

**SUICIDE ENCOURAGEMENT: A HOMICIDE
OFFENSE BASED ON THE DOCTRINE OF
UNDUE INFLUENCE**

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I. INTRODUCTION

Conrad Roy, an eighteen-year old high school student from Massachusetts, tried on several occasions to kill himself.¹ After each suicide attempt, Roy reached out to someone that he trusted for help.² Michelle Carter, one such confidante, was a friend who Roy met while one vacation. The relationship later became romantic even though their interactions were almost exclusively confined to electronic communication.³ Roy confided in Carter that he had struggled with mental illness and that he was contemplating another suicide attempt.⁴ Unfortunately for Roy, his trust in Carter was misplaced. Instead of offering emotional support, Carter actively encouraged Roy to kill himself

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1. Jesse Barron, *The Girl From Plainville*, ESQUIRE (Aug. 23, 2017), <http://www.esquire.com/news-politics/a57125/michelle-carter-trial/>; *Commonwealth v. Carter*, 115 N.E.3d 559, 562 (Mass. 2019).

2. *See Carter*, 115 N.E.3d at 562.

3. *Id.*; Barron, *supra* note 1.

4. Text Messages between Michelle Carter and Conrad Roy (June 1, 2014–Sept. 21, 2014) <https://htv-prod-media.s3.amazonaws.com/files/carter-exhibit-30-1497356322.pdf> [hereinafter Carter-Roy Texts], at June 21, 2014, 11:48–11:50 AM; July 1, 2014, 10:56 PM. Carter described Roy as “suicidal and [having] severe depression and social anxiety,” who she was responsible for “keeping alive basically.” Text Messages between Michelle Carter and Samantha Boardman, June 22, 2014, 8:51 PM, <https://htv-prod-media.s3.amazonaws.com/files/sam-boardman-1497289698.pdf> [hereinafter Carter-Boardman Texts].

and even suggested various methods of suicide.⁵ She exploited his mental and emotional instability, as well as his religious convictions, while simultaneously seeking to detach Roy from his family and friends.⁶ Carter and Roy eventually decided upon carbon monoxide poisoning as the most efficient method after Carter provided information on how long the process would take and even how many parts-per-million of carbon monoxide would be necessary for a lethal dose.⁷ She consistently took steps to conceal her involvement, and proffered avenues Roy could take to avoid detection by his parents and authorities both before and during the commission of the suicide.⁸

On July 12, 2014, eighteen-year old Conrad Roy committed suicide in the parking lot of a Fairhaven, Massachusetts K-Mart by running a gas-powered water pump inside the cabin of his pickup truck.⁹ When Roy made the final decision to end his life, Carter continued her encouragement via telephone until the very moment of his death.¹⁰ Importantly, when Roy exited the truck, apparently aware and fearful of the poison's effects, Carter ordered Roy to get back in.¹¹ Roy returned to his truck and succumbed to the carbon monoxide inside.¹²

On June 16, 2017, then-twenty-year old Michelle Carter was convicted of involuntary manslaughter for her involvement in Roy's death.¹³ Carter's conviction has attracted national attention because of the apparent inconsistency between Roy's killing himself and Carter's conviction for having killed him.¹⁴ In homicide prosecutions based on a

5. Carter-Roy Texts, *supra* note 4, at July 12, 2014, 10:21 AM; June 29, 2014, 7:23–7:24 PM, 8:32 PM, 8:35 PM; June 30, 2014, 9:58 AM.

6. *Id.* at July 5, 2014, 7:41 PM; July 9, 2014, 3:25 PM; July 11, 2014, 7:00 PM.

7. *Id.* at July 4, 2014, 6:02 PM; July 6, 2014, 5:11 PM, 5:12 PM, 5:16 PM.

8. *Id.* at July 12, 2014, 10:36 AM, 5:17 PM; Text Messages between Michelle Carter and Camdyn Roy, July 12, 2014, 10:18 PM <https://htv-prod-media.s3.amazonaws.com/files/camdyn-roy-1497289693.pdf> [hereinafter Carter-Camdyn Texts]; Text Messages between Michelle Carter and Lynn Roy, July 13, 2014, 6:13 PM <https://htv-prod-media.s3.amazonaws.com/files/lynn-roy-1497289695.pdf> [hereinafter Carter-Lynn Texts]. Camdyn and Lynn Roy are Conrad Roy's sister and mother, respectively.

9. Commonwealth v. Carter, 115 N.E.3d 559, 562 (Mass. 2019).

10. Carter-Roy Texts, *supra* note 4, at July 12, 2014, 5:15–5:19 PM; Carter-Boardman Texts, *supra* note 4, at July 13, 2014, 10:09 PM.

11. Carter-Boardman Texts, *supra* note 4, at Sept. 15, 2014, 8:24 PM.

12. Carter, 115 N.E.3d at 565. Interestingly enough, Carter related to Boardman that she believed Lynn Roy to be suspicious that Carter had been involved in, and had encouraged, her son's suicide. Carter-Boardman Texts, *supra* note 4, at Sept. 15, 2014, 7:02 PM.

13. Dan Glaun, *Massachusetts Supreme Judicial Court to hear appeal of Michelle Carter's texting suicide conviction on Thursday*, MASSLIVE (Oct. 1, 2018), https://www.masslive.com/news/2018/10/supreme_judicial_court_to_hear_2.html.

14. See Sherry F. Colb, *When Should Encouraging Suicide Be a Crime?*, VERDICT (July 5, 2017), <https://verdict.justia.com/2017/07/05/encouraging-suicide-crime>; Rebecca Turco,

theory of suicide encouragement, the law requires a causal connection between the defendant's conduct and the victim's death.¹⁵ Causation is often difficult to prove in suicide encouragement cases because the defendant is usually absent from the scene of the crime and is never the person who actually "pulled the trigger."

This Comment will address suicide encouragement as a distinct homicide offense and propose a doctrinal framework for establishing causation based on the doctrine of undue influence in inheritance law. It also argues that causing suicide statutes, which proscribe causing another's suicide through force, duress, deception, or coercion, are best fitted for prosecuting suicide encouragement cases like *Carter*.

II. CURRENT JUDICIAL AND LEGISLATIVE APPROACHES

Massachusetts does not have a statute directly criminalizing either the aiding, encouraging, or causing of another's suicide;¹⁶ instead, the state decided to prosecute Carter for involuntary manslaughter.¹⁷ In Massachusetts, involuntary manslaughter, a common law offense, prohibits the wanton or reckless killing of another.¹⁸ The state argued that Carter's ordering Roy back into the car, knowing he had filled it with poisonous carbon monoxide gas, amounted to wanton and reckless conduct and that Carter caused Roy's death by influencing him to take action and end his life.¹⁹ Moreover, Carter herself had admitted to a friend that she had caused Roy's death.²⁰ Carter argued that her encouragement of Roy's suicide could not be the legal cause of his death without any physical act, or even physical presence at the scene, on her part.²¹ Following a bench trial, Carter was convicted as charged.²²

Defense attorneys reflect on Michelle Carter case, ABC 6 (Oct. 2, 2018, 6:11 PM), <http://www.abc6.com/story/39217410/defense-attorneys-reflect-on-michelle-carter-case>; *Michelle Carter: What the texting suicide case tells us*, BBC NEWS (June 17, 2017), <https://www.bbc.com/news/world-us-canada-40307210>.

15. See *Carter*, 115 N.E.3d at 568.

16. See Robert Rivas, *Survey of State Laws Against Assisting in a Suicide*, FINAL EXIT NETWORK, INC. (2017), http://www.finalexitnetwork.org/Survey_of_State_Laws_Against_Assisting_in_a_Suicide_2017_update.pdf.

17. See *Carter*, 115 N.E.3d at 561.

18. *Commonwealth v. Pease*, 731 N.E.2d 92, 94 (Mass. App. Ct. 2000) (citing *Commonwealth v. Catalina*, 556 N.E.2d 973, 975 (Mass. 1990)); *Commonwealth v. Life Care Ctrs. of Am. Inc.*, 926 N.E.2d 206, 214 (2010); MASS. GEN. LAWS ch. 265, § 13 (2018).

19. *Commonwealth's Response to Defendant's Motion to Dismiss* at 30–32, *Commonwealth v. Carter*, (No. 15YO0001NE) (Mass. Juv. Ct. Aug. 21, 2015).

20. *Id.* at 32.

21. See *Carter*, 115 N.E.3d at 565–66.

22. *Id.* at 562.

On appeal, Carter claimed that the evidence at trial was insufficient to support her conviction where the trial judge's findings on the record did not explicitly set forth the nature of the causation between Carter's conduct and Roy's death.²³ The Supreme Judicial Court of Massachusetts recognized that "legal causation in the context of suicide is an incredibly complex inquiry . . ."²⁴ Characterizing Roy as a "vulnerable, confused, mentally ill" teenager and Carter as his "only confidant in [the] suicidal planning," the court found sufficient evidence that causation existed between Carter's badgering and constant pressuring and Roy's eventual suicide.²⁵ The court explained that Carter abused Roy's repose of trust by "preying upon well-known weaknesses, fears, anxieties and promises, that finally overcame the willpower to live of a mentally ill, vulnerable, young person, thereby coercing him to commit suicide."²⁶

The court distinguished the offense in *Carter* from assisted suicide, which implicates "end-of-life discussions between a doctor, family member, or friend and a mature, terminally ill adult confronting the difficult personal choices that must be made when faced with the certain physical and mental suffering brought upon by impending death."²⁷ In affirming her conviction, the court was careful to condemn Carter's individual conduct and confine its holding to the facts of the case at hand; it was Carter's calculated abuse of Roy's vulnerability and psychological condition on which the court would hang the homicide conviction.²⁸

Unlike Massachusetts, some states have enacted statutes prohibiting assisted suicide where the defendant actually participates in the suicidal act.²⁹ A handful of states have enacted statutes prohibiting suicide encouragement, or laws criminalizing verbal conduct such as motivation or advice that results in another's suicide;³⁰ while these statutes would seem to best account for cases like *Carter*, they sometimes suffer from

23. *Id.* at 567.

24. *Id.* at 568.

25. *Id.*

26. *See id.* at 566, 570.

27. *See id.* at 566, 572 (citing *Commonwealth v. Carter*, 52 N.E.3d 1054, 1064 (Mass. 2016)).

28. *See id.* at 572–73.

29. *See* ARIZ. REV. STAT. ANN. § 13-1103 (2019); GA. CODE ANN. § 16-5-5 (West 2019); IDAHO CODE ANN. § 18-4017 (West 2019); IND. CODE ANN. § 35-42-1-2.5 (West 2019); MICH. COMP. LAWS ANN. § 752.1027 (West 2019); OHIO REV. CODE ANN. § 3795.04 (West 2019); R.I. GEN. LAWS ANN. § 11-60-3 (West 2019); S.C. CODE ANN. § 16-3-1090 (2019); TENN. CODE ANN. § 39-13-216 (West 2019).

30. *See* CAL. PENAL CODE § 401 (West 2019); DEL. CODE ANN. tit. 11, § 645 (West 2019); IOWA CODE ANN. § 707A.2 (West 2019); LA. STAT. ANN. § 14:32.12 (2019); ME. REV. STAT. ANN. tit. 17-A, § 204 (2019); MISS. CODE ANN. § 97-3-49 (West 2019); N.H. REV. STAT. ANN. § 630:4 (2019); N.D. CENT. CODE ANN. § 12.1-16-04(1) (West 2019); OKLA. STAT. ANN. tit. 21, § 813 (West 2019); S.D. CODIFIED LAWS § 22-16-37 (2019).

constitutional infirmities which render them unenforceable.³¹ Still other states, such as Connecticut, New York, and Pennsylvania, as well as the Model Penal Code, criminalize assisting suicide as manslaughter, but where the suicide is caused through force, deception, duress, or coercion, the killing constitutes murder.³²

In a Minnesota case, the defendant posed as a young female nurse and responded to posts on online suicide forums, “feign[ing] caring and understanding to win the trust of the victims while encouraging [them] to hang themselves, falsely claiming that he would also commit suicide, and attempting to persuade them to let him watch the hangings.”³³ Melchert-Dinkel was alleged to have successfully convinced two people, one in the United Kingdom and the other in Canada, to kill themselves.³⁴ He was charged and tried on two counts of aiding suicide under Minnesota law, which prohibits intentionally assisting another in taking the other’s own life.³⁵ In response to Melchert-Dinkel’s constitutional arguments, the court reasoned that use of the word “assists” only proscribed physical aid in another’s commission of suicide, or the narrow class of speech which bore “the most direct, causal links” to the suicide.³⁶

After a protracted procedural history, due in part to complications with fitting Melchert-Dinkel’s conduct into the statutory scheme he was prosecuted under, he pursued his final appeal before the Minnesota Court of Appeals, having been found guilty of aiding in one suicide and attempting to aid in a second by the district court on remand.³⁷ The former conviction was affirmed, while the latter was reversed.³⁸ In affirming, the court needed to find that Melchert-Dinkel exhibited conduct amounting to an intent to assist a suicide and the provision of actual assistance to the decedent.³⁹ The first prong was satisfied by virtue of the circumstances surrounding Melchert-Dinkel’s online communications with his first victim, in which he provided specific instructions on a particular method of “suspension hanging” to cause

31. See, e.g., *State v. Melchert-Dinkel*, 844 N.W.2d 13, 24 (Minn. 2014) (criticizing a Minnesota statute that prohibits “advising” and “encouraging” suicide because such terms are too broad and encompass protected speech).

32. See CONN. GEN. STAT. ANN. § 53a-54a (West 2019); N.Y. PENAL LAW §§ 125.25, 120.30, 125.15 (McKinney 2019); 18 PA. STAT. AND CONS. STAT. ANN. § 2505; MODEL PENAL CODE §§ 2.02, 2.03, 210.2, 210.5 (AM. LAW INST. 2018).

33. *Melchert-Dinkel*, 844 N.W.2d at 16.

34. *Id.* at 16–17.

35. *Id.*; See MINN. STAT. ANN. § 609.215(1) (West 2019).

36. *Melchert-Dinkel*, 844 N.W.2d at 22–23.

37. See *State v. Melchert-Dinkel*, No. A15-0073, 2015 WL 9437531, at *1 (Minn. Ct. App. Dec. 28, 2015).

38. *Id.*

39. *Id.* at *6–7.

death, which he described as “the best and surest method.”⁴⁰ In finding actual assistance, the court reiterated the Minnesota Supreme Court’s finding that “speech instructing another on suicide methods falls within the ambit of constitutional limitations on speech that assists another in committing suicide,” and concluded that the influence Melchert-Dinkel exerted over his victim provided the victim “with what was needed for him to commit suicide.”⁴¹ Melchert-Dinkel, therefore, was guilty of assisting in a suicide.⁴²

Salient through these two cases is the notion that the application of coercive and unduly influential forces to vulnerable individuals toward killing themselves can be the actual, legal cause of their eventual suicide and can support a homicide conviction.

III. A USEFUL COMPARISON

An example of a more typical assisting suicide case helps highlight the nature of the causation at play in cases of encouraging suicide such as *Carter* and *Melchert-Dinkel*. Assisting suicide statutes were enacted in response to a growing public desire to add physician-assisted suicide to the repertoire of available end-of-life treatment options.⁴³ In *State v. Final Exit Network, Inc.*, Final Exit Network (“FEN”), a nonprofit organization, “provide[d] its members experiencing debilitating mental or physical illness with counseling services and information on end-of-life-care, including methods to hasten death by suicide.”⁴⁴ After the member has gone through an extensive approval process through which FEN is able to determine that the member has an incurable disease causing great suffering and is mentally competent to make an educated and informed decision regarding ending his/her life, FEN provides the member with instructions on how to find and assemble the necessary equipment for carrying out the suicide.⁴⁵ FEN then conducts multiple practice runs with the member to ensure that the member can successfully complete the procedure on his/her own; FEN officials take no

40. *Id.* at *6. The court noted that “[i]ntent may be inferred from the defendant’s conduct and the surrounding circumstances.” *Id.* (citing *State v. Whisonant*, 331 N.W.2d 766, 768 (Minn. 1983)).

41. *Id.* at *9. (quoting *Melchert-Dinkel*, 844 N.W.2d at 23).

42. *Id.*

43. See generally John A. Alesandro, Comment, *Physician-Assisted Suicide and New York Law*, 57 ALB. L. REV. 819 (1994) (discussing the origins of the assisted suicide debate and the moral and legal problems surrounding it).

44. *State v. Final Exit Network, Inc.*, 889 N.W.2d 296, 299 (Minn. Ct. App. 2016).

45. *Id.* at 300.

part in the assembly or act of the procedure, other than checking the member's pulse and cleaning up the equipment afterwards.⁴⁶

Final Exit Network centered on a medical group's provision of information regarding suicide to terminally ill individuals after a lengthy vetting process meant to determine that the person was not just looking for a way out.⁴⁷ More importantly, it involved assistance in a suicide already firmly decided upon by its eventual victim, absent any indications that the decision was urged or foisted on them.⁴⁸ A Minnesota jury found FEN guilty of assisting another in taking the other's own life in violation of Minn. Stat. § 609.2015(1), the same statute under which Melchert-Dinkel was prosecuted for very factually-different conduct.⁴⁹

The underlying culpability in the case of encouraging suicide that this Comment addresses is arguably much more severe than that exhibited by FEN employees providing end-of-life treatment to terminally ill patients.⁵⁰ As such, it makes sense to punish the intent to

46. *Id.* See also *Who is the Final Exit Network (FEN)*, FINAL EXIT NETWORK (last visited Apr. 20, 2019), <http://www.finalexitnetwork.org/Mission.html> (“We do not encourage anyone to end their life and are opposed to anyone encouraging anyone to end their life. We do not provide the means for self-deliverance and we do not assist in self-deliverance.”). Notably, this organization recognizes the distinction between the services they provide, which they have argued does not rise to the level of assistance in a suicide, and encouraging suicide. *Id.* But see *State v. Final Exit Network, Inc.*, Nos. A13–0563, A13–0564, A13–0565, 2013 WL 5418170, at *8 (Minn. Ct. App. Sept. 30, 2013) (After finding sufficient evidence of physical assistance, the court states that FEN’s communications with the deceased, “specifically about [the] request for exit-guide services, establishe[d] a reasonable probability” of having assisted the suicide).

47. See *Final Exit Network*, 889 N.W.2d at 299–300.

48. “When a member makes the decision to end his or her life, *the member contacts Final Exit* requesting ‘exit services’ and provides Final Exit with a personal statement and medical diagnosis.” *Id.* at 299 (emphasis added). The fact that the member must request FEN’s services, and provide documentation justifying the desire to end his/her life on more objective criteria than personal whim or caprice stands in contrast to Carter’s knowledge of Roy’s mental and emotional vulnerabilities and Melchert-Dinkel’s intentional seeking out of vulnerable individuals on online suicide forums, thus distinguishing a case of assisting suicide from cases of encouraging suicide. Compare *id.*, with *Commonwealth v. Carter*, 115 N.E.3d 559, 568 (Mass. 2019) (stating the defendant knew of the victim’s “weakened state” and “badgered” him to commit suicide), and *State v. Melchert-Dinkel*, 844 N.W.2d 13, 17 (Minn. 2014) (where the victim described to the defendant “an existence in which he was trapped” in misery, and the defendant then offered “practical advice” on suicide.)

49. *Final Exit Network*, 889 N.W.2d at 299, 302; see also MINN. STAT. ANN. § 609.215 (West 2019), *invalidated by State v. Melcher-Dinkel*, 844 N.W.2d. 13 (Minn. 2014). The Advisory Committee Comment relevant to this section relate that a typical case falling under its purview are those involving “(1) [w]here one who is suffering from an incurable and painful illness asks to be supplied with the means of self-destruction as by a gun or poison. . . .” *Id.* See generally *People v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994) (involving the suicides of terminally ill patients of Dr. Jack Kevorkian who enlisted his aid and medical expertise in ending their lives).

50. In the assisting suicide context, courts are normally faced with someone at “the penumbra where death begins but life, in some form, continues.’ These patients are

kill, albeit carried out by the victim's own hand, more severely than the intent to provide a suicidal individual assistance in an act they have already self-determined to undertake. From the distinction drawn, it is clear that encouraging suicide is not appropriate for prosecution under an assisting suicide statute intended to circumscribe the physical provision of aid, as opposed to the provision of willpower to take one's own life through coercive and unduly influential forces.⁵¹ The law should treat the former as criminal homicide, while maintaining the latter's position as a distinct felony not rising to the level of homicide.⁵²

IV. UNDUE INFLUENCE: A NEW CONCEPTUAL FRAMEWORK

The culpability of the defendants in assisting suicide cases such as *Final Exit Network* is sharply distinguished against that displayed in cases of encouraged suicide such as *Carter* and *Melchert-Dinkel*. Assisting suicide is condonation of another's choice to end their own life; encouraging suicide is making that choice for them through an undue exertion of coercion and influence.⁵³ *Carter* and *Melchert-Dinkel* were highly receptive to the notion that one's encouragement overcoming another's will could be the actual, legal cause of another's suicide, and would thus be subject to the imposition of criminal liability, when looked at within the factual circumstances surrounding the death.⁵⁴

Other doctrinal contexts make specific allowances for consideration of the effect one's encouragement toward a given result have over the conduct of another. In the context of testamentary dispositions, the doctrine of undue influence is raised by will opponents to invalidate disbursements of property where the testator may have been pressured or coerced into disposing of the property.⁵⁵ Influence over another becomes undue where the

frequently in great pain, unable to move, or oblivious to their surroundings . . ." and thus "seek assistance through medication in order to die peacefully and without pain . . ." William J. Tarnow, *Recognizing a Fundamental Liberty Interest Protecting the Right to Die: An Analysis of Statutes Which Criminalize or Legalize Physician-Assisted Suicide*, 4 ELDER L.J. 407, 408 (1996).

51. See *Carter*, 115 N.E.3d at 572.

52. See generally *People v. Cleaves*, 280 Cal. Rptr. 146 (Cal. Ct. App. 1991); *Gentry v. State*, 625 N.E.2d 1268 (Ind. Ct. App. 1993); *People v. Campbell*, 335 N.W.2d 27 (Mich. Ct. App. 1983); 2 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 15.6 (3d ed. 2018).

53. See Sue Woolf Brenner, *Undue Influence in the Criminal Law: A Proposed Analysis of the Criminal Offense of "Causing Suicide,"* 47 ALB. L. REV. 62, 70 (1982) ("In a true 'causing suicide' case, the impetus for the act must come from the adviser who imposes his will upon the victim.").

54. See *Carter*, 115 N.E.3d at 568–69; *State v. Melchert-Dinkel*, No. A15-0073, 2015 WL 9437531, at *6 (Minn. Ct. App. Dec. 28, 2015).

55. See generally, REST. (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 (Am. Law Inst. 2003).

influence was such as, in effect, to destroy the testator's free agency and substitute for his own another person's will. Evidence must be produced that pressure was brought to bear directly upon the testamentary act. Mere general influence, however strong and controlling . . . is not enough; it must be influence used directly to procure the will and must amount to *coercion* destroying free agency on the part of the testator.⁵⁶

A determination of whether undue influence tainted the testator's chosen plan of disposition is a fact-bound inquiry, focusing on "the effect of a long course of conduct upon the mind of the testator at the time the will was made, and the evidence by which it is established is usually circumstantial."⁵⁷ Undue influence is described as causing the testator "to make a donative transfer that the [testator] would not otherwise have made."⁵⁸ Circumstantial evidence is generally supplied by examining whether the testator was susceptible to undue influence, and whether the influencer had an opportunity and motivation to unduly influence them.⁵⁹

Alternatively, a presumption of undue influence may be raised by a will opponent showing both the existence of a confidential relationship between the testator and alleged influencer, and suspicious circumstances surrounding the execution of the testamentary instrument.⁶⁰ Although usually arising out of fiduciary obligations, a confidential relationship is also presumed from informal personal relationships of "special trust and confidence," where the testator could justifiably believe that the influencer would only act in the testator's best interest.⁶¹ Examples of suspicious circumstances are: the testator's

56. Hagen v. Hickenbottom, 48 Cal. Rptr. 2d 197, 204–05 (Cal. Ct. App. 1995) (citations omitted in original). "Thus, undue influence is mental, moral or physical exertion that destroys the free agency of a testator . . . by preventing the testator . . . from following the dictates of his or her own will and accepting instead the dominating influence of another." 95 C.J.S. *Wills* § 358 (2019).

57. See *In re Thompson's Will*, 104 S.E.2d 280, 284 (N.C. 1958). "Undue influence may be proved directly by testimony showing that one person, by threats or coercion or importunities, so exhausted the will of the other person to resist that the act taken by the weaker was not his or her own act but that of the person exercising the undue influence." *In re Estate of Depriest*, 733 S.W.2d 74, 75–78 (Tenn. Ct. App. 1986).

58. REST. (THIRD) OF PROP., *supra* note 55.

59. *Id.* at Comment e. "The alleged wrongdoer need not be present when the donative document was executed in order to exert undue influence." *Id.* Put differently, evidence of the "power to influence the grantor, where the opportunity to do so was present, and where the disposition of property was a changed course of action or departure from the estate plan" will support a finding of undue influence. 95 C.J.S., *supra* note 56, at § 377.

60. REST. (THIRD) OF PROP., *supra* note 55, at Comment f.

61. *Id.* at Comment g; Heyward Rebecca Dodkin, Howard v. Nasser: *The Relative Burdens for Wills Contested on the Basis of Confidential Relationships and Undue Influence*, 57 S.C. L. REV. 531, 537–38 (2006) ("Most courts state that confidential

susceptibility to undue influence; participation by the alleged influencer in the preparation of the will; the lack of independent and disinterested advice from another during the preparation of the will; preparation of the will in secrecy or with urgency; a change in the relationship of the testator with others as a result of the testator's relationship with the alleged influencer; substantial discrepancies between prior wills and the will in question; absence of continuity of purpose as evidenced in prior wills; and whether a reasonable person would judge the chosen disposition as "unnatural, unjust, or unfair. . . ."⁶²

Carter and *Melchert-Dinkel* have made room for the notion that the coercive effects of one's encouragement or motivation may rise to the level of actually causing or procuring another's suicide.⁶³ Undue influence is a doctrinal inquiry measuring the coercive or influential effects one's encouragement or motivation has on the conduct of another; *i.e.* whether the undue influence caused the resulting testamentary disposition.⁶⁴ In both instances mere encouragement or general endorsement of a particular course of action are held insufficient.⁶⁵ Thus, importation of the undue influence analysis into the encouraging suicide context could prove to be a powerful judicial tool in addressing cases in which one's excessive involvement could reasonably be considered the actual cause of another's suicide, absent any provision of aid or assistance as defined in assisting suicide statutes.⁶⁶

Such a theory was espoused by Sue Woolf Brenner to support her view that when a case of motivating another's suicide is examined through an undue influence framework, it could justify a criminal

relationships are not limited to formal fiduciary relationships, but 'may also arise informally from moral, social, domestic, or purely personal relationships.'"

62. REST. (THIRD) OF PROP., *supra* note 55, at Comment h. This list provided by the Restatement is not dispositive or exhaustive, and courts should consider "all relevant factors." *Id.*

63. See *Commonwealth v. Carter*, 115 N.E.3d 559, 568–69 (Mass. 2019); *State v. Melchert-Dinkel*, No. A15-0073, 2015 WL 9437531, at *9 (Minn. Ct. App. Dec. 28, 2015); *Commonwealth v. Bowen*, 13 Mass. 356, 360 (1816) (discussing nature and efficacy of one's encouragement in the context of another's suicide); *People v. Kevorkian*, 447 Mich. 436, 445 (1995) (holding that "[o]nly where there is probably cause to believe that death was the direct and natural result of a defendant's act can the defendant be properly bound over on a charge of murder.").

64. See generally REST. (THIRD) OF PROP., *supra* note 55.

65. See *In re Estate of Dietrich*, 271 A.D.2d 894, 894–95 (N.Y. App. Div. 2000); *James v. Knotts*, 705 S.E.2d 572, 575 (W. Va. 2010) (citing *Stewart v. Lyons*, 47 S.E. 442 (W. Va. 1903)); *Matter of Will of Pritchard*, 443 N.W.2d 95, 98 (Iowa 1989); 95 C.J.S., *supra* note 56, at § 357; *Melchert-Dinkel*, 2015 WL 9437531, at *11.

66. "Given this conceptual similarity [between undue influence and the criminal act of destroying another's willpower in the suicide context], it is useful in considering the criminal act of causing suicide to examine the tests which have been developed to identify the presence of undue influence." Brenner, *supra* note 53, at 88.

homicide charge for causing suicide under statutes like those in New York, Connecticut, Pennsylvania, and the Model Penal Code.⁶⁷ Although only a few states currently have causing suicide statutes such as these, such enactments stand a substantially better chance of more thoroughly circumscribing the conduct demonstrated by Carter than assisting suicide statutes.⁶⁸

Brenner envisioned application of undue influence to the suicide context as a direct analogy to the duress language in Model Penal Code § 210.5.⁶⁹ According to Brenner, “duress in the causing suicide context involves situations in which the suicide is produced by exerting psychological influence in order to overcome the victim’s own will.”⁷⁰ As such, an inquiry into whether a suicide was procured by duress tracks essentially the same factors as undue influence; one exerting psychological pressure over another must be in a position to so influence them, thus requiring some sort of “dependency” relationship, and because the law has consistently acknowledged the possibility and effect of such influence in the wills context, “[c]ausing suicide is an extension of that recognition to a more macabre arena.”⁷¹

Under the Model Penal Code, when one acts with purposeful intention of causing another’s suicide, and purposely engages in conduct amounting to force, duress, or deception to procure that result, and a suicide actually results from such purposeful conduct, an indictment for criminal homicide is appropriate.⁷² In addition, the Model Penal Code treats the purposeful or knowing killing of another as first-degree murder.⁷³

Therefore, Model Penal Code § 210.5 extends the “applicability of the other homicide offenses to conduct that causes another to commit suicide” and strictly “confines criminal sanctions to cases where the actor ‘purposely causes such suicide by force, duress, or deception.’”⁷⁴ In fact, the Advisory Committee reviewing Model Penal Code § 210.5 was receptive to the possible overinclusion problem in criminalizing suicide encouragement.⁷⁵

67. See *id.* at 89. “The criminal act in causing suicide is the destruction of volition which is conceptually very similar to undue influence in the context of wills.” *Id.*

68. See *supra* notes 29–30, 32 (discussing differing treatments of externally caused suicides in various jurisdictions).

69. Brenner, *supra* note 53, at 91.

70. *Id.*

71. *Id.* at 91–92.

72. MODEL PENAL CODE §§ 210.5, 2.02, 2.03.

73. *Id.* at § 210.2.

74. MODEL PENAL CODE, Pt. II, Art. 210, References and Annotation, § 210.5.

75. “And we were somewhat fearful of a formulation that went any beyond this in attributing homicide liability based upon the action of another person. So in Section [210.5] we deliberately limited it to ‘purposely.’” *Continuation of Discussion of Model Penal Code*,

If an assessment of the totality of the circumstances surrounding one's suicide indicates that its commission was the result of undue influence, then the unduly influential conduct would be established as bearing the "most direct, causal link[]" to the suicide.⁷⁶ A finding of causation would need to be further assessed such that the causal relationship would only be criminal upon a finding that the influencer purposely exerted such influence with the conscious object of bringing about the death of another.⁷⁷ The totality analysis that would be utilized in determining whether undue influence was present could double as a test of what the influencer intended in so influencing the victim, a test the *Melchert-Dinkel* court applied.⁷⁸ And because findings of undue influence, causation, and mental culpability are all fact-sensitive inquiries, analysis of the facts of a case in any of those three contexts could inform the evaluation of the other two.⁷⁹

IV. CONCLUSION

If directly analogized to the wills context, Carter's encouragement toward suicide equates with the excessive and undue influence toward the testator's disposition of property in the influencer's favor. Carter's formulation of the plot that would ultimately claim Roy's life would be the importuning of the favorable dispositive provisions of the will over the testator's own volition and willpower. Roy's compilation of the necessary materials to carry out Carter's prescribed course of action would be the testator's transcription of those favorable terms into the

36 A.L.I. PROC. 122, 137 (1959). In addition, the Minnesota Supreme Court was sensitive to this very same consideration in altering the language of the statute under which *Melchert-Dinkel* was originally prosecuted. See *State v. Melchert-Dinkel*, 844 N.W.2d 13, 23–24 (Minn. 2014).

76. *Melchert-Dinkel*, 2015 WL 9437531, at *7.

77. See *supra* note 72 and accompanying text; see also Sean Sweeney, *Deadly Speech: Encouraging Suicide and Problematic Prosecutions*, CASE W. RES. L. REV. 941, 974–75 (2017).

78. *Melchert-Dinkel*, 2015 WL 9437531, at *9. It bears mentioning that the Minnesota statute under consideration in *Melchert-Dinkel* required that the defendant *intentionally* bring about the suicide of another, such that satisfaction of the intentionality requirement in Minnesota would likewise satisfy the Model Penal Code's requirement of purposeful conduct. See Ted Sampson-Jones, *Mens Rea in Minnesota and the Model Penal Code*, 39 WM. MITCHELL L. REV. 1457, 1467 (2013).

79. See LAFAYE, *supra* note 52, at § 5.2(f) ("It is not always easy to prove at a later date the state of a man's mind So of course his thoughts must be gathered from his words (if any) and actions in light of all the surrounding circumstances."); *Id.* at § 6.4 (outlining myriad scenarios and the appropriate findings of causation in each, as determined by close observation of the facts); 95 C.J.S., *supra* note 56, at § 396 (highlighting that courts must take all relevant factors into consideration when determining undue influence in the wills context).

testamentary instrument, fortified by the fact that Roy executed the plan in complete conformity with Carter's instructions. Roy placing himself in the cabin of his pick-up truck and flipping on the generator, with Carter present on the phone with him, corresponds to the execution of the unduly influenced will in the presence of the influencer. And, Roy's exiting the truck was him lifting the pen off the instrument mid-signature, contemplating a reversion to the terms of a prior will drafted free of undue influence. Carter then issued her final instruction, and procured the result she intended of her influence, which itself was entirely inconsistent with each of those previous versions of the will or, rather, each previous iteration of Roy's exertion of his own will to live.

This Comment has argued that viewing the facts of cases like *Carter* as a species of assisting suicide is fundamentally incorrect, as the culpable conduct in a case of encouraging suicide simply does not correspond to the proscriptions of an assisting suicide statute. As we have seen, assisting and encouraging suicide are completely different offenses, both in terms of their predicate facts and the liability flowing from their commission. Instead, a causing suicide statute is to be preferred in prosecuting cases such as *Carter*.

In order to overcome some of the hurdles of prosecuting encouraging suicide when subsumed under the "force, duress, or deception" language, courts could resort to the long-standing judicial doctrine of undue influence. Such a fact-sensitive analysis could more fully capture the nuanced scenarios in which encouraging suicide occurs. It would account for the causal relationship between one's encouragement and another's actions by closely tracking whether actual, "but for" causation exists between the two. The undue influence framework would also facilitate determinations of an actor's intentions in involving themselves in another's suicide. The similarities between the inquiries into the causes of a suicide and the causes of a particular testamentary disposition parallel each other in many respects, and it makes good sense to utilize the undue influence framework in easing the burden on courts faced with true cases of encouraging suicide.

Ultimately, the propriety of considering encouraging suicide as criminal homicide comes down to recognition of its bare factual underpinnings: a person has taken their own life, and someone else was intimately tied to that death in such a way that the desire and intentionality causing the death was not generated from the one whose life was lost. This is homicide, not suicide. Michelle Carter killed Conrad Roy by forcing him to believe that he wanted to kill himself as much she wanted him to die.