

2017

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Carla M. Zavala

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Recommended Citation

Zavala, Carla M., "Manslaughter by Text: Is Encouraging Suicide Manslaughter?" (2017). *Law School Student Scholarship*. Paper 891.
http://scholarship.shu.edu/student_scholarship/891

Manslaughter by Text: Is Encouraging Suicide Manslaughter?

Carla Zavala*

I. Introduction

On the morning of July 13, 2014, police found an eighteen-year-old dead in his pick-up truck behind a K-Mart in Fairhaven, Massachusetts.¹ It was Conrad Roy, whose mother had reported him missing after he failed to come home the night before.² He left his mother's house the previous night, around 6:30 PM, telling her that he would be visiting a friend.³ Instead, the young man drove to the Fairhaven K-Mart and filled the passenger cabin of his truck with carbon monoxide using a combustion engine.⁴ By the time the police found Conrad the next morning, he was dead.⁵ According to the district attorney's office, police searched Conrad's cell phone in the course of their investigation and found that he had been text-messaging Michelle Carter at the time of his death.⁶

At the time of Conrad's suicide, Michelle Carter was a seventeen-year-old high school student. She met Conrad in 2012 while both were visiting relatives in the same Florida neighborhood.⁷ The two initiated a romantic relationship that was primarily carried on through online and cell phone communication, with very little in-person contact.⁸ Initially, Michelle

* J.D. Candidate 2017, Seton Hall University School of Law.

¹ See Commonwealth's Response to Defendant's Motion to Dismiss at 17, *Commonwealth v. Carter*, No. 15YO0001NE (Mass. Dist. Ct. Aug. 21, 2015).

² See *id.*

³ See *id.*

⁴ See *id.*

⁵ See Stephanie Slifer, *Is It a Crime to "Encourage Suicide"? Teens' Texts Under Scrutiny*, CBS NEWS, Mar. 3, 2015, <http://www.cbsnews.com/news/is-it-a-crime-to-encourage-suicide-unusual-massachusetts-case-of-conrad-roy-and-michelle-carter/>.

⁶ See *Investigators Say Plainville Girl 'Strongly Influenced' Teen's Suicide*, CBS BOS., Feb. 27, 2015, <http://boston.cbslocal.com/2015/02/27/investigators-say-plainville-girl-strongly-influenced-teens-suicide/>.

⁷ See Astead W. Henderdon & John R. Ellement, *Judge Won't Dismiss Case Against Teen Who Urged Friend's Suicide*, BOS. GLOBE, Sept. 23, 2015, <https://www.bostonglobe.com/metro/2015/09/23/judge-refuses-dismiss-charge-plainville-teen-suicide/F6IITaXG7L6X0MJTQAYuyK/story.html>.

⁸ See Commonwealth's Response to Defendant's Motion to Dismiss, *supra* note 1, at 1.

admitted to police that she was talking to Conrad at the time he committed suicide but claimed she did not know what he was doing.⁹ She said that when the phone call ended, she “did not think much of it.”¹⁰ Police were able to recover conversations between the two from Conrad’s cell phone, despite Michelle having asked Conrad to delete them.¹¹ Conrad’s text messages revealed a very different picture. For at least a week prior to his suicide, Conrad spoke to Michelle about his plans to commit suicide.¹² Michelle’s own text messages with a friend revealed that she had a forty-seven minute telephone conversation with Conrad on the night he committed suicide.¹³

On February 5, 2015, a grand jury indicted Michelle on charges of involuntary manslaughter for Conrad’s suicide.¹⁴ According to prosecutors, Michelle “pressured [Conrad] to go through with suicide for almost a week before he carried out the act . . . counseled him to overcome his fears; researched methods of committing suicide painlessly; and lied to police, his family and her friends about his whereabouts during the act itself and after.”¹⁵ The district attorney believed Michelle’s involvement “caused Conrad’s death by wantonly and recklessly assisting him in poisoning himself with carbon monoxide.”¹⁶ Bristol County Judge Bettina Borders agreed and rejected Michelle’s motion to dismiss on September 23, 2015, allowing the prosecution to proceed with the charges against her.¹⁷

⁹ See Commonwealth’s Response to Defendant’s Motion to Dismiss, *supra* note 1, at 18.

¹⁰ *Id.*

¹¹ Abby Phillip, “*It’s Now or Never*”: Texts Reveal Teen’s Efforts to Pressure Boyfriend into Suicide, WASH. POST, Aug. 31, 2016, <http://www.washingtonpost.com/news/morning-mix/wp/2015/08/31/its-now-or-never-texts-reveal-teens-efforts-to-pressure-boyfriend-into-suicide/>.

¹² See Commonwealth’s Response to Defendant’s Motion to Dismiss, *supra* note 1, at 1.

¹³ See *id.* at 21; see also Henderdon & Ellement, *supra* note 7.

¹⁴ See Commonwealth’s Response to Defendant’s Motion to Dismiss, *supra* note 1, at 1; Slifer, *supra* note 5.

¹⁵ Phillip, *supra* note 11.

¹⁶ Commonwealth’s Response to Defendant’s Motion to Dismiss, *supra* note 1, at 24.

¹⁷ See Henderdon & Ellement, *supra* note 7.

Suicide is a significant problem in the United States.¹⁸ Suicide is the tenth leading cause of death for people of all ages in the United States.¹⁹ For Americans between ages fifteen and twenty-four, the reality is still harsher: suicide is the second leading cause of death in this age group.²⁰ High school students seem especially vulnerable to attempting suicide.²¹ This means that it is likely that most teenagers and young adults know someone who has had suicidal thoughts or has attempted suicide. What if, instead of supporting their depressed peers or encouraging them to seek psychiatric help, people began supporting their plans to commit suicide and pressuring them to kill themselves? This could be why the public has found Michelle's actions so appalling.

Even a cursory glance at the comments on any news article about Michelle's case will show that many people agree with the prosecution's decision to charge Michelle. Certainly, her actions were not those of a model friend, girlfriend, or citizen. Martin W. Healy, chief legal counsel at the Massachusetts Bar Association, commented to the Boston Globe that Michelle's lawyers "do not have a particularly sympathetic defendant."²² But are her actions so blameworthy that she should spend twenty years in state prison?²³ Not all actions that insult society's conception of moral conduct give rise to criminal liability.

¹⁸ According to the Center for Disease Control and Prevention (CDC), over the past decade, suicide has increased from a low of 10.4 per 100,000 people in 2000 to 12.1 per 100,000 people in 2013, the most recent year for which data is available. *See Suicide Facts*, SUICIDE AWARENESS VOICES OF EDUCATION, http://www.save.org/index.cfm?fuseaction=home.viewPage&page_id=705D5DF4-055B-F1EC-3F66462866FCB4E6 (last visited Mar. 19, 2016).

¹⁹ *See* Centers for Disease Control and Prevention. *10 Leading Causes of Death by Age Group*, CENTERS FOR DISEASE CONTROL AND PREVENTION (2013), http://www.cdc.gov/injury/wisqars/pdf/leading_causes_of_death_by_age_group_2013-a.pdf.

²⁰ *See id.*

²¹ In 2013, eight percent of students in high school attempted suicide, compared to 0.6% of adults over eighteen years old. Centers for Disease Control and Prevention. *See Suicide Facts at a Glance*, CENTERS FOR DISEASE CONTROL AND PREVENTION (2015), <http://www.cdc.gov/violenceprevention/pdf/suicide-datasheet-a.pdf>.

²² Henderdon & Ellement, *supra* note 7.

²³ In Massachusetts, manslaughter carries a maximum sentence of twenty years in state prison. MASS. GEN. LAWS ANN. ch. 265, § 13 (West 2015).

Part II of this Comment will discuss the particular circumstances of Conrad Roy's suicide and Michelle Carter's role in it, which gave rise to her indictment for involuntary manslaughter. Part III of this Comment will analyze the history of how various states have treated actions like Michelle's. Part IV will separate the types of conduct into three categories by the defendant's level of participation in the other person's suicide. Part V will argue that a statute that specifically proscribes the encouragement of suicide would be better suited to achieve the societal goals punishment is intended to serve and would be a better alternative for prosecuting Michelle and others like her. Part VI briefly concludes.

II. The Case Against Michelle Carter

Michelle Carter is accused of encouraging her boyfriend, Conrad Roy, to commit suicide, which he eventually did. This section will address the specifics of Michelle's involvement in Conrad's suicide. Then, it will discuss the arguments raised by the prosecution in its charges against Michelle. Lastly, it will delineate the arguments raised by Michelle in her defense.

A. Michelle Carter's Role in Conrad Roy's Suicide

Michelle Carter and Conrad Roy met in 2012, when both teens were visiting relatives who lived in Florida.²⁴ Afterwards, they developed a romantic relationship. Although they both lived in Massachusetts, their relationship was mostly online.²⁵ Conrad had a history of. According to his family, Conrad had been struggling with suicidal thoughts and depression these issues for several years.²⁶ Conrad had attempted suicide in 2012 by ingesting acetaminophen and was treated with medication, counseling, and hospitalizations at psychiatric facilities.²⁷ Conrad's

²⁴ See Henderdon & Ellement, *supra* note 7.

²⁵ See Commonwealth's Response to Defendant's Motion to Dismiss, *supra* note 1, at 1. Some sources have reported that the two teens actually met on the internet prior to meeting in person. See Phillip, *supra* note 11.

²⁶ See CBS BOS., *supra* note 6.

²⁷ See Laura Crimaldi, "It's Now or Never," *Text Said to Friend Allegedly Urged to Kill Self*, BOS. GLOBE, Aug. 26, 2015, <https://www.bostonglobe.com/metro/2015/08/25/you-have-just-tonight-night/jTor3lbphOrwZM9KNEPOLJ/story.html>.

grandmother, however, claimed that Conrad seemed to be “pulling out of [the depression].”²⁸ Text messages between Michelle and Conrad show the couple discussed suicide often and in great detail over the course of their relationship.²⁹ She told him he was strong enough to do it, and that his parents would understand that he had reached a point where no one could save him.³⁰

Over time, Michelle became even more involved in Conrad’s suicide plans. She encouraged him to overcome his fear of death or failing in his suicide attempt.³¹ In one text exchange, she told him that once he committed suicide, he would finally “get to be happy in heaven. No more pain. No more bad thoughts and worries. [He would] be free.”³² Michelle even conducted research and recommended methods of suicide.³³ On one occasion, Michelle specifically suggested that Conrad kill himself by carbon monoxide poisoning, which would be “painless” and “would definitely work.”³⁴ When Conrad failed to carry out the plans, Michelle expressed her frustration to him: “I guess that [I am frustrated], just because you always say you are going to do it but you don’t, but last night I know you really wanted to do it and I’m not mad. Well I mean kind of, I guess.”³⁵ Michelle complained to him that he always had an excuse for not committing suicide.³⁶

On July 6, 2014, six days before Conrad committed suicide, Conrad and Michelle discussed the logistics of his suicide plans.³⁷ Michelle told him that with carbon monoxide poisoning he would “lose consciousness with no pain. [He would] just fall asleep and die.”³⁸ On July 9, Conrad

²⁸ See CBS BOS., *supra* note 6.

²⁹ See Phillip, *supra* note 11.

³⁰ See Commonwealth’s Response to Defendant’s Motion to Dismiss, *supra* note 1, at 2.

³¹ See *id.* at 3.

³² *Id.*

³³ See Phillip, *supra* note 11.

³⁴ See *id.*

³⁵ Commonwealth’s Response to Defendant’s Motion to Dismiss, *supra* note 1, at 4.

³⁶ See *id.* at 4–5.

³⁷ See *id.* at 6.

³⁸ See *id.*

realized his father's generator, which he was going to use to produce carbon monoxide, did not work.³⁹ In the days that followed, Michelle and Conrad worked on finding another method to produce carbon monoxide and ensured that Conrad's parents did not find out about the plan.⁴⁰

On July 12, 2014, Michelle and Conrad began their conversation at 4:19 AM, when Michelle suggested that "[i]t's probably the best time now because everyone is sleeping."⁴¹ Throughout the day, Michelle asked him if he was going to do it that night, and told him repeatedly that he was overthinking and needed to "just do it."⁴² Conrad sent his last text message at 6:25 PM that evening, when he left his mother's house for the K-Mart in Fairhaven, Massachusetts.⁴³ Conrad's phone records show two forty-minute phone calls with Michelle that evening.⁴⁴ During the second phone call, Conrad exited the car and told Michelle that he was afraid the carbon monoxide poisoning was working; she told him to "get back in."⁴⁵ The next morning, police found Conrad's car in the parking lot, after his mother reported him missing.⁴⁶ Conrad Roy was dead.

In the days that followed, Michelle told Conrad's mother and sister, her own friend Samantha, and the police that she did not know that Conrad planned to commit suicide.⁴⁷ The police searched Michelle's phone and noted that she had deleted her conversation with Conrad after 7:00 PM on the evening he committed suicide.⁴⁸ When she heard that police were looking into Conrad's text messages as part of his suicide investigation, Michelle texted her friend

³⁹ See *id.* at 8.

⁴⁰ See *id.* at 9–10.

⁴¹ See Commonwealth's Response to Defendant's Motion to Dismiss, *supra* note 1, at 11.

⁴² See *id.* at 12–16.

⁴³ See *id.* at 16.

⁴⁴ See *id.* at 17.

⁴⁵ See *id.* The police found this information in Michelle's text messages to her friend Samantha Boardman on September 15. See Commonwealth's Response to Defendant's Motion to Dismiss, *supra* note 1, at 21 ("I was the one on the phone with him and he got out of the car because [it] was working and he got scared and I fucken [sic] told him to get back in, Sam, because I knew he would do it all over again the next day and I couldn't have him live the way he was living anymore.").

⁴⁶ See Commonwealth's Response to Defendant's Motion to Dismiss, *supra* note 1, at 17.

⁴⁷ See *id.* at 17–18.

⁴⁸ See *id.* at 18.

Samantha in a panic, claiming that if police were to read her messages to Conrad, she would be “done,” his family would hate her, and she could go to jail.⁴⁹ In September, Michelle began telling Samantha that Conrad’s death was her fault because she could have stopped him but that Samantha would not understand because she had “never helped someone with a suicide.”⁵⁰

B. District Attorney’s Case

In February 2015, a grand jury indicted Michelle Carter, now eighteen years old, for involuntary manslaughter.⁵¹ The manslaughter statute in Massachusetts does not contain a definition for “manslaughter;” instead, its meaning is derived from the common law definition.⁵² Common law defines involuntary manslaughter as “an unlawful homicide unintentionally caused by an act which constitutes such a disregard of probable harmful consequences to another as to amount to wanton or reckless conduct.”⁵³ According to the State, Michelle’s actions were both objectively and subjectively reckless.⁵⁴ Michelle was objectively wanton or reckless because “any woman in [her] position would appreciate the danger in advocating that carbon monoxide poisoning is a painless and effective way of committing suicide to a suicidal teen.”⁵⁵ Alternatively, the prosecution argues that her conduct was also subjectively wanton or reckless because under

⁴⁹ See *id.* at 20.

⁵⁰ See *id.* at 21–22.

⁵¹ See Michael Miller, *Michelle Carter Can Face Manslaughter Charge for Allegedly Encouraging Boyfriend’s Suicide, Judge Rules*, WASH. POST, Sept. 24, 2015, <https://www.washingtonpost.com/news/morning-mix/wp/2015/09/24/michelle-carter-can-face-manslaughter-charge-for-allegedly-encouraging-boyfriends-suicide-judge-rules/>.

⁵² See *Commonwealth v. Catalina*, 556 N.E.2d 973, 976 (Mass. 1990); see also MASS. GEN. LAWS ANN. ch. 265, § 13 (West 2015).

⁵³ See *Commonwealth v. Life Care Ctrs. of Am., Inc.*, 926 N.E.2d 206, 211 (Mass. 2010). For purposes of manslaughter, “wanton” and “reckless” conduct are considered synonymous. See *e.g., id.* (“Wanton or reckless conduct generally involves a wilful [sic] act that is undertaken in disregard of the probable harm to others that may result.”); *Commonwealth v. Welansky*, 55 N.E.2d 902, 910 (Mass. 1944) (“The words ‘wanton’ and ‘reckless’ are practically synonymous in this connection, although the word ‘wanton’ may contain a suggestion of arrogance or insolence or heartlessness that is lacking in the word ‘reckless.’ But intentional conduct to which either word applies is followed by the same legal consequences as though both words applied.”).

⁵⁴ A defendant can be found guilty of manslaughter if his or her conduct was either objectively or subjectively reckless. See *Commonwealth v. Life Care Ctrs. of Am. Inc.*, 926 N.E.2d 206, 211–12 (Mass. 2010); see also discussion at *infra* II.C.

⁵⁵ Commonwealth’s Response to Defendant’s Motion to Dismiss, *supra* note 1, at 27.

Michelle's own admission, she knew that Conrad was susceptible to suicidal thoughts, and she had advance knowledge of his plan to commit suicide on July 12.⁵⁶ The State alleges that Michelle caused Conrad's death by enabling him to produce carbon monoxide,⁵⁷ as well as by telling him to "get back in" when he had second thoughts.⁵⁸

Alternatively, omission or failure to act when the defendant had a duty to act can also constitute wanton or reckless conduct for purposes of manslaughter prosecution.⁵⁹ A defendant has a duty to act if (1) he or she has a special relationship to the victim or (2) he or she created a life-threatening condition.⁶⁰ The State relied on the latter theory, arguing that Carter created a life-threatening condition for a suicidal Conrad by directing Conrad to obtain a generator and pressuring him to commit suicide.⁶¹ Because she created the life-threatening condition, Michelle had to a duty to take reasonable steps to alleviate the risk of him carrying out the plan.⁶² Michelle could have alleviated the possible harm to Conrad by either preventing his suicide or alerting his family of his plans, but she failed to do so.⁶³

C. Defendant's Argument⁶⁴

⁵⁶ See *id.* at 27.

⁵⁷ See *id.* at 32.

⁵⁸ See *id.* at 30.

⁵⁹ See *Commonwealth v. Welansky*, 55 N.E.2d 902, 910–11 (Mass. 1995).

⁶⁰ See *Commonwealth v. Zhan Tang Huang*, 25 N.E.3d 315, 328 (Mass. App. Ct. 2015) ("Duty may be established in one of two ways. The first is where the defendant has a special relationship to the victim. . . . The second is where the defendant 'creates a situation that poses a grave risk of death or serious injury to another.'").

⁶¹ See *Commonwealth's Response to Defendant's Motion to Dismiss*, *supra* note 1, at 30.

⁶² See *id.* at 29.

⁶³ See *id.* at 29–30.

⁶⁴ This Comment will not address Defendant's arguments that the Massachusetts Manslaughter Statute is unconstitutionally vague as applied to this case and that Michelle Carter is not a "youthful offender." See Defendant's Memorandum in Support of Motion to Dismiss at 17–18, 15–17, *Commonwealth v. Carter*, No. 15YO0001NE (Mass. Dist. Ct. Aug. 21, 2015) (hereinafter Defendant's Memorandum).

In response to these allegations, Michelle argues that there is not enough evidence to sustain a charge of involuntary manslaughter because she was not wanton or reckless. First, Michelle argues that she did not commit an affirmative act that constituted wanton or reckless conduct because there is no evidence that “a physical act of force, pressure, violence, or any direct touching by the defendant whatsoever led to this manner of death.”⁶⁵ For this argument, the defense cites Massachusetts case law that requires a “physical act” that caused the victim’s death for manslaughter which is not based on an omission.⁶⁶ She did not provide the physical means for Conrad to commit suicide, and she was not physically present at the time that he committed the act.⁶⁷

Second, Michelle contends she cannot be charged under the alternative theory of wanton or reckless conduct by omission. First, Michelle and Conrad did not have a “special relationship” recognized by law that would give rise to a duty to prevent Conrad from committing suicide.⁶⁸ Michelle also argued that she did not “create” the risk of death for Conrad because he had contemplated suicide before meeting Michelle, and therefore his suicidal condition was not caused by Michelle.⁶⁹ Lastly, the defendant argued that her actions are protected by the First Amendment and the Massachusetts Declaration of Rights’s protections on free speech.⁷⁰ Based on these arguments, the defense filed a motion to dismiss the charges against her.⁷¹ On September 23, 2015,

⁶⁵ Defendant’s Memorandum, *supra* note 64, at 4.

⁶⁶ *See* Commonwealth v. Welansky, 55 N.E.2d 902, 909 (Mass. 1995) (“Usually wanton or reckless conduct consists of an affirmative act, like driving an automobile or discharging a firearm, in disregard of probable harmful consequences to another.”); *see also* Commonwealth v. Life Care Ctrs. of Am., Inc., 926 N.E.2d 206, 211 (Mass. 2010) (intentional act requirement); Commonwealth v. Pugh, 969 N.E.2d 672, 687 (Mass. 2012) (physical act requirement).

⁶⁷ *See* Defendant’s Memorandum, *supra* note 64, at 14.

⁶⁸ *See id.* at 5.

⁶⁹ *See id.* at 9–10.

⁷⁰ *See id.* at 17–18 (citing State v. Melchert-Dinkel, 844 N.W.2d 13, 16 (Minn. 2014)).

⁷¹ *See* Henderdon & Ellement, *supra* note 7.

Bristol County Judge Bettina Borders rejected the motion to dismiss and ruled that the case would proceed.⁷²

III. Punishing Suicide and Related Offenses

Courts have varied in their treatment of encouraging suicide over time, with recent cases tending to more lenient punishment. This section will examine the history of punishment for assisting suicide. First, it will discuss the way the common law treated suicide and assisting suicide, both in England and the early history of the United States. Next, it will discuss cases that punished suicide assistance or encouragement as murder. Lastly, it will discuss courts's more recent tendency of treating assisting or encouraging suicide as manslaughter.

A. Common Law

Common law treated suicide as murder and a felony.⁷³ Under the common law of England, it was a “crime against the laws of God and man.”⁷⁴ However, by the very nature of the crime, the felon was out of the reach of the law, which created a difficulty in designing a punishment.⁷⁵ As punishment, the “goods and chattels of the criminal were forfeited to the [k]ing, his body had an ignominious burial in the highway, and he was deemed a murderer of himself and a felon, *felo de se*.”⁷⁶ Because all of the deceased's property was surrendered to the king, the felon's family and heirs were left to suffer the consequences of the suicide.

The colonies declined to follow the English common law by requiring forfeiture. For example, the common law of Massachusetts never required forfeiture of property after suicide.⁷⁷

⁷² *See id.*

⁷³ *See State v. Sage*, 510 N.E.2d 343, 346 (Ohio 1987).

⁷⁴ *See Commonwealth v. Mink*, 123 Mass. 422, 425 (1877).

⁷⁵ *See id.* at 423 (“It is true, undoubtedly, that suicide cannot be punished by any proceeding of the courts, for the reason that the person who kills himself has placed himself beyond the reach of justice, and nothing can be done. But the law, nevertheless, recognizes suicide as a criminal act, and the attempt at suicide is also criminal.”).

⁷⁶ *Id.* at 425. In 1870, England abolished the practice of forfeiture and finally abolished suicide as a crime in 1961. *See David S. Markson, Comment, Punishment of Suicide - A Need for Change*, 14 VILL. L. REV. 463, 465 (1969).

⁷⁷ *See Mink*, 123 Mass. at 426.

Nevertheless, suicide was still considered *malum in se* and a felony under Massachusetts common law.⁷⁸ An act is *malum in se* if it is “inherently immoral, such as murder, arson, or rape.”⁷⁹ Lacking the ability to punish the felon, the Massachusetts legislature passed a statute in 1660 denying “the privilege of being buried in the common burying-place of Christians” to those who committed suicide and instead required that they be buried on a common highway with a cartload of stones over the grave.⁸⁰ Massachusetts was the only state to adopt the English practice of ignominious burial.⁸¹ The dishonorable burial was intended to serve as a “brand of infamy, and as a warning to others to beware of the like damnable practices.”⁸² This law remained in place into the establishment of the Commonwealth of Massachusetts.⁸³

Massachusetts was not the only state to reject the harsh punishment of suicide at English common law. For example, Michigan omitted suicide from its criminal law altogether.⁸⁴ Some states included provisions in their constitutions prohibiting forfeiture of property as punishment in general.⁸⁵ West Virginia went a step further in 1923 and enacted a statute that specifically prohibited forfeiture of a person’s estate as punishment suicide.⁸⁶ Faced with an inability to punish the crime, many states decided not to treat suicide as a crime at all when they moved away from

⁷⁸ See *id.*

⁷⁹ See BLACK’S LAW DICTIONARY 1103 (10th ed. 2014). See also William L. Barnes, Jr., *Revenge on Utilitarianism: Renouncing a Comprehensive Economic Theory of Crime and Punishment*, 74 IND. L.J. 627, 648 (1999) (“[M]alum in se, . . . means wrong in and of itself.”).

⁸⁰ See *Commonwealth v. Mink*, 123 Mass. 422, 426 (1877).

⁸¹ See Catherine D. Shaffer, *Criminal Liability for Assisting Suicide*, Note, 86 COLUM. L. REV. 348, 349 (1986) (citing G. Williams, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 262 (1957)).

⁸² *Mink*, 123 Mass. at 426.

⁸³ See *id.*

⁸⁴ See Donald Wright, Comment, *Criminal Aspects of Suicide in the United States*, 7 N.C. CENT. L.J. 156, 157 (1975).

⁸⁵ See *id.* (citing N.C. CONST. art. 1, § 1).

⁸⁶ See W. VA. CODE § 61-11-4 (2015) (“No suicide or attainder of felony shall work corruption of blood or forfeiture of estate.”).

the common law and shifted toward statutory crimes.⁸⁷ Other states retained the common law crime of suicide in order to allow them to punish suicide attempts.⁸⁸

It is less clear whether *assisting* suicide was a crime at common law. According to some sources, aiding, advising, or abetting a suicide was murder, just as committing suicide was murder.⁸⁹ The aider and abettor was treated as “a principal in the second degree to the self-murder of the other.”⁹⁰ Other sources suggest the common law punished assisting suicide under a theory of accomplice liability.⁹¹ As a result, the accomplice was treated differently depending on whether or not he or she was present at the time of the suicide. If the aider and abettor was present at the time of the act, he or she was considered a principle to the crime of suicide.⁹² On the other hand, those who encouraged suicide but were not present at the time of the suicide would escape punishment because conviction of an accessory required the conviction of the principal of the crime.⁹³ However, this treatment was premised on the idea that suicide was a crime, to which the defendant could be a party, which was not always the case.⁹⁴

B. Encouraging Suicide as Murder

Early decisions by Massachusetts courts treated assisting suicide as murder. In the 1816 case of *Commonwealth v. Bowen*, a Massachusetts court convicted the defendant for murder after he encouraged a fellow inmate to commit suicide.⁹⁵ Bowen’s cell was adjacent to another prisoner,

⁸⁷ See Wright, *supra* note 84, at 157.

⁸⁸ See *id.*

⁸⁹ See, e.g., State v. Sage, 510 N.E.2d 343, 346 (Ohio 1987); *In re Joseph G.*, 667 P.2d 1176, 1179 (Cal. 1983).

⁹⁰ *Id.*

⁹¹ See Wright, *supra* note 84, at 161.

⁹² See Wright, *supra* note 84, at 161.

⁹³ See Markson, *supra* note 76, at 473.

⁹⁴ See Sanders v. State, 112 S.W. 68, 70 (Tex. Crim. App. 1908) (holding that the defendant could not be an accomplice to suicide because suicide was not a crime in the state), *overruled by* Aven v. State, 277 S.W. 1080 (Tex. Crim. App. 1925).

⁹⁵ See 13 Mass. 356 (1816). The facts of this case are largely laid out in a later Massachusetts case, *Commonwealth v. Mink*, 123 Mass. 422, 427 (1877).

which allowed the men to converse freely with one another.⁹⁶ Bowen was accused of encouraging the other prisoner to commit suicide in order to deprive the sheriff and the townspeople of the opportunity to see him executed.⁹⁷ The night before the other prisoner was scheduled for execution, he took Bowen's advice and hung himself in his cell.⁹⁸ Bowen was charged with murder, and the court found that "where one counseled [sic] another to commit suicide, who by reason of his advice, and in his presence, did so, the adviser was guilty of murder."⁹⁹

In 1877, The Massachusetts Supreme Court revisited this application of the murder statute in *Commonwealth v. Mink*, which involved a woman who was charged with murder after accidentally killing her fiancé during an attempt to kill herself.¹⁰⁰ Defendant-Mink threatened to kill herself when her fiancé threatened to leave her.¹⁰¹ He tried to prevent her from committing suicide, and in the ensuing struggle, she shot and killed him.¹⁰² Though the court proceeded under a theory of felony murder, it discussed in detail and affirmed the holding in *Bowen*, stating that "if a man murders himself, and one stands by, aiding in and abetting the death, he is as guilty as if he had conducted himself in the same manner where A[] murders B. And if one becomes the procuring cause of death, though absent, he is accessory."¹⁰³

This approach to suicide is not unique to Massachusetts. In its 1872 decision, *Blackburn v. State*,¹⁰⁴ an Ohio court heard a case where the defendant administered poison to a woman, who eventually died as a result.¹⁰⁵ Evidence showed that the defendant and the decedent had agreed to

⁹⁶ *See id.*

⁹⁷ *See id.*

⁹⁸ *See id.*

⁹⁹ *Commonwealth v. Mink*, 123 Mass. 422, 427 (1877).

¹⁰⁰ *See* 123 Mass. 422 (1877).

¹⁰¹ *See Mink*, 123 Mass. at 422–23.

¹⁰² *See id.* at 423.

¹⁰³ *See id.* at 428.

¹⁰⁴ 23 Ohio St. 146 (1872), *overruled on other grounds by* *State v. Staten*, 247 N.E.2d 293 (1969).

¹⁰⁵ *See Blackburn v. State*, 23 Ohio St. 146, 147 (1872), *overruled on other grounds by* *State v. Staten*, 247 N.E.2d 293 (1969).

commit suicide together.¹⁰⁶ Evidence also showed, however, that the defendant, “by threats of violence or otherwise, forced [the woman] to swallow the poison, or forced it down her throat.”¹⁰⁷ The defendant argued that Ohio does not have a law prohibiting suicide, and therefore, he could “not be a criminal accessory, nor a criminal principal in the second degree, to an act which is not itself a crime.”¹⁰⁸ The court found it immaterial whether the victim took the poison by choice or if she succumbed to pressure from the defendant.¹⁰⁹ Instead, the Supreme Court of Ohio held that the defendant was not being prosecuted for assisting in suicide but for administering poison to another person, which is murder regardless of the other person’s wishes or condition.¹¹⁰ Similarly, in its 1920 decision, *People v. Roberts*, the Michigan Supreme Court held that a man committed murder when he mixed poison for his wife with multiple sclerosis and left it at her bedside, especially since her condition would not have allowed her to obtain the poison without his help.¹¹¹

However, in 1983, the Michigan Court of Appeals decided that *Roberts* no longer represented the law of Michigan. In *People v. Campbell*, the court held that encouraging suicide and even providing the murder weapon could not be murder because murder was the unlawful killing of *another*.¹¹² Campbell was drinking with another man who became depressed and suicidal during the course of their drinking together.¹¹³ Campbell encouraged the man to buy a gun, and when he refused, Campbell went to his house to get his own gun.¹¹⁴ Campbell left his gun with the other man, who used it to kill himself.¹¹⁵ Michigan’s murder statute did not include a definition

¹⁰⁶ See *id.* at 148–49.

¹⁰⁷ See *id.* at 148.

¹⁰⁸ *Id.* at 153.

¹⁰⁹ See *id.* at 162–63.

¹¹⁰ See *d.* at 163–64.

¹¹¹ See *People v. Roberts*, 178 N.W. 690, 693 (Mich. 1920).

¹¹² See 335 N.W.2d 27 (Mich. Ct. App. 1983).

¹¹³ See *People v. Campbell*, 335 N.W.2d 27, 28 (Mich. Ct. App. 1983).

¹¹⁴ See *id.*

¹¹⁵ See *id.* at 29.

for homicide, so the courts derived its definition from the common law, which defined a homicide as the killing of one human being by another.¹¹⁶ Since the man killed himself, there was no homicide to which Campbell could have been a party.¹¹⁷ Furthermore, in order to find the defendant guilty, the court required that he want to kill the man himself, not only that he want the man to die.¹¹⁸ As a final consideration, the court noted that there had been a trend towards charging assistance or aiding in a suicide as manslaughter, but not murder, which the court interpreted as a reflection of the “moral values of the present day.”¹¹⁹

C. Encouraging Suicide as Manslaughter

Consistent with the observation of the Michigan court in *Campbell*, more recent cases have been less harsh than the courts in *Bowen* and *Blackburn*, charging those who encourage or assist suicide with manslaughter, instead of murder. For example, Massachusetts backed away from its harsh treatment of encouraging suicide in *Bowen* and shifted towards treating it as manslaughter. Massachusetts’s statute prohibiting manslaughter does not define the term “manslaughter.”¹²⁰ Instead, manslaughter derives its elements from its common law definition.¹²¹ The common law defined involuntary manslaughter as “an unlawful homicide, unintentionally caused (1) in the commission of an unlawful act, *malum in se*, [] not amounting to a felony nor likely to endanger life . . . or (2) by an act which constitutes such a disregard of probable harmful consequences to another as to constitute wanton or reckless conduct.”¹²² Wanton or reckless conduct is “intentional

¹¹⁶ *See id.*

¹¹⁷ *See id.* at 30.

¹¹⁸ *See id.*

¹¹⁹ *See Campbell*, 335 N.W.2d at 30.

¹²⁰ “Whoever commits manslaughter shall, except as hereinafter provided, be punished by imprisonment in the state prison for not more than twenty years or by a fine of not more than one thousand dollars and imprisonment in jail or a house of correction for not more than two and one half years.” MASS. GEN. LAWS ANN. ch. 265, § 13 (West 2015).

¹²¹ *See Commonwealth v. Catalina*, 556 N.E.2d 973, 976 (Mass. 1990).

¹²² *See id.* The court in *Catalina* abolished the first kind of manslaughter, a death that occurs during an act that is *malum in se* but not a felony. *See id.* at 977–78.

conduct, by way either of commission or of omission where there is a duty to act, which conduct involves a high degree of likelihood that substantial harm will result to another.”¹²³ Therefore, conviction for involuntary manslaughter requires finding that (1) the defendant intended to commit an act, (2) the act the defendant intended to commit was wanton or reckless, and (3) the act caused the victim’s death.¹²⁴

Conduct satisfies the wanton or reckless requirement if it is either objectively or subjectively wanton or reckless.¹²⁵ Conduct is objectively wanton or reckless “if an ordinary normal [person] under the same circumstances would have realized the gravity of the danger.”¹²⁶ For a finding of subjective wanton or recklessness, the “grave danger to others must have been apparent and the defendant must have chosen to run the risk rather than alter [his or her] conduct so as to avoid the act or omission [that] caused the harm.”¹²⁷ Lastly, the intentional, wanton or reckless conduct must be the cause of the death that occurs. Courts have defined “cause” as conduct which “in the natural and continuous sequence, produces the death, and without which the death would not have occurred.”¹²⁸

A typical manslaughter case is based on affirmative conduct that causes the death of a victim. Two separate Massachusetts cases are instructive here. In *Commonwealth v. McCauley*, the defendant was charged with involuntary manslaughter after he shot and killed one of his friends.¹²⁹ The court found that the evidence that McCauley was not familiar with guns, had no intent to kill the victim, and did not know the gun was loaded was sufficient to warrant a jury

¹²³ See *Commonwealth v. Welansky*, 55 N.E.2d 902, 910 (Mass. 1994).

¹²⁴ See *Commonwealth v. Life Care Ctrs. of Am. Inc.*, 926 N.E.2d 206, 211–12 (Mass. 2010).

¹²⁵ See *Commonwealth v. Pugh*, 969 N.E.2d 672, 685 (Mass. 2012) (“Wanton or reckless conduct is determined based either on the defendant’s specific knowledge or on what a reasonable person should have known in the circumstances.”).

¹²⁶ See *id.* (citing *Welansky*, 55 N.E.2d at 902).

¹²⁷ See *id.*

¹²⁸ See *Commonwealth v. Rhoades*, 401 N.E.2d 342, 351 (Mass. 1980); see also discussion *infra* Part IV.

¹²⁹ See *Commonwealth v. McCauley*, 246 N.E.2d 425, 426 (Mass. 1969).

instruction for manslaughter.¹³⁰ In *Commonwealth v. Power-Koch*, a more recent case, the Massachusetts Court of Appeals charged the defendant with involuntary manslaughter for shooting his friend in the chest.¹³¹ Like in *McCauley*, the court found the evidence that the defendant “did not know whether the gun was fully loaded” and his testimony that he had never fired the gun before sufficient to support a charge of involuntary manslaughter.¹³²

Encouraging suicide does not fit as neatly into the definition of manslaughter because there is usually an intervening act by the victim, which causes death. Still, the Massachusetts Supreme Court has previously upheld a charge of involuntary manslaughter to an alleged assisted suicide.¹³³ In *Persampieri v. Commonwealth*, the defendant was charged with involuntary manslaughter after his wife committed suicide.¹³⁴ Persampieri had allegedly loaded the gun for his wife at her request and made suggestions that would make it easier for her to discharge the gun.¹³⁵ He also taunted her for being “too chicken” to kill herself, as she had attempted suicide twice before, but failed both times.¹³⁶ The court held that involuntary manslaughter was an appropriate charge because the defendant aided his wife’s self-murder by being present in the room during the suicide, encouraging his wife to kill herself, and taunting her with accusations of being too scared to do it.¹³⁷

Courts in other states have similarly held that a defendant is guilty of manslaughter if he or she provides the physical means of suicide while encouraging the victim to carry out a suicide plan. The Iowa Supreme Court took this approach in *State v. Marti*.¹³⁸ In this 1980 case, the court

¹³⁰ *Id.* at 429.

¹³¹ *See Commonwealth v. Power-Koch*, 871 N.E.2d 1085, 1087 (Mass. App. 2007).

¹³² *See id.* at 1089.

¹³³ *See* 175 N.E.2d 387 (Mass. 1961).

¹³⁴ *See Persampieri v. Commonwealth*, 175 N.E.2d 387, 389 (Mass. 1961).

¹³⁵ *See id.*

¹³⁶ *See id.*

¹³⁷ *See id.* at 390.

¹³⁸ *See generally* 290 N.W.2d 570 (Iowa 1980).

held that loading a gun for a suicidal person and encouraging him or her to commit suicide is criminal because “it constitutes murder or manslaughter, not because it coincidentally helped someone to die who wanted to die anyway.”¹³⁹ In 1992, an appellate court in New York affirmed a manslaughter conviction where the defendant goaded the victim to kill himself, knowing that the victim was drunk and depressed.¹⁴⁰ According to the court, the defendant acted recklessly because he knew there was a substantial risk that the victim would heed his advice and kill himself, due to his depression and intoxication.¹⁴¹

IV. Categories of Encouraging Suicide

Part of the reason that punishing actions like Michelle’s and other similar cases is so difficult is the lack of clear, legally significant categories of offenses. Cases involving assisting or encouraging suicide fall mainly into three broad categories, with varying degrees of involvement on behalf of both the defendant and the victim. Each category is defined by the causal connection between the defendant’s conduct and the other person’s suicide, which is also known as the “causation” element of the offense.¹⁴² A defendant’s act satisfies the causation element of a criminal offense if it is both the actual cause and the proximate cause of the prohibited result.¹⁴³ In this case, the prohibited result is the suicide of the other person. First, the defendant’s act is the actual cause of a suicide if it is a cause without which the result, in this case the suicide, would not have occurred when it did.¹⁴⁴ Second, the defendant’s act is the proximate cause of the suicide if

¹³⁹ See *Marti*, 290 N.W.2d at 581.

¹⁴⁰ See *People v. Duffy*, 586 N.Y.S.2d 150, 151 (N.Y. App. Div. 1992).

¹⁴¹ See *id.*

¹⁴² See Michael S. Moore, *Causation*, in 1 *ENCYCLOPEDIA OF CRIME & JUSTICE* 151 (Joshua Dressler ed., 2d ed. 2002); see also Joshua Dressler, *UNDERSTANDING CRIMINAL LAW* 182–83 (6th ed. 2012).

¹⁴³ See *id.* at 184.

¹⁴⁴ See generally H.L.A. Hart & Tony Honoré, *CAUSATION IN THE LAW* 391–92 (2d ed. 1985); see also Dressler, *supra* note 142, at 184.

it produced the death in a natural and continuous sequence of events.¹⁴⁵ This section will divide the cases into three categories based on whether the defendant's actions satisfied these types of causation for the suicide of another person.

A. Defendant Kills Victim Who Wanted to Die

The first category of cases involves those defendants who physically kill the victim. Typically, the defendant will be charged with murder, regardless of the fact that the victim might have wanted to die anyway. In this category, the defendant is both the proximate cause and the but-for cause of the other person's death. In *People v. Matlock*,¹⁴⁶ the defendant claimed that the man he had robbed and murdered had requested that he do so. According to Matlock, the victim wanted to die so that his family could collect his life insurance policy, but the policy did not cover suicide, so he enlisted the defendant's help.¹⁴⁷ In evaluating the defendant's appeal, the court noted that the defendant had clearly committed murder, regardless of whether his allegations about the victim's wishes were true.¹⁴⁸ In a similar 1981 case, the Supreme Court of Kansas held that murder was an appropriate charge where the defendant had administered a lethal dose of cocaine at the victim's request and later shot the victim in the head when the cocaine failed to bring about the victim's death.¹⁴⁹

These cases fall easily into the category of murder or voluntary manslaughter, even if they are not typical murders. Although the victim allegedly wanted to die, their death was still at the hands of the defendants. In both of these cases, the defendants, not the victims, were the physical actors. This fact pattern is in-line with both the legal and the layperson's concepts of murder.

¹⁴⁵ See e.g., *Commonwealth v. Baker*, 856 N.E.2d 908, 911 (Mass. App. Ct. 2006); *Commonwealth v. Rhoades*, 401 N.E.2d 342, 351 (Mass. 1980).

¹⁴⁶ 336 P.2d 505 (Cal. 1959).

¹⁴⁷ See *id.* at 509.

¹⁴⁸ See *id.* at 513 (finding that evidence tending to corroborate the defendant's story went solely to the question of the *degree* of the murder).

¹⁴⁹ See *State v. Cobb*, 625 P.2d 1133, 1136 (Kan. 1981).

Even *Mink* can be put in this category, because, there, the defendant killed her fiancé by accidentally shooting him; the fact that the fatal shooting happened during her own suicide attempt is an irrelevant circumstance.¹⁵⁰ These cases fall easily into existing categories of murder or manslaughter.

B. Defendant Provides Instrument Used in Suicide

Another category of cases involves defendants who provide a suicidal individual with the weapon or means to commit suicide, with knowledge that the person wanted to commit suicide. In this category, the defendant is the actual cause—but not the proximate cause—of the person’s suicide. The defendant gives the individual the means to commit suicide, but the other person’s act produces the suicide. If the act of the other was free, deliberate, and informed, the intervening act is a superseding cause of the suicide.¹⁵¹ Cases that fall in this category include providing a suicidal individual with a gun;¹⁵² loading the gun for a suicidal individual;¹⁵³ and providing poison to someone who is suicidal.¹⁵⁴ Cases like these have received more varied treatment from courts, ranging from murder convictions¹⁵⁵ to findings of no liability at all.¹⁵⁶

Courts struggle with these cases because the “victim” commits the act that directly causes his or her own death, like taking the poison or shooting themselves with the loaded gun.¹⁵⁷

¹⁵⁰ See *Commonwealth v. Mink*, 123 Mass. 422, 427 (1877).

¹⁵¹ See *Hart & Honoré*, *supra* note 144, at 326 (“The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility.”).

¹⁵² See *People v. Campbell*, 335 N.W.2d 27, 29 (Mich. Ct. App. 1983).

¹⁵³ See, e.g., *State v. Marti*, 290 N.W.2d 570, 580 (Iowa 1980); *Persampieri v. Commonwealth*, 175 N.E.2d 387, 389 (Mass. 1961).

¹⁵⁴ See *People v. Roberts*, 178 N.W. 690, 693 (Mich. 1920).

¹⁵⁵ See *Blackburn v. State*, 23 Ohio St. 146, 163–64 (1872), *overruled on other grounds by State v. Staten*, 247 N.E.2d 293 (1969).

¹⁵⁶ See *Campbell*, 335 N.W.2d 27, 29 (Mich. Ct. App. 1983).

¹⁵⁷ Compare *Roberts*, 178 N.W. at 693 (“[W]hen defendant mixed the paris green with water and placed it within reach of his wife to enable her to put an end to her suffering by putting an end to her life, he was guilty of murder by means of poison within the meaning of the statute, even though she requested him to do so.”) with *People v. Kevorkian*, 527 N.W.2d 714, 716 (Mich. 1994) (“Where a defendant merely is involved in the events leading up to the death, such as providing the means, the proper charge is assisting in a suicide [not murder].”).

However, the defendant provided the instrument used for the murder, and in some cases, the victim would not have been able to obtain the instrument without the defendant's action.¹⁵⁸ The defendant's acts are blameworthy, but would not have led to a death without the victim's intervening action.

C. Defendant Verbally Encourages Suicide

A third category of cases involves defendants who do not commit physical actions that lead to the victim's death. Instead, the defendants verbally encourage the victim to commit suicide. Arguably, the defendants in this category of cases are neither the actual cause nor the proximate cause of the suicide. Not only does the other person's free, deliberate, and informed act of committing suicide break the causal connection,¹⁵⁹ but also, the defendant's act was not an actual cause of the suicide. The defendant neither kills the other person nor provides the means for suicide. The defendant is not even physically with the other individual when he or she commits suicide.¹⁶⁰ The victim could have committed suicide without the defendant's intervention.

In *State v. Melchert-Dinkel*, the defendant did not commit a physical act to help another person commit suicide.¹⁶¹ Melchert-Dinkel posed as a suicidal nurse on message boards that provided emotional support for people who were also suicidal.¹⁶² Two of the people with whom Melchert-Dinkel had contact eventually committed suicide.¹⁶³ The individuals who committed

¹⁵⁸ See, e.g., *Persampieri*, 175 N.E.2d at 389 (victim unable to load gun herself); *Campbell*, 335 N.W.2d at 28 (victim did not have his own gun); *Roberts*, 178 N.W. at 191 (victim's multiple sclerosis made her helpless).

¹⁵⁹ See Hart & Honoré, *supra* note 144, at 326.

¹⁶⁰ At common law, an individual was held liable for the suicide of another if they were physically present when the other person committed suicide. See, e.g., *Commonwealth v. Bowen*, 13 Mass. 356 (1816); see also discussion *supra* Part III.A.

¹⁶¹ See 844 N.W.2d 13 (Minn. 2014).

¹⁶² See *State v. Melchert-Dinkel*, 844 N.W.2d 13, 16 (Minn. 2014).

¹⁶³ See *id.* at 17–18. Michigan charged Melchert-Dinkel with violating a statute that criminalized the encouragement and assistance of suicide. See *id.* at 16. He challenged the constitutionality of the statute, and the court held it to be invalid as applied to speech encouraging suicide, but upheld it as applied to assistance of suicide, which the court defined as “help, which in turn is defined as to provide (a person etc.) with what is needed for a purpose.” See *id.* at 20–24.

suicide lived in England and Canada, while Melchert-Dinkel was in Minnesota.¹⁶⁴ Similarly, Michelle was thirty miles away when Conrad committed suicide.¹⁶⁵ She did not physically plug the power into the generator that caused his death; she did not provide him with the generator. She was at her home, talking to Conrad from a remote location.¹⁶⁶

Because these defendants were not the actual nor proximate causes, their cases are much more difficult to fit into traditional concepts of murder or manslaughter. Nevertheless, the defendants did contribute, if slightly, to the suicide. Even Michelle knew that she could potentially face consequences for her encouragement, though she likely could not imagine she would face charges of manslaughter.¹⁶⁷ In some ways, this kind of encouragement seems more culpable than someone who physically helps a terminally-ill loved one commit suicide, although the latter would fall into the category of providing physical means for suicide.¹⁶⁸ Even so, defendants who verbally encourage another's suicide are distinguishable from usual murder cases or accidental shootings, which are more typical manslaughters.

V. A Statutory Solution

Instead of punishing encouragement¹⁶⁹ or physical assistance of suicide under a theory of murder or manslaughter, states could proscribe this conduct with a statute that would specifically prohibit the assistance of suicide. This section will recommend a statute under which encouragement and assistance to suicide can be prosecuted without resorting to manslaughter or

¹⁶⁴ See *Melchert-Dinkel*, 844 N.W.2d at 16.

¹⁶⁵ See Slifer, *supra* note 5.

¹⁶⁶ See Defendant's Memorandum, *supra* note 64, at 12.

¹⁶⁷ See Commonwealth's Response to Defendant's Motion to Dismiss, *supra* note 1, at 21 ("...I didn't bully him or anything? So you don't think they'll really tell his family?").

¹⁶⁸ See *e.g.*, *People v. Roberts*, 178 N.W. 690, 694 (Mich. 1920) (defendant provided his wife with poison to relieve her of the pain caused by multiple sclerosis). This Comment will not discuss the specific circumstance of physician-assisted suicide, as that specific circumstance raises very different issues and require different safeguards and treatment in law.

¹⁶⁹ For purposes of this discussion, "encouragement" is defined as verbal incitement, as distinguished from providing material assistance, which is used to denote physical participation in the suicide (i.e. providing a gun).

murder statutes. Then, it will compare how prosecution under the proposed theory compares to the current approach in achieving the societal goals that punishment is supposed to serve.

A. The Statute

In *People v. Campbell*, when deciding a charge of murder for assisting suicide, the Michigan Supreme Court noted that the decision of whether to criminalize incitement to suicide belongs to the legislature.¹⁷⁰ The Model Penal Code treats “causing” a suicide as criminal homicide “only if [the defendant] purposely causes such suicide by force, duress or deception.”¹⁷¹ A separate provision makes it a crime to “aid or solicit” suicide.¹⁷² An example of “causing” suicide would be a defendant who brutally beats a victim, threatening that if she does not jump out of an eleventh floor window to her death, he will personally beat her to death.¹⁷³ Though the defendant did not physically throw the victim out of the window, the victim committed suicide under duress. This kind of duress or coercion is different from a case where a defendant provides a gun or verbal encouragement to an individual who was already suicidal before the defendant intervened.

Verbal encouragement and physical assistance would fall into the category of “aiding or soliciting” suicide, which is a second degree felony and an offense separate from homicide, under the Model Penal Code’s formulation.¹⁷⁴ The maximum sentence for second degree felonies in the Model Penal Code’s tentative sentencing guidelines is twenty years imprisonment, which was increased from ten years imprisonment in the original draft.¹⁷⁵ Some states have enacted specific

¹⁷⁰ See 335 N.W.2d 27, 31 (Mich. App. 1983). Other courts have also taken a similar position, finding no liability for assisting or aiding suicide in the absence of a specific statute prohibiting the act. See, e.g., *Grace v. State*, 69 S.W. 529, 530 (Tex. Crim. App. 1902).

¹⁷¹ See MODEL PENAL CODE § 210.5(1) (1985).

¹⁷² See § 210.5(2).

¹⁷³ See *State v. Lassiter*, 484 A.2d 13, 15–17 (N.J. Super. Ct. App. Div. 1984) (charged with murder).

¹⁷⁴ See MODEL PENAL CODE § 210.5(2) (1985) (“Aiding or Soliciting Suicide as an Independent Offense. A person who purposely aids or solicits another to commit suicide is guilty of a felony of the second degree if his conduct causes such suicide or an attempted suicide, and otherwise of a misdemeanor.”).

¹⁷⁵ See MODEL PENAL CODE: SENTENCING § 6.06 (Tentative Draft No. 2, 2011).

statutes that criminalize assisting or aiding suicide, but punish the offense at or about the same level as manslaughter.¹⁷⁶ A specific statute should include provisions for lesser punishment, to accommodate the diminished culpability of the defendant, in light of the victim's own intervening acts that caused his or her death.

A specific statute should also provide a definition for what kind of assistance would rise to the level of "aid" to a suicide. One suggestion would be to expand the Model Penal Code provision to distinguish between the different types of assistance. Thus, under such a statute, a defendant is guilty of assistance to suicide if he or she: (1) "intentionally provides the means by which suicide is attempted or committed" or (2) intentionally acts as a suicide participant.¹⁷⁷ A suicide participant is a person, other than the victim, who "actively, affirmatively participates in the act of suicide."¹⁷⁸ In other words, liability for assisting suicide would be limited to those who are both the actual and proximate cause of the victim's suicide. Alternatively, the state could choose to limit liability to those who physically participate in the suicide.¹⁷⁹ If a state legislature wants the statute's prohibition to reach conduct that is merely verbal encouragement, they can include a prohibition for causing or soliciting a suicide by means of duress. If the victim acted under duress, their intervening act would not be the kind of free, deliberate, and informed act that breaks the causal

¹⁷⁶ See, e.g., ALASKA STAT. § 11.41.120 (2015) (manslaughter); CAL. PENAL CODE § 401 (West 2016) (felony); FLA. STAT. § 782.08 (2015) (manslaughter, second degree felony). *But compare* N.Y. PENAL LAW § 120.30 (McKinney 2015) (promoting a suicide attempt is a class E felony with a maximum prison sentence of four years), *with* N.Y. PENAL LAW § 125.15 (McKinney 2015) (second degree manslaughter is a class C felony with a maximum sentence of fifteen years).

¹⁷⁷ See Shaffer, *supra* note 81, at 372.

¹⁷⁸ *Id.*

¹⁷⁹ See, e.g., GA. CODE ANN. § 26-5-5 (2015) (statute criminalizing assistance to suicide defines "assistance" as "the act of physically helping or physically providing the means"). After the Michigan courts struggled to apply manslaughter and murder theories in cases like *Roberts* and *Campbell*, the Michigan legislature enacted a statute that prohibits providing the physical means for suicide or participating in the physical act of suicide if the defendant knew that the victim intended to commit suicide. See MICH. COMP. LAWS § 752.1027 (2016).

chain between the defendant's act and the ensuing suicide. The fact-finder at trial would then determine whether the defendant's actions rose to the level of duress.

B. Evaluating the Alternatives

Society punishes criminals in order to achieve certain goals. Criminal punishment seeks to attain four goals: deterrence, incapacitation, rehabilitation, and retribution.¹⁸⁰ An adequate criminal punishment should achieve one or more of these goals.¹⁸¹ This section will discuss each goal of punishment. Then, it will analyze and compare how each alternative for punishing encouraging suicide, manslaughter and a specific statute, achieves the goal of punishment.

i. Deterrence

One goal of criminal punishment is deterrence. There are two kinds of deterrence: specific deterrence and general deterrence. According to the theory of specific deterrence, criminal punishment aims to deter the criminal himself (rather than to deter others) from committing further crimes, by giving him an unpleasant experience he will not want to endure again.¹⁸² This theory of punishment requires the deterrence of the particular defendant. Under this view, Michelle Carter should be prosecuted so that she will not commit this crime again. However, there is no evidence that Michelle made Conrad suicidal or sought him out for that reason. To the contrary, Conrad was suicidal and was treated for depression and mental illness before he even met Michelle.¹⁸³ There is also evidence that Michelle regretted not doing more to prevent Conrad from killing

¹⁸⁰ See, e.g., Ashley Paige Dugger, *Victim Impact Evidence in Capital Sentencing: A History of Incompatibility*, 23 AM. J. CRIM. L. 375, 398–403 (1996); Gregory G. Jackson, *Punishments for Reckless Skiing—Is the Law Too Extreme?*, 106 DICK. L. REV. 619, 634–39 (2002). See also 1 Subst. Crim. L. § 1.5 (2d ed.).

¹⁸¹ According to the Federal Sentencing Guidelines, a court imposing a criminal sentence shall consider the need for the sentence imposed to (1) “reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense” (retributivism); (2) “afford adequate deterrence to criminal conduct” (deterrence); (3) “to protect the public from further crimes of the defendant” (restraint); and (4) “provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner” (rehabilitation). See 18 U.S.C. § 3553(a)(2) (2012).

¹⁸² See 1 Subst. Crim. L. § 1.5 (2d ed.).

¹⁸³ See Phillip, *supra* note 11.

himself.¹⁸⁴ A statutory prohibition would allow for Michelle to be punished, while allowing more lenient penalties that would better fit the crime she committed. Restraint¹⁸⁵ and rehabilitation,¹⁸⁶ discussed further below, are often considered types of specific deterrence.¹⁸⁷

General deterrence argues for the punishment of offenders as a way of sending a message to other people who might consider engaging in the same conduct in the future. According to this theory, other people will see the harsh punishment imposed upon the offender and will not want to suffer the same fate, so they will not engage in the behavior.¹⁸⁸ In the case of encouraging or aiding suicide, criminal prosecution seeks to deter people from encouraging another's suicide to advance their own personal motives, like pursuing an inheritance or ridding themselves of a burdensome dependent.¹⁸⁹

There is evidence that general deterrence is mildly effective for *malum prohibitum*¹⁹⁰ offenses, but not for other kinds of crime.¹⁹¹ Three requirements must be met in order for this kind of deterrence to be effective.¹⁹² First, the potential offender must know of the law prohibiting the conduct.¹⁹³ Second, the offender must perceive the cost of violating the law as greater than any benefit he or she will derive from committing the crime.¹⁹⁴ Lastly, the potential offender must be able and willing to allow this knowledge to influence his or her actions.¹⁹⁵ Under this analysis, it

¹⁸⁴ See Defendant's Memorandum, *supra* note 64, at 20.

¹⁸⁵ See *infra* Part IV.B.ii.

¹⁸⁶ See *infra* Part IV.B.iii.

¹⁸⁷ See *e.g.*, Barnes, *supra* note 79, at 633.

¹⁸⁸ See *id.* at 631.

¹⁸⁹ See Wright *supra* note 84, at 162.

¹⁹⁰ An offense is categorized as *malum prohibitum* if it is wrong only because it is proscribed by law, as opposed to *malum in se* offenses, which are inherently wrong. See Barnes, *supra* note 79, at 646.

¹⁹¹ See J. ANDENAES, PUNISHMENT AND DETERRENCE 45–46 (1974).

¹⁹² See generally Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949 (2003) (arguing that criminal punishment does very little to deter potential offenders).

¹⁹³ See *id.* at 954.

¹⁹⁴ See *id.*

¹⁹⁵ See *id.* at 954–56.

is unlikely that charging Michelle with manslaughter will deter others from engaging in the same behavior.

First, the public is probably unaware that some jurisdictions punish encouraging suicide, in any form, as murder or manslaughter. Michelle's case has been widely reported and has brought attention to the possibility of being charged with involuntary manslaughter for encouraging suicide. Prior to her case, however, the average person was likely unaware that verbal encouragement—or even incitement—of suicide could be manslaughter. As time passes and Michelle's case fades from the public eye, the general population will again forget, and any potential deterrent effect will be lost. A specific statute that proscribes certain kinds of encouragement and assistance of suicide would leave no doubt in the mind of both law enforcement and citizens that such acts are prohibited. A clear, straightforward prohibition on encouragement or assistance to suicide would at least increase the likelihood that a potential offender can understand the law.¹⁹⁶

Second, effective general deterrence requires the offender to perceive the cost of punishment to be greater than any benefit from the violation. Even those who are aware of the possibility of being charged with manslaughter for encouraging another's suicide might still believe that they are unlikely to be caught or prosecuted. This will influence their balancing of the costs and benefits of committing the prohibited act. For example, Michelle asked Conrad to delete their text message conversations before committing suicide so that she would not be associated with his death.¹⁹⁷ Furthermore, prosecution for encouraging suicide is sporadic and often leads to

¹⁹⁶ See *id.* at 989 (“[T]here are ways in which knowledge of [a criminal law rule] can be increased. . . . [A] bare prohibition itself is the easiest rule to convey.”).

¹⁹⁷ See Phillip, *supra* note 11.

wildly inconsistent outcomes.¹⁹⁸ This is certainly true in Michelle's case; the last reported case of a charge of manslaughter for encouraging suicide in Massachusetts was *Persampieri v. Commonwealth* in 1961.¹⁹⁹ Delay between the commission of the act and the eventual punishment may also distort any cost-benefit analysis a potential offender might undertake, making benefits seem much greater than any costs which he or she believes to be far off.²⁰⁰ Michelle's case has been significantly delayed by motions and arguments about whether or not her actions fit the definition of involuntary manslaughter under Massachusetts precedent.²⁰¹ If Massachusetts passed the proposed statute that specifically prohibited encouraging suicide, such issues would be easier to decide because the statute would define the offense. As jurisprudence develops, appellate courts would resolve ambiguities that remain in the application of the statute.

The final prerequisite for deterrence to be effective requires that the offender use the calculation of costs against benefits to influence his or her decisions. It is likely that offenders do not consider the legal implications of their acts at all. For example, use of drugs and alcohol often impairs an offender's judgment.²⁰² Critics of the theory of both general and specific deterrence argue that the idea of a criminal rational actor is an oxymoron.²⁰³ This is especially true in

¹⁹⁸ See Shaffer, *supra* note 81, at 370–71 (arguing that police and prosecutorial discretion tends to make prosecution of encouraging suicide ineffective and results in injustice whenever charges are pursued).

¹⁹⁹ See *Persampieri v. Commonwealth*, 175 N.E.2d 387, 389 (Mass. 1961). Some sources reported that Bristol County District Attorney Thomas Quinn had a relationship with Conrad's family, and he eventually recused himself from the case. CBS BOS., *supra* note 6. It is not clear whether his relationship influenced the decision to bring charges against Michelle.

²⁰⁰ See Robinson & Darley, *supra* note 192, at 954.

²⁰¹ Conrad committed suicide in July 2014, and the Judge decided the Defendant's motion to dismiss in September 2015. See Miller, *supra* note 51.

²⁰² See Robinson & Darley, *supra* note 192, at 954–56.

²⁰³ See Barnes, *supra* note 79, at 631; see also James Q. Wilson, THINKING ABOUT CRIME 118 (rev. ed. 1983) (“[S]ome scholars contend that a large fraction of crime is committed by persons who are so impulsive, irrational, or abnormal that even if there were no delay, uncertainty, or ignorance attached to the consequences of criminality, we would still have a lot of crime.”).

situations rife with emotion like those involving suicide.²⁰⁴ Michelle probably did not consider the costs or possible consequences of her encouragement in the weeks leading up to Conrad's suicide. It was not until afterwards that she seemed to consider that she could be prosecuted for her involvement.²⁰⁵

ii. Restraint

Restraint, also called incapacitation, is a theory of punishment focused on removing the criminal from society.²⁰⁶ According to this theory, if a defendant is imprisoned or restrained in some way, then he or she cannot commit more crimes and possibly do more harm to society.²⁰⁷ The only way to incapacitate an offender completely is to put them to death, since that will permanently remove them from society.²⁰⁸ Any other form of incapacitation is by definition less than complete. Therefore, unless the state sentenced all offenders to death or life in prison, how well punishment achieves incapacitation is a matter of degree. Even offenders serving life in prison without possibility of parole remain members of prison society and, in some cases, can continue their life of crime within the prison.²⁰⁹ Restraint can, however, be furthered through other means. When offenders are put in prison, they are isolated from general society for some period of time, protecting at least some part of the population from their crimes. Electronic monitoring systems provide an alternative to incarceration while still restraining the offender to some degree.

²⁰⁴ See generally Herbert Hendin, *Suicide and the Request for Assisted Suicide Meaning and Motivation*, 35 DUQ. L. REV. 285, 287–299 (1996) (identifying depression, ambivalence, and psychodynamics as factors that influence an individual's decision to commit suicide or request physician assisted suicide).

²⁰⁵ Michelle requested that Conrad delete her text messages from his phone on the night he committed suicide, and deleted them from her own phone as well. Commonwealth's Response to Defendant's Motion to Dismiss, *supra* note 1, at 18. This is the first indication that Michelle was aware that her actions could be wrong. She later sent text messages to her friend Samantha expressing her fear that she might be prosecuted. See *id.* at 20.

²⁰⁶ See Jackson, *supra* note 180, at 637.

²⁰⁷ See Dugger, *supra* note 180, at 401.

²⁰⁸ See *id.* at 402.

²⁰⁹ See *id.* at 402 (“[A] life sentence (most generally, life without the possibility of parole) also keeps [offenders] away from us. It just keeps them alive and away from us, in their own society, rather than dead and away from us.”). See also Barnes, *supra* note 79, at 632 (“Is a murderer really incapacitated if he murders other prisoners while behind bars?”).

²¹⁰ In the case of punishing suicide encouragement, prosecution for manslaughter would carry a longer prison term than a specific statute that would impose a lighter sentence. Therefore, if removing Michelle from the general public were the ultimate goal, a charge of manslaughter would better achieve it.

There is, however, no reason to believe that time in prison would protect other suicidal individuals in society. In fact, research indicates that in these situations, the person who commits suicide manipulates others into assisting or encouraging their suicide.²¹¹ According to this theory, suicidal individuals often respond to stress with “helplessness, clinging, asking to be told what to do, and wanting to be looked after, and a suicide attempt may be an effort to coerce such support.”²¹² Even trained therapists can fall victim to this coercion, so it is not surprising that those close to the individual find themselves drawn into a loved one’s plan for suicide.²¹³ If this is true, then restraining the person who assisted or encouraged the suicide will not actually protect other suicidal individuals, who might manipulate another loved one to encourage or help plan their suicide.²¹⁴ This dynamic makes encouraging suicide a unique situation in which incapacitation of the offender does not actually protect those who are at risk of becoming victims of the offense. Neither the statutory solution nor the current approach under a theory of manslaughter truly serves the goal of restraining the offender to prevent them from hurting society. Because incapacitation for any length of time does not protect society, the offender should only be restrained long enough

²¹⁰ Massachusetts utilizes an electronic monitoring program as an alternative to incarceration and to provide an extra level of supervision of probationers and parolees. *See generally* The Electronic Monitoring Program Fact Sheet 2014, MASS. PROBATION SERVICE 1, <http://www.mass.gov/courts/probation/elmofactsheet.pdf> (last visited Apr. 9, 2016).

²¹¹ *See* Shaffer, *supra* note 81, at 355 (“Suicidal persons often have ‘learned to use the anxiety that they can arouse in others about their death in a coercive or manipulative way.’”). *See also* Hendin, *supra* note 204, at 293 (noting that both terminally ill patients who ask to die and people who are otherwise suicidal are often motivated by a desire to test the affection of others).

²¹² Shaffer, *supra* note 81, at 355 (internal citations omitted).

²¹³ *See id.* at 355–56.

²¹⁴ *See* Shaffer, *supra* note 81, at 355.

to serve the other goals of punishment; longer prison terms would not serve the goal of incapacitation—protecting society—any more than a short prison term.

iii. Rehabilitation

Rehabilitation is a theory of punishment that argues for providing offenders the appropriate treatment in order to reintegrate the offender into society as law-abiding citizens.²¹⁵ Unlike the other goals of punishment, rehabilitation seeks to help the offender as well as society. The offender benefits by being purged of their “moral sickness” and reaccepted into society, and society benefits from another productive member.²¹⁶ According to one definition of rehabilitation, the prosecution and punishment itself is rehabilitative because it gives the offender more perfect information on the chances of being caught committing the offense.²¹⁷ A more contemporary understanding of rehabilitation argues that punishment should help the offender reintegrate into society by reforming the offender’s character or by medical treatment.²¹⁸

The punishment of encouraging suicide, whether by specific statute or otherwise, will achieve the first kind of rehabilitation by providing the offender with more perfect information for forming future decisions. For example, Michelle will likely think twice before encouraging another person to carry out a plan to commit suicide, regardless of whether she was charged with manslaughter or under a specific statute prohibiting encouragement.²¹⁹ However, a longer prison

²¹⁵ See Dugger, *supra* note 180, at 402 (citing James M. Burns & Joseph S. Mattina, SENTENCING 1-5 (1978)). Some have criticized this theory because the definition of rehabilitation varies, which results in different kinds of “treatment” in different situations; see also Meghan J. Ryan, *Death and Rehabilitation*, 46 U.C. DAVIS L. REV. 1231, 1261–68 (2013) (arguing that most discussions of rehabilitation as a goal of punishment are imprecise because the concept of rehabilitation is actually made up of various components).

²¹⁶ See Markus Dirk Dubber, *The Right to Be Punished: Autonomy and Its Demise in Moral Penal Thought*, 16 LAW & HIST. REV. 113, 143 (1993); see also Ryan, *supra* note 215, at 1264–67.

²¹⁷ See Barnes, *supra* note 79, at 634.

²¹⁸ See Ryan, *supra* note 215 at 1264–65; see also Meghan Ryan, *Science and the New Rehabilitation*, 3 VA. J. CRIM. L. 261, 327–28 (2015) [hereinafter *Science*] (“Today, commentators on rehabilitation often focus almost exclusively on offenders’ behaviors and reintegration into society.”).

²¹⁹ Some scholars have criticized this assumption, arguing that it fails to take account of recidivism rates among offenders. See Barnes, *supra* note 79, at 634; Ryan, *supra* note 215, at 1267 (“[A]ny potential benefits of reintegrating rehabilitated offenders back into society also hinge on the offenders not re-offending.”). However,

sentence is not likely to result in the second kind of rehabilitation: helping the offender reintegrate into society. To the contrary, the American prison system has largely failed to achieve reformation of prisoners.²²⁰ Incarceration itself has been found to have negative psychological effects on prison inmates.²²¹ A long prison term might only serve to exacerbate Michelle's emotional and psychological problems, making her more likely to commit a crime in the future. Instead, rehabilitation may justify a shortened sentence or diversion to non-incarcerative programs because the offender is more likely to improve outside of prison.²²² Conviction under a statute for assisting or encouraging suicide would result in a shorter prison term than a conviction for manslaughter, thus reducing the possibility that incarceration can inflict severe negative psychological effects on Michelle and other offenders like her.

iv. Retribution

Lastly, the theory of retribution argues that offenders should be punished because "crime inherently merits punishment."²²³ Punishment for retribution gives offenders what they deserve and prevents the punishment of those who do not deserve it. Retributive punishment does not seek to achieve social benefits, but instead seeks to inflict harm on someone who deserves it.²²⁴ Thus,

because prosecution for encouraging or assisting suicide is sporadic and inconsistent, there is no data regarding rates of recidivism.

²²⁰ See Craig Haney, *Demonizing the "Enemy": The Role of "Science" in Declaring the "War on Prisoners,"* 9 CONN. PUB. INT. L.J. 185, 191 (2010) (documenting the failure of rehabilitative programs in American corrections because "program-oriented officials typically lacked funding and personnel commensurate to the task at hand").

²²¹ See *id.* at 194 ("Rather than focusing exclusively on the presumed pathology of prisoners to account for post-prison problems and possible recidivism, [in their book *C-Unit: Search for Community in Prison*, Studt, Messinger, and Wilson's analysis] placed part of the blame on the nature of institutions in which [the prisoners] had been kept. It was one sign among many of a growing recognition that powerful and potentially destructive forces at work in prison, even within the very programs that were designed to help produce positive change in the name of rehabilitation.") (discussing ELLIOT STUDD, ET AL., *C-UNIT: SEARCH FOR COMMUNITY IN PRISON 3* (1968)).

²²² See Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1317 (2000).

²²³ See *id.* at 1315. Retribution in this sense is also called "social retribution," as opposed to "individual-oriented vengeance" which refers to the satisfaction that individuals feel when a criminal is punished. See Paul Boudreaux, *Criminal Law: Booth v. Maryland and the Individual Vengeance Rationale for Criminal Punishment*, 80 J. CRIM. L. & CRIMINOLOGY 177, 184 (1989).

²²⁴ See Cotton, *supra* note 223, at 1315–16.

retributive theory calls for punishment even when no social benefit will result, a fact that sets it apart from the other utilitarian theories of punishment.²²⁵ Though sometimes considered the original purpose of punishment,²²⁶ recent scholarship has recast retributivism as a method of limiting punishment, giving offenders only as much punishment as they deserve.²²⁷ This gives rise to the difficulty with assigning desert: how does retributivist theory decide who deserves to be punished and how much punishment the offender deserves?²²⁸ Under one theory, protective retributivism, punishment would look to the harms society suffered as a result of the offender's action.²²⁹ Under another theory, victim vindication, the degree of punishment the offender deserves is that which would "even the score" between the offender and the victim of his or her crime.²³⁰

Encouraging suicide is considered a threat to the "interests in the sanctity of life that are represented by the criminal homicide laws . . . even though the act may be accomplished with the consent, or at the request, of the suicide victim."²³¹ In Michelle's case, many people might find what Michelle did morally repugnant—something even her lawyer, Joseph Cataldo, acknowledges.²³² Some have called her actions "horrendous," and others have commented that

²²⁵ See *id.* at 1316.

²²⁶ See Meghan J. Ryan, *Proximate Retribution*, 48 HOUS. L. REV. 1049, 1053–54 (2012) [hereinafter *Proximate Retribution*] (tracing retributivism back to the Hammurabi Code of about 1760 BC and the Bible).

²²⁷ See, e.g., Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1302 (2006) (internal quotations omitted) (criticizing the modern view that "desert is a limiting principle, a principle that, though it would rarely tell us the exact sanction to be imposed . . . would nevertheless give us the outer limits of leniency and severity which should not be exceeded."); see also *Proximate Retribution*, *supra* note 226, at 1062 ("[T]he permutation of . . . modern retributivism that has gained the most traction among courts and scholars is 'limiting retributivism,' which uses the tenets of ordinary retributivism to determine the appropriate endpoints on an acceptable range of punishment and uses consequentialist theories to determine the particular punishment within that range.").

²²⁸ See *Proximate Retribution*, *supra* note 226, at 1064–69.

²²⁹ See *id.* at 1066–67.

²³⁰ See *id.* at 1068–69.

²³¹ *In re Joseph G.*, 667 P.2d 1176, 1181 (Cal. 1983).

²³² See Susan Zalkind, *Is Telling Someone to Commit Suicide a Crime?*, VICE, Sept. 2, 2015, http://www.vice.com/read/is-telling-someone-to-commit-suicide-a-crime-902?utm_source=vicetwitteurs ("Cataldo maintains Carter was simply exercising her freedom of speech and that her words do not add up to a manslaughter

“there should be some way that society punishes this behavior.”²³³ Similarly, the Michigan Court of Appeals called encouraging suicide “morally reprehensible” but ultimately not a crime, because there was no statute in Michigan prohibiting it.²³⁴ Punishing encouragement of suicide under a specific statute would punish the offender, serving society’s need for retribution. At the same time, it would also serve the limiting principle of modern retributivism, by allowing for a shorter sentence. A shorter sentence is more proportionate to the crime of the person who encouraged a suicide. Under the protectionist view of retribution, offenders should be punished in proportion to their crime. Michelle’s actions, while reprehensible, do not rise to the level of culpability of an accidental shooting²³⁵ or providing a gun to someone intent on committing suicide.²³⁶ Choosing between manslaughter and a specific statute, the victim vindication theory of retributivism would also require the less severe of the two. The evidence that the “victims” of encouraged suicide often manipulate their loved ones into helping them tends to show that there is much less of a score to “even” in the case of this specific crime.²³⁷

VI. Conclusion

When the news spread that Bristol County Massachusetts was charging Michelle Carter with manslaughter for encouraging her boyfriend to commit suicide, some questioned whether her actions actually constituted manslaughter.²³⁸ Her actions did not fit the public’s preconceived notion of what manslaughter is. Her case seemed to be an anomaly, prompting widespread media attention. However, a close look at both at English common law and cases in various states proves

charge. Her messages may be disturbing, but they are not criminal, he says. ‘If you find it repugnant that’s fine,’ says Cataldo.”).

²³³ See Slifer, *supra* note 5.

²³⁴ See *People v. Campbell*, 335 N.W.2d 27, 31 (Mich. App. 1983).

²³⁵ See *e.g.*, *Commonwealth v. Mink*, 123 Mass. 422, 427 (1877); *Commonwealth v. McCauley*, 246 N.E.2d 425, 426 (Mass. 1969); *Commonwealth v. Power-Koch*, 871 N.E.2d 1085, 1087 (Mass. App. 2007).

²³⁶ *Persampieri v. Commonwealth*, 175 N.E.2d 387, 389 (Mass. 1961).

²³⁷ See *supra* footnote 211 and accompanying text.

²³⁸ See Zalkind, *supra* note 232.

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that her case is not the first of its kind. Because Massachusetts law allows prosecutors to treat any and all encouragement or assistance of suicide under a theory of manslaughter, there have been inconsistent outcomes that do little to advance the goals of punishment. As the above analysis indicates, a specific statute that prohibits encouragement and assistance of suicide will better serve the goals of punishment and is preferable to the current approach. A statutory solution will allow the legislature within each state to clarify this area of law; otherwise, prosecutors will continue to make due with an unclear legal landscape and an antiquated punishment for an act that has become more nuanced due to modern technology.