website, there may be old or outdated threads to read through, but there may also be “goodbye threads” encouraging suicide in real time. For each case where books or other publications are implicated in a suicide, there will be a First Amendment analysis to determine whether the speech was protected or not. As the law exists currently, the speech in these books and websites is most likely entirely protected by the First Amendment.

The importance of the First Amendment cannot be understated, but the potential for harm that may stem from these protections is also great.<sup>216</sup> In *Board v. Pico*, in 1982, the Supreme Court considered whether a local school board violated the Constitution by removing books from a school library.<sup>217</sup> They affirmed that the right to receive information is a fundamental right protected under the U.S. Constitution.<sup>218</sup> When assisted suicide cases arise that implicate pro-suicide books or other writings, courts must perform a careful analysis. Especially where the speech is integral to the suicide, courts should consider exploring the outer limits of *Brandenburg*.

Because of the nature of the speech and severity of the consequences, pro-suicide books and websites should be viewed with seriousness and skepticism. Suicide is a hefty price to pay for First Amendment freedom for the select few who choose to write about it. However, pro-suicide speech cannot be outlawed in its entirety. Even if authors’ aims are to educate and empower, suicide is a public health problem that can be exacerbated by the accessibility of these writings. For those who are contemplating suicide, an easy-to-follow guide might be just what is needed to make the decision. Liability should be reserved for those situations where this is the case.

## V. Conclusion

In *Commonwealth v. Carter*, Michelle Carter was adjudicated delinquent of involuntary manslaughter for coaxing her boyfriend, Conrad Roy, to commit suicide.<sup>219</sup> The judge’s decision depended on her active involvement in and direct contribution to Roy’s death.<sup>220</sup> There was a similar outcome in Inyoung You’s case, where she pled guilty to involuntary manslaughter in 2021,<sup>221</sup> and with Melchert-Dinkel in 2011.<sup>222</sup>

Additionally, one can be liable for providing a suicidal individual with the means to kill themselves. However, the means must be traceable to the death to establish a sufficient causal link between the defendant and suicide. With *Five Last Acts* and other similar publications, the causal link is severed because there is no specific target. The authors do not know who, if anyone, is using their information to take their own lives. Thus, if an element is not satisfied, there is no criminal liability.

<sup>215</sup>Robby Soave, *Michelle Carter Didn’t Kill with a Text*, N.Y. TIMES (June 16, 2017), <https://www.nytimes.com/2017/06/16/opinion/michelle-carter-didnt-kill-with-a-text.html> [https://perma.cc/8NNL-XLL6].

<sup>216</sup>Ninety-four percent of survey respondents viewed the First Amendment as “vital” to democracy. Jan Neuharth, *First Amendment Day is an Important Reminder of the Rights we Enjoy – and Must Protect*, USA TODAY (Sept. 23, 2021, 10:00 AM), <https://www.usatoday.com/story/opinion/2021/09/23/first-amendment-rights-must-protect/8377984002/> [https://perma.cc/W9KZ-PYY2].

<sup>217</sup>*Bd. of Educ. v. Pico*, 457 U.S. 853, 855-56 (1982).

<sup>218</sup>*Id.* at 866-67.

<sup>219</sup>Levenson, *supra* note 9.

<sup>220</sup>See *Commonwealth v. Carter*, 52 N.E.3d 1054, 1063 (2016).

<sup>221</sup>Chung, *supra* note 126.

<sup>222</sup>*State v. Melchert-Dinkel*, No. A15-0073, 2015 WL 9437531, at \*9.

Even though the authors are not engaging in illegal wrongdoing, authors or their publishers could be encouraged to include voluntary disclosures or disclaimers on their websites or in their books. As an extension of the free speech argument, authors should not be forced to include such disclaimers or be required to firewall their websites to prevent specific populations from accessing the site,<sup>223</sup> so these are not feasible interventions. Instead, suicide prevention groups could collaborate with pro-suicide authors for their mutual benefit. Authors would avoid potential legal consequences, while suicides would be prevented.

In cases like *Commonwealth v. Carter*, a direct link between the behavior and the suicide existed. Carter acted with the requisite *mens rea* and her conduct resulted directly in Roy's death. Her speech played a critical and definite role in his suicide, whereas abstract thoughts that are directed at a general, public audience are not so easily attributable to suicides that they facilitate. Had Carter provided Roy with a copy of *Five Last Acts* instead of actively coaching him via phone, she likely would not have been found guilty. If she had read it to him over the phone knowing him to be suicidal and prepared to act upon his ideations, there may have been liability.

In sum, there is a fine line between criminality and immunity, but the line does exist. Each case is fact specific, but criminal liability lies between the circumstances in *Commonwealth v. Carter* and *Five Last Acts*, with criminal liability a more likely result where the communication is real-time and where the defendant intends a particular individual to act on it or knows that they will. Carter's guilt stemmed largely from persuading Roy back into his truck when he became scared.<sup>224</sup> Her active involvement is what caused his death; participation *as the suicide is occurring* is more likely to be criminal. However, the words or information must be targeted at a particular person with the intent that they act on it. Without this causal link, criminal liability will be severed. Further, the First Amendment may still protect certain speech, even if it satisfied the crime.

Simply identifying the line of legality as it relates to suicide assistance provides an understanding of the criminality of this conduct. The need for anti-suicide information on the internet is critical because, during the same period that hits for pro-suicide websites were increasing, visits to suicide prevention sites declined.<sup>225</sup> Suicide prevention organizations could increase awareness of the issue online. There must be more balance in the accessibility of pro- and anti-suicide messages. One creative example is the #iamhere Facebook groups, which post links to articles with hateful comments and direct their members to "counterspeak" or respond to those hateful comments productively.<sup>226</sup> Hopefully, some individuals may think twice about encouraging suicide or "helping" a friend to commit suicide if they recognize that their assistance may constitute murder or manslaughter.

While criminalization of behavior does not always deter it,<sup>227</sup> there is a public health interest in preventing suicide and the assistance of it. Though suicide itself is no longer considered a crime as it was in medieval England, aiding in another's death quickly approaches the line of murder. As the law exists now, it may be difficult to hold participants accountable, especially those acting through books and pro-suicide websites. Because these are growing in popularity, there is cause for concern.<sup>228</sup> But before implementing broader laws with relaxed *mens rea*, for instance, there must be a bioethical discussion as to whether that is the "correct" solution for the problem. Any encroachment on the First Amendment

<sup>223</sup>See *Intellectual Freedom and Censorship Q&A*, AM. LIBR. ASSOC. (May 29, 2007), <https://www.ala.org/advocacy/intfree/dm/censorship/faq#ifpoint9> [<https://perma.cc/LUU2-U6G7>] (defining censorship as "limiting ... access to words, images, or ideas").

<sup>224</sup>LiveNOW from FOX, *supra* note 163.

<sup>225</sup>Biddle et al., *supra* note 149, at 373.

<sup>226</sup>Daniel Jones & Susan Benesch, *Combating Hate Speech Through Counterspeech*, BERKMAN KLEIN CTR. (Aug. 9, 2019), <https://cyber.harvard.edu/story/2019-08/combating-hate-speech-through-counterspeech> [<https://perma.cc/33U6-5BGM>].

<sup>227</sup>See NAT'L INST. OF JUST., *Five Things About Deterrence* (June 5, 2016), <https://nij.ojp.gov/topics/articles/five-things-about-deterrence> [<https://perma.cc/PG3D-VR6E>].

<sup>228</sup>Biddle et al., *supra* note 149, at 370-73.

would need to be done mindfully. Lastly, as a public health problem, targeting the individual may not achieve the health outcomes that we seek, as there are a host of unique situations that may make their way into the legal system.<sup>229</sup> For now, simply identifying the line of legality and spreading awareness of the issue could have a deterrent effect, but further action must be taken soon.

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<sup>229</sup>Shaffer, *supra* note 110, at 348 (“Some acts of suicide assistance deserve stiffer penalties than are now imposed, while many other forms of assistance do not warrant any criminal penalty at all.”).