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CONSTITUTIONAL LAW: HOW MINNESOTA UNCONSTITUTIONALLY BROADENED ITS ASSISTED-SUICIDE STATUTE—*STATE V. MELCHERT-DINKEL*

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I. INTRODUCTION

In *State v. Melchert-Dinkel*, the "Minnesota Supreme Court held that an individual cannot be prohibited from providing another with advice or encouragement to commit suicide.[1] Specifically, it held that Minnesota's assisted-suicide statute,[2] which prohibits an individual from advising, encouraging, or assisting another to commit suicide, violated the First Amendment to the U.S. Constitution because the terms "advising" and "encouraging" were unconstitutionally overbroad.[3] Yet, the court also held that the assisted-suicide statute was constitutional, in part, because the term "assisting" was narrowly tailored to serve a compelling governmental interest.[4] The court stated that "speech alone may also enable a person to commit suicide" and remanded the proceeding to determine if William Francis Melchert-Dinkel's speech assisted the victims in their suicides.[5] This note addresses the Minnesota Supreme Court's conclusion that speech alone can rise to the level of "assistance."[6]

This case note begins by providing a brief history of the First Amendment and constitutional restrictions on free speech.[7] Next, it

1. State v. Melchert-Dinkel (*Melchert-Dinkel III*), 844 N.W.2d 13, 24 (Minn. 2014).
2. MINN. STAT. § 609.215 (2012).
3. *Melchert-Dinkel III,* 844 N.W.2d at 24.
4. *Id.* at 23.
5. *Id.* at 23, 25.
6. *See infra* Part IV.C.
7. *See infra* Part II.A.

discusses the history of assisted-suicide restrictions.[8] The note then turns to the facts of *Melchert-Dinkel*, as well as the Minnesota Supreme Court's decision, rationale, and outcome.[9] Finally, this note argues that, although the court's application of strict scrutiny was appropriate, an interpretation of assistance in Minnesota's assisted-suicide statute that includes pure speech[10] is unconstitutional.[11]

II. HISTORY OF FREE SPEECH IN THE UNITED STATES

Over the past four hundred years, freedom of speech in the United States has evolved. Our conceptual understanding of free speech derived from England.[12] In 1791, that concept was inscribed in the First Amendment.[13] Since then, the United States Supreme Court has used myriad tests to interpret the text in the First Amendment.[14] In particular, the Court classifies speech based on its social value[15] and generally protects the message's content and a speaker's viewpoint under the First Amendment.[16] Moreover, the Court also considers where the message is conveyed. Like any First Amendment analysis, the Court turns to the origins of free speech to determine if speech on the Internet should receive greater protection than radio or broadcast television.[17]

A. Origins of Free Speech in the United States

The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech."[18] In particular, most speech—

8. *See infra* Part III.

9. *See infra* Part IV.

10. Throughout this note, the phrase "pure speech" is used to specify speech or expression absent any physical action by an individual.

11. *See infra* Part V.B–C.

12. Michael Kahn, *The Origination and Early Development of Free Speech in the United States*, 76 FLA. B.J. 71, 71 (2002).

13. U.S. CONST. amend. I.

14. *See generally* Joshua D. Rosenberg & Joshua P. Davis, *From Four Part Tests to First Principles: Putting Free Speech Jurisprudence into Perspective*, 86 ST. JOHN'S L. REV. 833, 874–76 (2012) (discussing several doctrines and tests used to determine the validity of statutory restrictions against the freedom of speech).

15. *See infra* Part II.A.

16. 16A AM. JUR. 2D *Constitutional Law* § 476 (2014).

17. *See infra* Part II.B.

18. U.S. CONST. amend. I.

artistic, social, political, and other forms, both spoken and written—is afforded some level of protection.[19] The United States Supreme Court justifies freedom of speech by suggesting that it creates a beneficial "market place of ideas."[20] Thus, free speech is considered a useful tool in the search for truth and knowledge.[21] Furthermore, the Court has held that free speech fosters effective participation in government.[22] Under this view, generally referred to as the "instrumentalist theory," restrictions on free speech are justified when society does not benefit from the restricted speech.[23] Alternatively, the so-called "individual autonomy theory" relies on the idea of basic human rights and dignity to justify free speech.[24] This theory generally argues for greater free speech protections, but supports restrictions on speech against "outright lies and

19. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."); *see also* Thea E. Potanos, *Dueling Values: The Clash of Cyber Suicide Speech and the First Amendment*, 87 CHI.-KENT L. REV. 669, 679 (2012).

20. United States v. Rumely, 345 U.S. 41, 56 (1953) (Douglas, J., concurring); *see* Bd. of Educ. v. Pico, 457 U.S. 853, 866 (1982) (stating that the First Amendment's role is to foster individual self-expression and provide "'public access to discussion, debate, and the dissemination of information and ideas'" (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978))); Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, 454 U.S. 290, 295 (1981) ("The Court has long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas."); *see also* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 2, 2–3 (1984).

21. Ingber, *supra* note 20, at 3. To review the first known discussion of a "marketplace of ideas," see *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas . . . accepted in the competition of the market . . . .").

22. *See* Roth v. United States, 354 U.S. 476, 484 (1957) ("The protection given speech . . . was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."); Stromberg v. People of Cal., 283 U.S. 359, 369 (1931) (discussing the usefulness of "free political discussion" in asserting the will of the people such that government may respond).

23. Ingber, *supra* note 20, at 4–5. *See generally* Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 121 (1989) (analogizing instrumental views as consequential).

24. *See* Bruce E.H. Johnson & Kyu Ho Youm, *Commercial Speech and Free Expression: The United States and Europe Compared*, 2 J. INT'L MEDIA & ENT. L. 159, 169 (2009) (citing THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4, 5 (1966)). *See generally* Greenawalt, *supra* note 23.

subliminal manipulation," because they may endanger autonomous choice.[25]

In practice, the instrumentalist and individual autonomy theories both support the concept that some speech may be restricted.[26] Yet, the Court found the instrumentalist theory more compelling and held that speech of "slight social value" may fall into a category less protected by the First Amendment.[27]

Many less-protected classifications of speech are relevant to assisted suicide, and each classification is afforded a low level of scrutiny.[28] Alternatively, where a prohibition on speech restricts the content of a message, the Court applies a much higher level of scrutiny.[29]

1. Less-Protected Classifications

Since the instrumentalist theory's adoption, the United States Supreme Court has determined that several classifications of speech are of "slight social value."[30] These less-protected classifications of speech include speech integral to criminal conduct,[31] speech that incites imminent lawless action,[32] and fraudulent speech.[33] Historically, the Court has been forced to balance the freedom of speech against certain dangers inherent in speech associated with lawlessness.[34] In the 1949 case of *Giboney v. Empire Storage & Ice Co.*, the Court created a new, less-protected classification of speech for the purposes of the First Amendment—speech integral to criminal conduct.[35]

At issue in *Giboney* was an injunction that prohibited a local union from picketing to compel a distributor to sign an agreement

25. Greenawalt, *supra* note 23, at 150–52 ("Of course, every government prohibition of action interferes with free choice, and therefore with the exercise of autonomy.").

26. *See generally* Ingber, *supra* note 20; Potanos, *supra* note 19.

27. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

28. *See infra* Part II.A.1.

29. *See infra* Part II.A.2.

30. *Chaplinsky*, 315 U.S. at 572.

31. *See* United States v. Alvarez, 132 S. Ct. 2537, 2539 (2012); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

32. *See* Brandenburg v. Ohio, 395 U.S. 444, 448 (1969).

33. *See Alvarez*, 132 S. Ct. at 2544.

34. Dennis v. United States, 341 U.S. 494, 548–49 (1951) (reasoning that a state may protect itself from violent overthrow).

35. 336 U.S. at 498.

that would violate Missouri antitrust laws.[36] On appeal, the local union argued that prohibiting their picketing violated the First Amendment.[37] This was the United States Supreme Court's first opportunity to address whether the First Amendment should protect speech integral to the violation of a criminal statute.[38] Ultimately, the Court held that the "constitutional freedom for speech [does not] extend [protection] to speech or writing used as an integral part of conduct in violation of a valid criminal statute."[39]

Twenty years later, in *Brandenburg v. Ohio*, the Supreme Court established another classification of less-protected speech—incitement.[40] Speech constitutes incitement when it advocates "imminent lawless action and is likely to incite or produce such action."[41] In *Brandenburg*, a Ku Klux Klan leader was convicted under a criminal syndicalism[42] statute for advocating violence per the Klan's missions and assembling "with a group formed to teach or advocate the doctrines of criminal syndicalism."[43] Although the Court recognized this additional less-protected class of incitement speech, it nevertheless found the statute unconstitutionally overbroad.[44] The Court held that incitement implies more provocation to action than mere advocacy, and because Ohio's statute prohibited advocacy, in addition to incitement, it went too far.[45]

Forty-three years later, in *United States v. Alvarez*, a new, less-protected speech classification was created.[46] Specifically, *Alvarez* held that the government may prohibit fraudulent speech when the speaker, by his or her speech, intends to "gain a material

36. *Id.* at 491–92.

37. Brief for Appellants at 12, *Giboney*, 336 U.S. 490 (No. 182), 1948 WL 47306, at *17.

38. *Giboney*, 336 U.S. at 498–501.

39. *Id.* at 498. For historical background, see *Thornhill v. Alabama*, 310 U.S. 88 (1940) and *Carlson v. California*, 310 U.S. 106 (1940), which discuss the limitations of a state's power to impair free speech.

40. 395 U.S. 444, 447 (1969).

41. *Id.*

42. The term "criminal syndicalism" is defined as "[a]ny doctrine that advocates or teaches the use of illegal methods to change industrial or political control." BLACK'S LAW DICTIONARY 1679 (10th ed. 2014).

43. *Brandenburg*, 395 U.S. at 444–48 (internal quotation marks omitted) (discussing the Ku Klux Klan leader's hateful remarks made at a televised rally).

44. *Id.* at 449.

45. *Id.*

46. 132 S. Ct. 2537 (2012).

advantage" or affect "other valuable considerations."[47] In this case, an individual fraudulently represented himself as a Congressional Medal of Honor recipient.[48] The United States Supreme Court held that the Stolen Valor Act,[49] which prohibited individuals from fraudulently representing themselves as recipients of military medals, was unconstitutional.[50] The Court declared that fraudulent speech was another classification with less protection under the First Amendment.[51] However, it reasoned that the Stolen Valor Act was unconstitutional because the state could "achieve its legitimate objectives in less restrictive ways."[52]

Generally, however, restrictions on any of these less-protected classifications—speech that is integral to criminal conduct, incites imminent lawless action, or is fraudulent—are found constitutional because they are subjected to less scrutiny than other types of speech.[53] This includes content-based restrictions,[54] which are discussed next.

47. *Id.* at 2547–48. The United States Supreme Court does not define "other valuable considerations" in *Alvarez*, but in previous decisions, it found that false statements are offered less protection under the First Amendment when they are related to situations that discuss defamation or some other legally cognizable harm. *See* Brown v. Hartlage, 456 U.S. 45, 60–61 (1982) ("[F]alsehoods are not protected by the First Amendment in the same manner as truthful statements."); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) ("Untruthful speech . . . has never been protected for its own sake.").

48. *Alvarez*, 132 S. Ct. at 2542.

49. 18 U.S.C. § 704 (2005).

50. *Alvarez*, 132 S. Ct. at 2556.

51. *Id.* at 2545.

52. *Id.* at 2551 (Breyer, J., concurring).

53. *See, e.g.*, Miller v. California, 413 U.S. 15, 15 (1973) (holding that a statute's restrictions were constitutional because obscene materials were not protected by the First Amendment).

54. *See* Republican Party of Minn. v. White, 536 U.S. 765, 774 (2002) (holding that a statute prohibiting speech based on its content was subject to strict scrutiny); Burson v. Freeman, 504 U.S. 191, 207 (1992) (applying strict scrutiny where a statute prohibited certain types of speech); Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1348 (2006). *See generally* 16B C.J.S. *Constitutional Law* § 827 (2014) (analyzing the level of scrutiny required for content-based restrictions).

2. Content-Based Restrictions

Content-based restrictions prohibit a particular message, subject, or viewpoint conveyed within speech.[55] The United States Supreme Court requires a high level of scrutiny for content-based restrictions because the Court acknowledges the potential risks of limiting a speaker's message.[56] Society has a vested interest in permitting a "market place of ideas."[57] Thus, without a high level of scrutiny for content-based restrictions, the government could prohibit "disfavored ideas or views from [entering] the marketplace [of ideas]."[58]

When restricted speech does not fall into a less-protected classification, the Court has consistently held that the speech is afforded total protection under the First Amendment.[59] Consequently, a statute that restricts speech based on its content must pass a strict level of scrutiny to be deemed constitutional.[60] To pass strict scrutiny, a compelling governmental interest must exist and the statute must be narrowly tailored to serve that compelling interest.[61] A statute is narrowly tailored if a compelling interest is actually served and there are no less restrictive alternatives.[62] For example, in *Sable Communications of California, Inc. v. FCC*, the Court held that a statute denying adult access to telephone messages, indecent in nature, was unconstitutional because there was a less

55. Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47 (1987); *see also* Ofer Raban, *Content-Based, Secondary Effects, and Expressive Conduct: What in the World Do They Mean (and What Do They Mean to the United States Supreme Court)?*, 30 SETON HALL L. REV. 551, 555 (2000) (describing content-based restrictions as restrictions on speech based on "substance or . . . subject matter").

56. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (holding that content-based regulations are "presumptively invalid"); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) (reasoning that restrictions on content-based speech can "drive certain ideas or viewpoints from the marketplace"); Leathers v. Medlock, 499 U.S. 439, 448–49 (1991) (acknowledging that content-based restrictions distort the marketplace of ideas).

57. *See supra* note 20 and accompanying text.

58. Time Warner Cable, Inc. v. FCC, 729 F.3d 137, 158 (2d Cir. 2013).

59. *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 812 (2000) ("Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles."); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) ("Government action that stifles speech on account of its message . . . contravenes [the First Amendment].").

60. Burson v. Freeman, 504 U.S. 191, 207 (1992).

61. *Id.* at 199.

62. *See, e.g.*, *Playboy Entm't Grp.*, 529 U.S. at 804.

rights-restrictive alternative.[63] Conversely, in *State v. Crawley*, the Minnesota Supreme Court found that a statute criminalizing false reports of police misconduct was constitutional because there was no less restrictive means of achieving the compelling governmental interest.[64]

B. The Internet and the First Amendment

Because an analysis on free speech restrictions depends on where the message is conveyed, and broadcast media falls under the protection of the First Amendment,[65] a historical look at other forms of broadcast media is highly relevant. The validity of a restriction depends, in part, on the applicable platform—radio, broadcast television, or the Internet.

The Internet is arguably "'the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen.'"[66] In the United States Supreme Court's first Internet-related First Amendment case, it analogized the Internet with other forms of broadcast media.[67] Historically, restrictions on broadcast media were analyzed under an intermediate level of scrutiny.[68]

In *Reno v. American Civil Liberties Union*, a statute prohibiting "indecent and patently offensive communications" on the Internet was constitutionally challenged.[69] Although the State asserted a compelling governmental interest, the Court found that less

63. 492 U.S. 115, 131 (1989).

64. 819 N.W.2d 94, 107 (Minn. 2012) (holding that the statute could be narrowly construed to reach only defamatory statements).

65. *See Regulation of Broadcast Speech*, 92 Harv. L. Rev. 148, 148 (1978).

66. Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1119 (2005) (quoting ACLU v. Reno (*Reno I*), 929 F. Supp. 824, 881 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997)).

67. Reno v. ACLU (*Reno II*), 521 U.S. 844, 845 (1997); Potanos, *supra* note 19, at 682.

68. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 758–59 (1978) (distinguishing broadcast radio from other forms of media by stating that the broadcast audience includes both willing adults and unsupervised children, and pointing out that broadcasting penetrates into the home, a place that should remain free from uninvited sights and sounds). For a summary of the intermediate scrutiny analysis, see *Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("To withstand intermediate scrutiny, a statutory classification must be *substantially related* to an *important* governmental objective." (emphasis added)).

69. *Reno II*, 521 U.S. at 849 (internal quotation marks omitted).

restrictive means to achieve the State's interest were available.[70] Notably, in its analysis, the Court reasoned that cyberspace was distinguishable from broadcast media and held that strict scrutiny was appropriate for content-based speech restrictions on the Internet.[71] Specifically, it held that cyberspace is not invasive; rather, individuals seek the content displayed on the Internet, as opposed to broadcast media, where viewers have little control over the content to which they are exposed.[72] Moreover, the Court was concerned with the chilling effect this particular restriction would have on free speech.[73] Consequently, the Court held that the statute was unconstitutional under the First Amendment because it failed strict scrutiny.[74]

In *Reno*, the statute's chilling effect was measured against two other cases. In *Gentile v. State Bar of Nevada*, the Court found a judicial rule unconstitutional under the void for vagueness doctrine because the rule failed to provide "fair notice to those to whom [it was] directed."[75] In *Dombrowski v. Pfister*, the Court held that the deterrent effect was increased when prohibited by a criminal statute.[76] Reliance on these two cases, and the outcome in *Reno*, emphasize the Court's desire to prevent the chilling effects associated with speech restrictions in cyberspace, even when such restrictions are aimed at limiting harmful speech.[77]

70. *Id.* at 877 (citing *Reno I*, 929 F. Supp. at 842) (agreeing with the district court that content-blocking software was "a reasonably effective" substitute and a less restrictive method of achieving the State's compelling interest).

71. *Id.* at 868 (arguing that factors present in other media discussions—"scarcity of available frequencies" and "invasive nature"—are missing in the context of cyberpace (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637–38 (1994) and Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 128 (1989))).

72. *Id.* at 869; *see also* Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697, 703–04 (2010) (discussing the various intermediaries employed to protect users from unwanted content, including firewalls and other filtering, anti-virus, and malware software).

73. *Reno II*, 521 U.S. at 871–72 (holding that the vagueness of this statute created an "obvious chilling effect").

74. *Id.* at 846 (arguing that the suppression of "a large amount of speech" constitutes significant overbreadth of the challenged statute).

75. 501 U.S. 1030, 1048 (1991) (quoting Grayned v. City of Rockford, 408 U.S. 104, 112 (1972)).

76. 380 U.S. 470, 499 (1965) (Harlan, J., dissenting) (asserting that the Court's "major premise" was "that criminal enforcement of an overly broad statute affecting rights of speech . . . is in itself a deterrent to the free exercise thereof").

77. *Reno II*, 521 U.S. at 846; *see* Todd A. Nist, *Finding the Right Approach: A*

III. HISTORY OF ASSISTED SUICIDE IN THE UNITED STATES AND MINNESOTA

For over seven hundred years, Anglo-American law has consistently punished an individual for assisting another in committing suicide.[78] Since the decriminalization of suicide, the United States Supreme Court has decided two significant cases questioning the constitutionality of barring assisted suicide.[79]

In 1997, in *Washington v. Glucksberg*, the Court considered whether a statute prohibiting physician-assisted suicide was constitutional under the Due Process Clause.[80] The Court weighed history, tradition, and current practices as significant factors.[81] Ultimately, the *Glucksberg* Court held that assisting another in committing suicide was not a fundamental right; thus, it found the statute constitutional.[82]

In the same year as the *Glucksberg* decision, the Court determined the constitutionality of another assisted-suicide statute in *Vacco v. Quill*.[83] In this case, a group of physicians brought a lawsuit against the State of New York, arguing that a statute criminalizing the assistance of suicide was unconstitutional under the Equal Protection Clause.[84] Although the physicians argued that refusal of life-sustaining treatment was no different than physician-

Constitutional Alternative for Shielding Kids from Harmful Materials Online, 65 OHIO ST. L.J. 451, 461–67 (2004) (discussing the negative effects of allowing harmful speech on the Internet).

78. Washington v. Glucksberg, 521 U.S. 702, 702 (1997).

79. Potanos, *supra* note 19, at 677.

80. 521 U.S. at 702.

81. *Id.* at 710–19. Common law history shows that harsh penalties were imposed on the estate of individuals who committed suicide. *Id.* at 712–13. Later, the common law approach was abandoned as states enacted laws criminalizing one person for assisting another in committing suicide. *Id.* at 713–15.

82. 521 U.S. at 728. Some liberties are deemed fundamental because they are so "deeply rooted in this Nation's history and tradition." Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 503 (1977); *see also* Ginsberg v. State of New York, 390 U.S. 629, 639 (1968) (concluding that a right was fundamental because it was "basic in the structure of our society"); Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring) (concluding that a right "as fundamental as our entire civilization" should maintain some protection, even if the U.S. Constitution does not expressly provide it). These fundamental rights are "protected by the Due Process Clause [of the Fourteenth Amendment of the U.S. Constitution]." *Glucksberg*, 521 U.S. at 728.

83. 521 U.S. 793 (1997).

84. *Id.* at 797–98.

assisted suicide, the United States Supreme Court disagreed.[85] The *Vacco* Court reasoned that a distinction exists between assisting another in committing suicide and letting another die through refusal of medical care—a distinction sufficient to confirm the constitutionality of the statute under the Equal Protection Clause.[86] While the Court, in distinguishing the two, focused on the actor's intent, its reasoning also concluded that some action or inaction was required to violate the assisted-suicide statute.[87]

IV. THE *MELCHERT-DINKEL* DECISION AND OUTCOME

A. Facts

Two individuals, Mark Drybrough and Nadia Kajouji, committed suicide after communicating over the Internet with William Francis Melchert-Dinkel.[88] In both cases, Melchert-Dinkel responded to the victims in an online forum and encouraged their suicidal thoughts.[89] Additionally, he attempted to watch the victims commit suicide "via webcam."[90] The State charged Melchert-Dinkel with two counts of aiding suicide.[91] He was convicted on both counts at trial,[92] and the conviction was affirmed by the Minnesota Court of Appeals.[93]

85. *Id.* at 798–99.

86. *Id.* at 793–94 (reasoning that this distinction agrees with principles of causation and intent); *see also* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279–80 (1990) (discussing the right to refuse lifesaving treatment).

87. *Vacco*, 521 U.S. at 802 (noting that a physician assisting a patient to commit suicide and a physician letting a patient die may have the same result); *Glucksberg*, 521 U.S. at 734 (defining euthanasia as the "deliberate termination of another's life at his request").

88. *Melchert-Dinkel III*, 844 N.W.2d 13, 16 (Minn. 2014).

89. *Id.* at 16–17.

90. *Id.* at 16.

91. Appellant's Brief, *Melchert-Dinkel III*, 844 N.W.2d 13 (No. A11-0987), 2012 WL 10756771, at *2.

92. State v. Melchert-Dinkel (*Melchert-Dinkel I*), No. 66-CR-10-1193, 2011 WL 893506, at *19 (Minn. Dist. Ct. Mar. 15, 2011).

93. State v. Melchert-Dinkel (*Melchert-Dinkel II*), 816 N.W.2d 703, 705 (Minn. Ct. App. 2012), *rev'd*, 844 N.W.2d 13 (Minn. 2014).

1. Mark Drybrough

On or around July 27, 2005, Mark Drybrough committed suicide by hanging.[94] Melchert-Dinkel initially contacted Drybrough in an online forum after Drybrough posted a question about committing suicide by hanging without a high point to tie his rope.[95] Melchert-Dinkel, posing as a female emergency room nurse, answered Drybrough's post by e-mail, suggesting that he could hang himself using a doorknob.[96] Additionally, Melchert-Dinkel assured Drybrough of this method's effectiveness, falsely boasting that he "trialed it . . . with very good results" and that he also planned on hanging himself.[97] Closing his initial e-mail, Melchert-Dinkel pressed Drybrough to reply with any additional questions, promising that he would respond quickly.[98]

In subsequent e-mails, Drybrough disclosed to Melchert-Dinkel that he suffered from mental-health issues and a condition with "chronic flu-like symptoms."[99] When Drybrough later inquired about committing suicide by overdosing on easily obtainable drugs, Melchert-Dinkel discouraged this method and again urged that Drybrough hang himself.[100] Moreover, Melchert-Dinkel created a false sense of urgency in Drybrough's suicide by stating, "I want to [die] very badly and plan to soon but [I] will stay here for you as long as possible."[101]

Throughout their communications, Drybrough indicated that he had "hope[d] that things might change."[102] He also told Melchert-Dinkel that he was grappling between life and suicide.[103] In Drybrough's last e-mail, he told Melchert-Dinkel that he was not

94. *Melchert-Dinkel III*, 844 N.W.2d at 17.

95. *Id.* at 16.

96. *Melchert-Dinkel II*, 816 N.W.2d at 706. Drybrough considered this information to be "instructions," and he passed the explanation along to another inquirer. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 707.

100. *Id.* at 706.

101. Respondent's Brief at 34, *Melchert-Dinkel III*, 844 N.W.2d 13 (Minn. 2014) (No. A11-0987), 2012 WL 10756772, at *34.

102. *Id.* at 7.

103. *Melchert-Dinkel II*, 816 N.W.2d at 706–07.

suicidal.[104] Yet, he followed Melchert-Dinkel's advice; he hung a noose, put it around his neck, and killed himself.[105]

2. Nadia Kajouji

On March 1, 2008, Nadia Kajouji posted a message on a suicide website stating that she suffered from severe depression.[106] Her post asked for advice on quick and reliable suicide methods.[107]

In Melchert-Dinkel's first e-mail to Kajouji, he again falsely represented himself as a female emergency room nurse suffering from severe depression and expressed a desire to commit suicide soon.[108] In the course of their first conversation, Melchert-Dinkel advocated for self-hanging and proposed that they commit suicide together.[109] Kajouji declined and, instead, stated her desire to jump from a bridge because she wanted her suicide to look like an accident.[110] In his second e-mail, Melchert-Dinkel repeatedly advised Kajouji to commit suicide by hanging and suggested that they both commit suicide that night.[111] In their last online chat, Kajouji confidently claimed that she would commit suicide in a few hours.[112] Her body was found in a river six weeks later.[113]

After Kajouji's death, law enforcement discovered her e-mails to Melchert-Dinkel.[114] Concerned that Melchert-Dinkel was also

104. Respondent's Brief, *supra* note 101, at 7. Four days after Drybrough's final e-mail, Drybrough's sister found him hanging from a loft ladder leaning up against a wall. *Id.*

105. *Melchert-Dinkel I*, No. 66-CR-10-1193, 2011 WL 893506, at *9–10 (Minn. Dist. Ct. Mar. 15, 2011).

106. *Melchert-Dinkel II*, 816 N.W.2d at 708.

107. Respondent's Brief, *supra* note 101, at 8; *see also Melchert-Dinkel I*, 2011 WL 893506, at *11 ("I have lived with severe depression . . . and it only worsens as I seek treatment and help. I have not attempted suicide in the past. . . . I just want a quick out.").

108. *Melchert-Dinkel II*, 816 N.W.2d at 708.

109. *Id.*; *see also Melchert-Dinkel I*, 2011 WL 893506, at *11–16 ("[I]f you wanted to do hanging we could have done it together on line so it would not have been so scary for you. . . . I can help you with it with the [web] cam.").

110. Respondent's Brief, *supra* note 101, at 8.

111. *Id.* at 10–11, 34 ("I wish [w]e [b]oth could die now while we are quietly in o[u]r homes ton[ight].").

112. *Id.* at 11; *Melchert-Dinkel I*, 2011 WL 893506, at *16. Kajouji was never seen after she e-mailed her roommate to inform her that she was going skating—the same night as Kajouji's final conversation with Melchert-Dinkel. *Id.* at *17.

113. *Melchert-Dinkel III*, 844 N.W.2d 13, 17 (Minn. 2014).

114. *Melchert-Dinkel I*, 2011 WL 893506, at *17.

suicidal, the Faribault police traced his e-mail address and contacted the Mankato Police Department.[115] At first, Melchert-Dinkel blamed his daughters for the e-mails; however, he eventually admitted to sending the communications himself.[116] Consequently, he was charged "with two counts of advising and encouraging suicide."[117] The prosecution did not accuse Melchert-Dinkel of assisting in the suicides, nor was "assist" included in the charges against him.[118]

B. Procedural Posture Before the Minnesota Supreme Court

At a bench trial, the State presented evidence that Melchert-Dinkel falsely posed as a female registered nurse and falsely discussed his own desire to commit suicide in his communications with the victims. The State showed that Melchert-Dinkel's communications took the form of coaching—urging the victims to write with any questions, promising that he would reply quickly.[119] The State also introduced evidence that Melchert-Dinkel provided Drybrough with step-by-step instructions on how to commit suicide by hanging.[120] The State's evidence indicated that both victims believed that Melchert-Dinkel's advice was both practical and sympathetic.[121]

After closing arguments, the district court found Melchert-Dinkel guilty of advising and encouraging suicide.[122] Furthermore, the district court dismissed Melchert-Dinkel's argument that the assisted-suicide statute was unconstitutional on its face because his speech was protected by the First Amendment.[123] Melchert-Dinkel appealed the district court's decision, maintaining that Minnesota's assisted-suicide statute violated his First Amendment rights.[124]

115. *Id.*

116. *Melchert-Dinkel II*, 816 N.W.2d 703, 711 (Minn. Ct. App. 2012), *rev'd*, 844 N.W.2d 13 (Minn. 2014). In addition, Melchert-Dinkel admitted to asking fifteen to twenty people to commit suicide and requesting a webcam to capture the event. *Id.* at 712.

117. *Id.*

118. *Id.*; *see also Melchert-Dinkel I*, 2011 WL 893506, at *29.

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

120. *Id.*

121. *Id.* at 707–11.

122. *Id.* at 712.

123. *Id.*

124. *Id.*

Today, aiding another in committing suicide remains a criminal offense in many states.[125] However, some state statutes have moved away from prohibitions on "encouraging" or "advising" another to commit suicide.[126] Prior to *Melchert-Dinkel*, the case that is the topic of this note, Minnesota prohibited "intentionally advis[ing], encourag[ing], or assist[ing] another in taking the other's own life."[127] Currently, Minnesota prohibits an individual from intentionally assisting another in taking the other's life.[128]

The Minnesota Court of Appeals recently reviewed two cases—*Melchert-Dinkel* included—addressing assisted suicide. In *Melchert-Dinkel*, the Minnesota Court of Appeals held that Minnesota's assisted-suicide statute was not unconstitutionally overbroad.[129] After the Minnesota Supreme Court granted review of *Melchert-Dinkel*,[130] the Minnesota Court of Appeals had an opportunity to reconsider its decision in another assisted-suicide case, *State v. Final Exit Network, Inc.*[131] Here, the Minnesota Court of Appeals reversed

125. *See generally* Justine R. Young, *Dead Wrong: The Problems with Assisted Suicide Statutes and Prosecutions*, 6 STAN. L. & POL'Y REV. 123 (1994) (comparing assisted-suicide statutes in the twenty-nine states that had them).

126. This author researched assisted-suicide statutes throughout the United States. Many statutes still include the terms "advise" and "encourage"; however, several states have modified their assisted-suicide statutes to indicate requirements of intent and causation in assisting another to commit suicide. *See, e.g.*, ALASKA STAT. ANN. § 11.41.120 (West, Westlaw through 2014 2d Reg. Sess.) ("A person commits . . . manslaughter . . . [when he or she] intentionally aids another person to commit suicide."); ARK. CODE ANN. § 5-10-104 (West, Westlaw through 2014 2d Extraordinary Sess.) ("A person commits manslaughter . . . [when he or she] purposely causes or aids another person to commit suicide."); CONN. GEN. STAT. ANN. § 53a-54a (West, Westlaw through 2014 Reg. Sess.) ("A person is guilty of murder when . . . he causes . . . a suicide by force, duress, or deception."); IND. CODE ANN. § 35-42-1-2 (West, Westlaw through 2014 2d Reg. Sess. and 2d Tech. Sess. of the 118th Gen. Assemb.) ("A person who intentionally causes another human being, by force, duress, or deception, to commit suicide commits causing suicide. . . ."); WASH. REV. CODE ANN. § 9A.36.060 (West, Westlaw through 2014 Reg. Sess.) ("A person is guilty of promoting a suicide attempt when he or she knowingly causes or aids another person to attempt suicide.").

127. MINN. STAT. § 609.215, subdiv. 1 (2012), *invalidated in part by Melchert-Dinkel III*, 844 N.W.2d 13 (Minn. 2014).

128. *See Melchert-Dinkel III*, 844 N.W.2d at 18.

129. *Melchert-Dinkel II*, 816 N.W.2d at 705, 713–17, 720 (finding that the statute was narrowly tailored to serve the State's compelling interest, even if Melchert-Dinkel's speech was protected by the First Amendment).

130. *See id.*

131. State v. Final Exit Network, Inc., Nos. A13-0563, -0564, -0565, 2013 WL

its previous decision, holding that the prohibition on encouraging or advising another to commit suicide was unconstitutional.[132] Unlike its previous decision in *Melchert-Dinkel*, the Minnesota Court of Appeals applied strict scrutiny and held that Minnesota's assisted-suicide statute failed because the language was broad and there was no causal connection between the prohibition and the state's interest in preserving human life.[133] The Minnesota Supreme Court had its first opportunity to apply a First Amendment argument to Minnesota's assisted-suicide statute in *Melchert-Dinkel*.

C. The Minnesota Supreme Court Decision

Before the Minnesota Supreme Court, Melchert-Dinkel again claimed that his interactions with Drybrough and Kajouji "represented constitutionally-protected speech pursuant to the First Amendment."[134] However, the State argued that Minnesota's assisted-suicide statute could restrict Melchert-Dinkel's speech because it fell into one of three less-protected exceptions to the First Amendment.[135] Even if an exception did not apply, the State claimed that Minnesota's assisted-suicide statute was narrowly tailored to serve the State's compelling governmental interest in preserving human life.[136]

1. Majority Opinion

The majority disagreed with the State's argument that Melchert-Dinkel's speech fell into the less-protected criminal conduct or incitement exceptions because the conduct advocated—suicide—did not violate any existing criminal statute.[137] Similarly, it disagreed with the State's argument that the statute fell

5418170 (Minn. Ct. App. Sept. 30, 2013), *rev. granted*, (Minn. Dec. 17, 2013), *rev. denied*, (Minn. June 17, 2014), *stay vacated*, (Minn. June 17, 2014).

132. *Id.* at *7.

133. *Id.* at *5–6.

134. Appellant's Brief, *supra* note 91, at *2.

135. *Melchert-Dinkel III*, 844 N.W.2d 13, 19 (Minn. 2014) (arguing that Melchert-Dinkel's speech was integral to criminal conduct, likely produced imminent lawless action, and provided false statements amounting to fraud).

136. *Id.* at 18.

137. *Id.* at 19–21. The Minnesota Supreme Court held that the argument regarding speech integral to criminal conduct was circular, and that an individual cannot be punished for inciting an action that is not illegal. *Id.* at 20.

under the less-protected fraud exception to the First Amendment.[138]

Instead, the court held that a strict level of scrutiny was required because the restriction was content-based.[139] First, the court recognized the State's interest in preserving human life as compelling.[140] Next, it reasoned that prohibiting the assistance, advisement, or encouragement of suicide could be necessary to achieve the State's compelling governmental interest in preserving human life, per *Glucksberg*.[141] Finally, it analyzed each term of the statute for its common and ordinary meaning to determine whether the statute was narrowly tailored.[142]

The Minnesota Supreme Court held that the statute's restriction against assisting another to commit suicide was narrowly tailored because a direct, causal link could be drawn between the prohibition and the State's interest in preserving human life. The court also found that speech alone may constitute assistance that enables a person to commit suicide.[143] Additionally, the court held that the terms "advise" and "encourage" indicated no direct, causal connection to committing suicide.[144] Consequently, those terms within the statute violated the First Amendment, and they were resultantly severed from Minnesota's assisted-suicide statute.[145]

138. *Id.* at 21. While the Minnesota Supreme Court found Melchert-Dinkel's actions to be deceitful, it was not convinced that his actions were an attempt at gaining some "material advantage or valuable consideration." *Id.*

139. *Id.* at 18 ("[T]he government 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" (quoting Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972))).

140. *Id.* at 22 (citing Planned Parenthood Ass'n of Kan. City v. Ashcroft, 462 U.S. 476, 485 (1983)).

141. *Id.* (citing Washington v. Glucksberg, 521 U.S. 702, 728 (1997)) (reasoning that a statement made by the United States Supreme Court in *Glucksberg*, under a rational basis review, was sufficient to continue the Court's analysis under strict scrutiny).

142. *Id.* at 22–24.

143. *Id.* at 23 ("While enablement perhaps most obviously occurs in the context of physical assistance, *speech alone may also enable a person to commit suicide*." (emphasis added)).

144. *Id.* at 23–24 ("[A] prohibition on advising or encouraging includes speech that is more tangential to the act of suicide."); *Id.* at 24 (reasoning that the State's compelling interest, preserving human life, did not mean that the State had a compelling interest to restrict speech that advised or encouraged suicide).

145. *Id.* at 15–16.

2. Justice Page's Dissent: Only Restricting Physical Actions that Assist Suicide

Justice Page agreed with the majority's holding that barring speech that "advises" or "encourages" suicide was unconstitutional.[146] However, he disagreed with the court's remand to determine whether Melchert-Dinkel's speech assisted the victims in taking their lives.[147] He argued that there was insufficient evidence to prove that Melchert-Dinkel assisted the two suicides under the dictionary definition of "assist" because there was no physical action.[148] Justice Page pointed out that the majority's failure to use the "dictionary definition of the word 'assist' [wa]s telling."[149] Furthermore, he claimed that the State failed to charge Melchert-Dinkel with assisting suicide—the prosecution's argument focused on whether Melchert-Dinkel advised or encouraged suicide.[150] Finally, Justice Page pointed out that, when Melchert-Dinkel was convicted, the district court judge intentionally left out the term "assist" from its finding.[151] He argued that this omission was deliberate; thus, remanding the case to determine whether Melchert-Dinkel assisted in the suicides was not appropriate.[152]

D. Remand Proceedings Following the Minnesota Supreme Court Decision

On September 8, 2014, Melchert-Dinkel appeared in Rice County District Court once more to determine whether his speech assisted Drybrough or Kajouji in their suicides; he was convicted of assisting Drybrough in committing suicide and attempting to assist Kajouji in committing suicide.[153] Here, the district court defined "assist" as "speech or conduct that provides another person with what is needed . . . to commit suicide."[154] Additionally, the district

146. *Id.* at 25 (Page, J., dissenting).

147. *Id.* (arguing, among other things, that there was insufficient proof to demonstrate that Melchert-Dinkel assisted the victims in committing their suicides).

148. *Id.* at 26. Justice Page, using the same dictionary as the majority, emphasized that the definition of "assist" requires some act. *Id.*

149. *Id.*

150. *Id.* at 26–27.

151. *Id.* at 25.

152. *Id.* at 27–28.

153. State of Minnesota v. William Francis Melchert-Dinkel (*Melchert-Dinkel IV*), 66-CR-10-1193, Sept. 8, 2014, at *1–2.

154. *Id.* at *9.

court focused on whether a "direct and causal connection" existed, and whether Melchert-Dinkel "intended to provide instructive suicide methods."[155]

To convict Melchert-Dinkel of assisting Drybrough in committing suicide, the district court focused on several e-mails where he stated his desire to "help" Drybrough commit suicide.[156] Moreover, it reasoned that Melchert-Dinkel's e-mails were "step-by-step instructions" that Drybrough sought, and Drybrough followed these instructions when he committed suicide.[157]

Although Kajouji also committed suicide, the court reasoned that Melchert-Dinkel did not assist in her suicide because she used a method different from Melchert-Dinkel's instructions.[158] Nonetheless, the district court held that Melchert-Dinkel committed the lesser offense of attempting to assist suicide because he intended to assist in her suicide, and he "did an act that was a substantial step toward . . . assisting suicide."[159]

Melchert-Dinkel will likely appeal these convictions, arguing that he did not assist in Drybrough's suicide.[160] Moreover, his attorney stated that a different defense would have been used under the new assisted-suicide statute.[161]

V. ANALYSIS

This note agrees with, and expands on, Justice Page's dissent. Although the Minnesota Supreme Court's decision to apply a strict level of scrutiny in this case was correct, it mistakenly concluded that Melchert-Dinkel could assist in the victims' suicide through

155. *Id.*

156. *Id.* at *6–7.

157. *Id.*

158. *Id.* at *10.

159. *Id.* at *11–12 (citing MINN. STAT. § 609.17 (2012)).

160. Importantly, Melchert-Dinkel instructed Drybrough on how he could hang himself from a door knob. *Melchert-Dinkel I*, No. 66-CR-10-1193, 2011 WL 893506, at *5–6 (Minn. Dist. Ct. Mar. 15, 2011). Since significant weight was placed on Melchert-Dinkel's specific instructions, and Drybrough did not commit suicide in the manner instructed by Melchert-Dinkel, a direct, causal relationship may not exist. *See Melchert-Dinkel IV*, 66-CR-10-1193, at *5; *Melchert-Dinkel I*, 2011 WL 893506, at *10.

161. *Former Nurse Guilty of Assisting Suicide to be Sentenced*, HUFFINGTON POST (Oct. 16, 2014, 4:59 PM), http://www.huffingtonpost.com/2014/10/15/former-nurse-assisted-sui_n_5988730.html.

speech alone.[162] Additionally, this note analyzes whether the court properly balanced the competing interests at issue.

A. Less-Protected Classifications of Internet Speech: Harmful or Illegal Conduct?

Although less-protected classifications of speech have been established, the United States Supreme Court maintains a protective stance over the First Amendment.[163] Due to the delicate nature of expressive conduct on the Internet,[164] the Minnesota Supreme Court's reluctance to expand on the exceptions to protected speech in *Giboney* and *Brandenburg* was appropriate.[165]

1. The Giboney *Exception: Speech Integral to Criminal Conduct*

Correct application of the holding in *Giboney* requires a distinction between harmful conduct and illegal conduct.[166] In *Giboney*, the Court concluded that speech can be restricted when it constitutes "a single and integrated course of [illegal] conduct."[167] The Court's reasoning focused on the appellant's violation of a statute, not on any specific harmful action.[168] Similarly, in *New York v. Ferber*, the Court held that the sale of child pornography was "an integral part of the [illegal] production of such materials."[169]

Traditionally, the United States Supreme Court has used a balancing test to determine whether a First Amendment restriction

162. *Melchert-Dinkel III*, 844 N.W.2d 13, 25 (Minn. 2014).

163. *See, e.g.*, Martin v. City of Struthers, 319 U.S. 141, 143 (1943) ("[A]uthors of the First Amendment knew that . . . unconventional ideas might disturb the complacent, but they . . . believed [it] essential if vigorous enlightenment was ever to triumph over slothful ignorance.").

164. *See generally* Marjorie A. Shields, Annotation, *First Amendment Protection Afforded to Web Site Operators*, 30 A.L.R. 6th 299 (2008) (summarizing First Amendment protections on the Internet).

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

166. *Id.* at 20 (arguing that the inclusion of harmful speech in the phrase "speech integral to criminal conduct" expands the exception beyond the United States Supreme Court's guidance).

167. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

168. *Id.*

169. New York v. Ferber, 458 U.S. 747, 759 (1982). Although the majority considered the direct harm suffered by the child, the United States Supreme Court held that the promotion of such performances was "intrinsically related to . . . sexual abuse of children." *Id.*

is justified.[170] Restricting speech that is integral to illegal conduct is clearly justified by a State's compelling governmental interest in preventing criminal activity.[171] Yet, expanding a category of speech to harmful conduct may unreasonably broaden the category.[172] For example, some harm may arise out of actions independent of any intended message.[173] Furthermore, some harmful speech may be justifiably protected by the First Amendment.[174]

The situation becomes more complex when dealing with harmful speech on the Internet. The Internet permits individuals to remain anonymous when stating their opinions and ideas, however distasteful or harmful the speech may be to others.[175] Accordingly, speech is likely to be more harmful on the Internet, since individuals are not held accountable for their anonymous conduct.[176] Moreover, restricting harmful speech in this context may have a significant chilling effect, and the United States Supreme Court has consistently held statutes unconstitutional "to avoid any chilling effect caused by an improper interpretation."[177]

The Internet consists of an infinite number of mediums through which individuals can communicate.[178] Since the Internet is a popular forum in which to exchange ideas, the Minnesota

170. Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 779 (2001).

171. *Id.*; *see also Giboney*, 336 U.S. at 498.

172. *See* Matthew C. Ruedy, *Repercussions of A Myspace Teen Suicide: Should Anti-Cyberbullying Laws Be Created?*, 9 N.C. J.L. & TECH. 323, 343 (2008) (arguing that an individual may be harmed even though, under an objective standard, a reasonable person would not foresee any harm).

173. *See, e.g.*, Appellant's Brief, *supra* note 91, at *43–44 (arguing that Melchert-Dinkel's actions were independent of the victims' decisions to commit suicide); *see also* Rubenfeld, *supra* note 170, at 777.

174. *See, e.g.*, Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 215–17 (3d Cir. 2001) (holding that a restriction against any "unwelcome verbal, written or physical conduct which offends . . . an individual" is unconstitutional, even though the state asserted a harm caused by the speech).

175. *See* Sarah Jameson, *Cyberharassment: Striking a Balance Between Free Speech and Privacy*, 17 COMMLAW CONSPECTUS 231, 238–39 (2008).

176. *Id.* at 239.

177. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 311 (2010); *see also* Broadrick v. Oklahoma, 413 U.S. 601, 630 (1973); 281 Care Comm. v. Arneson, 638 F.3d 621, 629 (8th Cir. 2011). *See generally* Wendy Seltzer, *Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 HARV. J.L. & TECH. 171 (2010) (discussing the chilling effects doctrine recognized by the United States Supreme Court).

178. *See Reno II*, 521 U.S. 844, 851 (1997).

Supreme Court correctly held that the *Giboney* exception should not be expanded to include harmful speech.

2. *The* Brandenburg *Test: Speech that Incites Imminent Lawlessness*

In *Melchert-Dinkel*, the State attempted to draw the court's attention to the interpretation of "imminent."[179] It correctly held that the *Brandenburg* exception only applied to unlawful actions.[180] Similar to *Giboney*, it is clear that the court was not willing to expand the *Brandenburg* exception to include both illegal and harmful speech.[181] Instead, it maintained that the application of *Brandenburg* must be rigorously adhered to in the interest of protecting the First Amendment.[182]

B. Is There a Compelling Interest to Prohibit Legal Acts?

To pass strict scrutiny, the government must first assert an interest that the court finds compelling.[183] In *Melchert-Dinkel*, the Minnesota Supreme Court found, based on precedent, that the State's asserted interest in preserving human life was compelling.[184] Yet, public policy and opinion on assisted suicide may be changing.[185] Moreover, the government should not prohibit an individual from assisting in a legal act.

Compelling governmental interests have no textual support in the U.S. Constitution.[186] Consequently, the United States Supreme Court has found compelling governmental interests on the basis of several different considerations.[187] Specifically, governmental interests may be held compelling based upon public policy or "the

179. *See* Respondent's Brief, *supra* note 101, at 33–37.

180. *See Melchert-Dinkel III*, 844 N.W.2d 13, 20–21 (Minn. 2014) (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).

181. *Id.* at 19–21.

182. *See id.* at 20–21.

183. *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 199 (1992).

184. *Melchert-Dinkel III*, 844 N.W.2d at 22 n.4.

185. *See* Dennis Thompson, *Did Brittany Maynard Change Minds About Right-to-Die Laws?*, CBSNEWS (Dec. 5, 2014, 11:59 AM), http://www.cbsnews.com/news/brittany-maynard-poll-right-to-die-laws; *see also infra* notes 191–95 and accompanying text.

186. Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 919 (1988).

187. *See id.*

realization of constitutional guarantees."[188] In *Melchert-Dinkel*, the Minnesota Supreme Court relied on public health and policy concerns addressed in an amicus brief that was filed by the National Alliance on Mental Illness of Minnesota.[189]

Although public policy arguments have historically favored rules that restrict an individual from assisting another in committing suicide,[190] recent events may be changing this view.[191] In fact, several other states have altered their assisted-suicide statutes to permit physician-assisted suicides.[192] Polls have shown general approval for physician-aided end-of-life decisions.[193] Yet, when the term "suicide" is used, the general approval rating drops.[194] This suggests that the term "suicide" itself still carries a negative connotation.[195] If general approval of assisted suicide continues, courts may be forced to reassess whether a compelling governmental interest exists based on public policy. *Melchert-Dinkel* holds that the government's interest in prohibiting a legal act—suicide—is compelling.[196] Yet, courts should not prohibit actions that assist in what is legal.

While a compelling governmental interest was found in *Melchert-Dinkel*, public policy seems to be changing,[197] and

188. *Id.* at 935–37.

189. *Melchert-Dinkel III*, 844 N.W.2d at 22 n.4.

190. *See Melchert-Dinkel II*, 816 N.W.2d 703, 713–14 (Minn. Ct. App. 2012), *rev'd*, 844 N.W.2d 13 (Minn. 2014) (citing Washington v. Glucksberg, 521 U.S. 702, 711–12 (1997)).

191. *See generally* Cyndi Bollman, *A Dignified Death? Don't Forget About the Physically Disabled and Those Not Terminally Ill: An Analysis of Physician-Assisted Suicide Laws*, 34 S. ILL. U. L.J. 395 (2010); Neil M. Gorsuch, *The Right to Assisted Suicide and Euthanasia*, 23 HARV. J.L. & PUB. POL'Y 599, 600 (2000).

192. *See* OR. REV. STAT. ANN. § 127.800 (West, Westlaw through 2014 Reg. Sess.); VT. STAT. ANN. tit. 18, §§ 5281–5292 (West, Westlaw through 2014 Gen. Assemb.); WASH. REV. CODE ANN. §§ 70.245.010–.904 (West, Westlaw through 2014 legislation); Baxter v. State, 224 P.3d 1211, 1215 (Mont. 2009).

193. Lydia Saad, *U.S. Support for Euthanasia Hinges on How It's Described*, GALLUP POL. (May 29, 2013), http://www.gallup.com/poll/162815/support-euthanasia-hinges-described.aspx.

194. *Id.* (stating that the approval number is still above average when the term "suicide" is used).

195. *Id.*

196. *See Melchert-Dinkel III*, 844 N.W.2d 13, 22 (Minn. 2014).

197. *Strong Public Support for Right to Die*, PEW RES. CENTER FOR PEOPLE & PRESS (Jan. 5, 2006), http://www.people-press.org/2006/01/05/strong-public-support-for-right-to-die/ ("A solid majority of Americans (60%) believe a person has a moral right to end their life if they are suffering great pain and have no hope of

preserving human life in the face of suicide may no longer be a compelling interest. Moreover, no legislature should be allowed to prohibit the assistance of legal acts.

C. Melchert-Dinkel*'s Outcome: Unconstitutional Restriction on Speech in Minnesota's Assisted-Suicide Statute*

The Minnesota Supreme Court held that assisting another in committing suicide can be prohibited because the term "assist" indicates a "direct, causal link" between the suicidal person and the person assisting in the suicide.[198] The prohibition against assisted suicide is constitutional because the court found that the statute was narrowly tailored.[199] This conclusion was proper, until the court stated that pure speech may assist another in committing suicide.[200]

Minnesota's assisted-suicide statute does not define the term "assist,"[201] and the plain-meaning interpretation adopted by the court is inappropriate because assistance requires some physical action.[202] Minnesota's assisted-suicide statute is analogous to its aiding and abetting statute, which requires some type of action beyond pure speech.[203] By expanding the definition of "assist" to include pure speech, the Minnesota Supreme Court broadened the statute's reach, thereby chilling speech that may also be properly defined as mere encouragement or advice. Whereas Melchert-Dinkel's speech—encouraging and advising suicide—is constitutionally protected, it may still be restricted under the majority's overly broad definition of the term "assist."

1. Pure Speech and the Term "Assist"

In his dissent, Justice Page asserts that some action, other than speech, must be performed for an individual to truly assist another in committing suicide.[204] This assertion not only matches the

improvement.").

198. *Melchert-Dinkel III*, 844 N.W.2d at 23 ("[S]tatutory limitation that . . . must be targeted at a specific individual, narrows the reach to . . . direct, causal links.").

199. *Id.*

200. *Id.* at 25–26 (Page, J., dissenting).

201. *See* MINN. STAT. § 609.215 (2012).

202. *Melchert-Dinkel III*, 844 N.W.2d at 26.

203. *See* MINN. STAT. §§ 609.05, 609.215.

204. *Melchert-Dinkel III*, 844 N.W.2d at 26.

dictionary definition of "assist,"[205] but it also ensures that the statute is narrowly tailored.[206]

In addition, Justice Page's assertion furthers Minnesota's principles of statutory interpretation.[207] In *Melchert-Dinkel*, the Minnesota Supreme Court defined the term "assist" as "provid[ing] (a person, etc.) with what is needed for a purpose."[208] However, this definition stems from the verb "help," not "assist."[209] The court seemingly decided that the terms "assist" and "help" were synonymous, even though the text of the statute does not mention the word "help."[210] Moreover, the court further altered the definition of the term "assist" to include pure speech that "enable[s] a person to commit suicide."[211] The same dictionary used by the majority defines "assist" as the "*act* of helping."[212] This common definition of the term "assist" requires action beyond speaking; therefore, precluding pure speech contradicts the true definition of "assist."[213]

Relying on the majority's definition not only defies the dictionary definition of "assist," but it also contradicts statutory interpretation.[214] The United States Supreme Court has consistently held that a statute "should be construed [such that] . . . no part will be inoperative or superfluous."[215] The Minnesota Supreme Court has similarly established that statutes must be "construed . . . so that no word . . . is superfluous, void, or insignificant."[216]

205. *Id.* (stating that "assist" is defined as the "*act* of helping" (quoting THE NEW SHORTER OXFORD ENGLISH DICTIONARY 132 (4th ed. 1993))).

206. *See infra* Part V.C.3.

207. *See* Boutin v. LaFleur, 591 N.W.2d 711, 716 (Minn. 1999); State v. Suess, 236 Minn. 174, 182, 52 N.W.2d 409, 415 (1952).

208. *Melchert-Dinkel III*, 844 N.W.2d at 23 (majority opinion). Importantly, the Minnesota Supreme Court's definition of the term "assist" was limited to the context of Minnesota's assisted-suicide statute. *Id.*

209. *Id.* Justice Page points out that the majority's "avoidance of the dictionary definition of the word 'assist' is telling." *Id.* at 26 (Page, J., dissenting).

210. *Id.* at 26.

211. *Id.* at 23 (majority opinion).

212. *Id.* at 26 (Page, J., dissenting) (citation omitted).

213. *Id.*

214. *Id.*

215. *See* Corley v. United States, 556 U.S. 303, 304 (2009); Hibbs v. Winn, 542 U.S. 88, 101 (2004) (quoting 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (6th ed. 2000)).

216. Boutin v. LaFleur, 591 N.W.2d 711, 716 (Minn. 1999).

Under the Minnesota Supreme Court's definition, "assist" is superfluous[217] because it is given the same meaning as the terms "encourage" or "advise."[218] In *Melchert-Dinkel*, the court stated that the terms "advise," "encourage," and "assist" all fell under its broad definition for "aid," a term the court uses interchangeably with "assist."[219] If the court had included an action more concrete than pure speech in its definition of "assist," the term would not be superfluous. By omitting an action requirement from its definition, a defendant's words alone could assist another to commit suicide.[220] Melchert-Dinkel's instructions "encouraged" and "advised" others to commit suicide.[221] That his words may also "assist" suicide supports the argument that the term "assist" is superfluous under the majority's definition.

2. *California's Solution: Comparing Assisted Suicide to Aiding and Abetting*

The California Supreme Court has interpreted its assisted-suicide statute as prohibiting the "aiding and abetting of a specific suicidal act."[222] In particular, it has envisioned some level of physical participation by an individual that enables another to commit suicide.[223] The court has interpreted the statute[224] in this way because the assisted suicide language bears a close resemblance to the aiding and abetting language found elsewhere in California's penal code.[225] In addition, the terms "aiding" and "abetting" have

217. *Id.* Under principles of statutory construction, a term is superfluous or insignificant if it is unnecessary or redundant. *Id.* (arguing that a redundant phrase in the language of a statute would be superfluous).

218. *Melchert-Dinkel III*, 844 N.W.2d at 23 (majority opinion) (defining the verb "advise" as to inform and the verb "encourage" as to give courage, confidence, or hope) (citation omitted).

219. *Id.* at 25 n.7.

220. *Id.* at 25 (concluding that Melchert-Dinkel's speech could have assisted Drybrough and Kajouji in committing suicide).

221. *See Melchert-Dinkel II*, 816 N.W.2d 703, 706, 712 (Minn. Ct. App. 2012).

222. McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 197 (Ct. App. 1988).

223. People v. Matlock, 336 P.2d 505, 511 (Cal. 1959) (holding that a person who "furnish[es] the means for bringing about death . . . for the use of the [other] person who himself commits . . . self murder" may be convicted of assisting suicide).

224. CAL. PENAL CODE § 401 (West, Westlaw through 2014 Reg. Sess.).

225. *In re* Ryan N., 112 Cal. Rptr. 2d 620, 632 (Ct. App. 2001).

been used interchangeably with the terms in its assisted-suicide statute.[226]

An analogy can be drawn between California's and Minnesota's assisted-suicide and aiding and abetting statutes, because each state's respective statute closely resembles the other.[227] Minnesota's aiding and abetting statute reads, "A person is criminally liable for a crime . . . if the person intentionally aids [or] advises . . . the other to commit the crime."[228] Although this language is strikingly similar to the Minnesota's assisted-suicide statute, the supreme court has interpreted each statute's text very differently.[229] While the statutes' terms "aid" and "assist" differ, the Minnesota Supreme Court previously stated that "aid" is a term "broad enough to encompass advice, encourage[ment], and assist[ance]."[230] If the supreme court interpreted its assisted-suicide statute as aiding and abetting a suicidal act, it too would require some physical action or further participation on the part of a defendant.[231] In aiding and abetting cases, the Minnesota Supreme Court requires that the "defendant intended his presence or *actions* to further [the] commission of [a] crime."[232] Thus, while Minnesota's assisted-suicide and aiding and abetting statutes are nearly identical in language, the court has given their terms significantly different meanings.

Like California, the Minnesota Supreme Court should adopt the previously established meaning of Minnesota's aiding and

226. *Id.* at 632 n.5 (discussing the similarities between statutes utilizing the terms advised, encouraged, aiding, and abetting).

227. *Compare* CAL. PENAL CODE § 31 ("All persons concerned in the commission of a crime, whether . . . they . . . aid and abet in its commission, or, not being present, have advised and encouraged its commission . . . ."), *and id.* § 401 ("Every person who deliberately aids, advises, or encourages . . . ."), *with* MINN. STAT. § 609.215 (2012) ("Whoever intentionally advises, encourages, or assists . . . may be sentenced . . . ."), *and id.* § 609.05 (1991) ("A person is criminally liable for a crime committed by another if the person intentionally aids, advises . . . the other to commit the crime.").

228. MINN. STAT. § 609.05, subdiv. 1.

229. *See Melchert-Dinkel III*, 844 N.W.2d 13, 23 (Minn. 2014) (including pure speech within its definition of the term "assist"); State v. Milton, 821 N.W.2d 789, 805 (Minn. 2012) (defining the term "aid," in part, as a defendant's "presence or actions to further the commission of [a] crime" (citing State v. Mahkuk, 736 N.W.2d 675, 682 (Minn. 2007))).

230. *Melchert-Dinkel III*, 844 N.W.2d at 25 n.7.

231. *See Milton*, 821 N.W.2d at 789.

232. *Id.* at 805 (emphasis added) (citing *Mahkuk*, 736 N.W.2d at 682).

abetting statute because the language is strikingly similar to Minnesota's assisted-suicide statute.[233] If the Minnesota Supreme Court interpreted assisted suicide similarly to California, assisted suicide would require something more than pure speech.

3. Distinguishing Between the Terms "Assist," "Advise," and "Encourage"

The Minnesota Supreme Court sent mixed signals with its holding in *Melchert-Dinkel*. Clearly, the terms "encourage" and "advise" were unconstitutionally overbroad.[234] Even though the court limited the assisted-suicide statute's prohibition to "assist," including pure speech within its definition unconstitutionally broadened the statute's reach.[235] Moreover, the term "assist" becomes arguably indistinguishable from the terms "encourage" and "advise" when its definition includes pure speech.

Justice Page asserted that without some action "more concrete than speech instructing another on suicide methods," publication of books that describe "successful suicide behavior" could be restricted.[236] The majority justified its inclusion of pure speech by stating that a "direct, causal link between speech and the suicide" existed.[237] Yet, Justice Page's book example also suggests a direct, causal link to suicide. The book may not target a specific individual, but it targets a vulnerable group of people contemplating suicide. Here, a direct, causal link would exist if an individual committed suicide using information obtained from a book that outlined methods of committing suicide.

The majority also reasoned that, unlike the term "assist," nothing in the definitions for the terms "advise" or "encourage"[238] required "a direct, causal connection to a suicide."[239] Yet, each term may directly cause suicide. For example, in 1992, a television

233. *See* MINN. STAT. § 609.215 (2012); MINN. STAT. § 609.05 (1991).

234. *Melchert-Dinkel III*, 844 N.W.2d at 25 (Page, J., dissenting).

235. A statute is unconstitutionally broad when it "deters the exercise of First Amendment rights by unnecessarily punishing constitutionally protected along with unprotected activity." *In re* S.L.J., 263 N.W.2d 412, 417 (Minn. 1978); *see also* Virginia v. Hicks, 539 U.S. 113, 118–19 (2003); Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).

236. *Melchert-Dinkel III*, 844 N.W.2d at 26.

237. *Id.* at 23 (majority opinion).

238. *See supra* note 227 and accompanying text.

239. *Melchert-Dinkel III*, 844 N.W.2d at 23.

station aired a movie that was based on a true story of a person who "aided her mother in committing suicide" with *advice* from a physician and a book that outlined suicide methods.[240] Under the majority's definition of "assist," the physician, the person who aided her mother, and the author who outlined suicide methods could be charged under the assisted-suicide statute because pure speech—whether it encourages, advises, or assists—can enable an individual to commit suicide.[241] Indeed, even the television company could be charged with assisting another in committing suicide if someone committed suicide after watching the movie.

The majority's interpretation of "assist" should include some action beyond pure speech.[242] Alternatively, the Minnesota Supreme Court should interpret Minnesota's assisted-suicide statute as aiding and abetting suicide.[243] Regardless, the terms "encourage," "advise," and "assist" are indistinguishable when the definition of "assist" includes pure speech.[244] An interpretation of "assist" that includes pure speech unconstitutionally broadens the language of the assisted-suicide statute in a First Amendment context.[245]

D. Melchert-Dinkel*'s Impact and an Alternative Holding*

The Minnesota Supreme Court did not apply the less-protected exceptions to the First Amendment found in *Giboney*, *Brandenburg*, and *Alvarez* in *Melchert-Dinkel*.[246] Furthermore, it is clear that the court was unwilling to expand less-protected classifications of speech to include harmful speech.[247] In the context of assisted suicide, the court determined that some speech may still be subject to restrictions further limiting First Amendment protections.[248] Yet, the decision in *Melchert-Dinkel* severed the terms "advises" and "encourages" from Minnesota's assisted-suicide statute.[249]

240. Young, *supra* note 125, at 124 n.7.
241. *Melchert-Dinkel III*, 844 N.W.2d at 23.
242. *Id.* at 26 (Page, J., dissenting).
243. Appellant's Brief, *supra* note 91, at *35–37.
244. *Melchert-Dinkel III*, 844 N.W.2d at 26.
245. *See id.*
246. *See id.* at 19–21 (majority opinion).
247. *Id.*
248. *See id.* at 23.
249. *Id.* at 24.

The *Melchert-Dinkel* decision leads to several unanswered questions. What constitutes providing another with what is needed to commit suicide?[250] Does giving another person step-by-step instructions on committing suicide by hanging constitute assistance?[251] Is the statute *really* narrowly tailored such that it satisfies strict scrutiny? Unfortunately, the Minnesota Supreme Court did not elaborate on its classification of assisted-suicide speech, other than suggesting that Melchert-Dinkel's speech could constitute assistance.[252]

Courts cannot change or alter the text of a statute. However, the legislature may and should look to assisted-suicide statutes in other states as examples. Many states require action beyond pure speech in their assisted-suicide statutes, explicitly providing that some physical act is also required.[253] By stating that assisted suicide requires a physical act, courts remove the need to apply strict scrutiny because a fundamental right—speech—is not affected.

The Minnesota Supreme Court should have followed the reasoning in Justice Page's dissent. Specifically, the holding should not have included pure speech in its definition of the term "assist," and the terms "encourage" and "advise" should have been severed.[254] This alternative ensures that the assisted-suicide statute is narrowly tailored to effect the compelling governmental interest of preserving human life.[255] Moreover, requiring something more

250. *See id.* at 23 ("Consistent with the plain language of the statute, we therefore conclude that the 'assist[]' prohibition . . . proscribes speech or conduct that provides another person with what is needed for the person to commit suicide.").

251. *See Melchert-Dinkel I*, No. 66-CR-10-1193, 2011 WL 893506, at *6 (Minn. Dist. Ct. Mar. 15, 2011) (detailing e-mails in which Melchert-Dinkel wrote to Drybrough and explained in great detail how to commit suicide via suspension hanging). For a discussion on the Rice County District Court's conclusion, see *supra* notes 153–61 and accompanying text.

252. *Melchert-Dinkel III*, 844 N.W.2d at 25.

253. *See* ARIZ. REV. STAT. ANN. § 13-1103 (West, Westlaw through 2014 2d Reg. Sess. and 2d Spec. Sess.); GA. CODE ANN. § 16-5-5 (West, Westlaw through 2014 Reg. Sess.); IDAHO CODE ANN. § 18-4017 (West, Westlaw through 2014 2d Reg. Sess.); 720 ILL. COMP. STAT. ANN. 5/12-34.5 (West, Westlaw through 2014 Reg. Sess.); IOWA CODE ANN. § 707A.2 (2014); KAN. STAT. ANN. § 21-5407 (West, Westlaw through 2014 Reg. Sess.); KY. REV. STAT. ANN. § 216.302 (West, Westlaw through 2014 legislation); MD. CODE ANN., CRIM. LAW § 3-102 (West, Westlaw through 2014 Reg. Sess.).

254. *Melchert-Dinkel III*, 844 N.W.2d at 25–26 (Page, J., dissenting).

255. *See id.* at 26.

than pure speech eliminates any concern over the chilling effect associated with speech that may assist another in committing suicide. Finally, the assisted-suicide statute should not be interpreted such that any term is superfluous.[256] Since Melchert-Dinkel did not perform any action beyond pure speech in the furtherance of the victims' suicides, his conviction under the assisted-suicide statute should have been reversed and the charges vacated.[257]

VI. CONCLUSION

The Minnesota Supreme Court correctly held that the standard of review for this First Amendment issue was strict scrutiny. The court's refusal to apply any of the less-protected exceptions to Melchert-Dinkel's speech implies that the First Amendment continues to protect harmful speech.[258] While the court found the State's interest in preserving human life compelling, such an interest may not be compelling in the context of assisted suicide. In addition, the court restricted pure speech that assists another in committing suicide.[259]

Presented with a difficult question, the Minnesota Supreme Court determined that an individual could not be criminally charged for encouraging or advising another to commit suicide.[260] However, it upheld the restriction against assisting another in committing suicide.[261] Moreover, the court found a restriction against pure speech that may assist another in committing suicide constitutional.[262] The court's reliance on a direct, causal link inherent in the term "assist," not present in either the term "encourage" or "advise," led to its conclusion that the restriction was narrowly tailored.[263] However, including pure speech in its definition of the term "assist" unconstitutionally broadened the assisted-suicide statute.[264]

256. *See* Boutin v. LaFleur, 591 N.W.2d 711, 716 (Minn. 1999).
257. *Melchert-Dinkel III*, 844 N.W.2d at 25.
258. *See id.* at 20–21 (majority opinion).
259. *Id.* at 23.
260. *Id.* at 24.
261. *Id.*
262. *Id.* at 23.
263. *Id.*
264. *See id.* at 26 (Page, J., dissenting).

Instead, the Minnesota Supreme Court should have required some action more concrete than speech alone to define the term "assist."[265] In doing so, it would have met the dictionary definition of "assist."[266] Furthermore, requiring physical action would have aligned the court's interpretation of Minnesota's assisted-suicide statute with its aiding and abetting statute,[267] while also ensuring that the statute is not unconstitutionally overbroad.[268] Allowing a restriction on speech that assists another in committing suicide leaves the door open for further misinterpretations of, and unconstitutional restrictions on, the First Amendment freedom of speech.

265. *Id.* at 25–26.
266. *Id.* at 26.
267. Appellant's Brief, *supra* note 91, at *14, 44.
268. *See Melchert-Dinkel III*, 844 N.W.2d at 26.