

## MANSLAUGHTER BY TEXT: IS ENCOURAGING SUICIDE MANSLAUGHTER?

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### 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.<sup>1</sup> It was Conrad Roy, whose mother had reported him missing after he failed to come home the night before.<sup>2</sup> He left his mother's house the previous night, around 6:30 p.m., telling her that he would be visiting a friend.<sup>3</sup> 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.<sup>4</sup> By the time the police found Conrad the next morning, he was dead.<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup> The two initiated

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<sup>1</sup> See Commonwealth's Response to Defendant's Motion to Dismiss at 17, Commonwealth v. Carter, No. 15YO0001NE (Mass. Dist. Ct. Aug. 21, 2015), available at <http://www.wcvb.com/blob/view/-/34888334/data/1/-/3mh04m/-/MichelleCarterCourtDocs082415.pdf>.

<sup>2</sup> See *id.*

<sup>3</sup> See *id.*

<sup>4</sup> See *id.*

<sup>5</sup> See Stephanie Slifer, *Is It a Crime to "Encourage Suicide"?* *Teens' Texts Under Scrutiny*, CBS NEWS (Mar. 3, 2015, 6:00 AM), <http://www.cbsnews.com/news/is-it-a-crime-to-encourage-suicide-unusual-massachusetts-case-of-conrad-roy-and-michelle-carter/>.

<sup>6</sup> See *Investigators Say Plainville Girl 'Strongly Influenced' Teen's Suicide*, CBS BOS. (Feb. 27, 2015, 5:05 PM), <http://boston.cbslocal.com/2015/02/27/investigators-say-plainville-girl-strongly-influenced-teens-suicide/>.

<sup>7</sup> 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->

a romantic relationship that was primarily carried on through online and cell phone communication, with very little in-person contact.<sup>8</sup> Initially, Michelle 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.<sup>9</sup> She said that when the phone call ended, she “did not think much of it.”<sup>10</sup> Police were able to recover conversations between them from Conrad’s cell phone, despite Michelle having asked Conrad to delete them.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

On February 5, 2015, a grand jury indicted Michelle on charges of involuntary manslaughter for Conrad’s suicide.<sup>14</sup> 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.<sup>15</sup>

The District Attorney believed Michelle’s involvement “caused Conrad’s death by wantonly and recklessly assisting him in poisoning himself with carbon monoxide.”<sup>16</sup> Bristol County Judge Bettina Borders agreed and rejected Michelle’s motion to dismiss on September 23, 2015, allowing the prosecution to proceed with the

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plainville-teen-suicide/F6IIaXG7L6X0MJTQAYuyK/story.html.

<sup>8</sup> See Commonwealth’s Response to Defendant’s Motion to Dismiss, *supra* note 1, at 1.

<sup>9</sup> See *id.* at 18.

<sup>10</sup> *Id.*

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

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

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

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

<sup>15</sup> Phillip, *supra* note 11.

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

charges against her.<sup>17</sup>

Suicide is a significant problem;<sup>18</sup> it is the tenth leading cause of death for people of all ages in the United States.<sup>19</sup> For Americans between ages fifteen and twenty-four, the reality is harsher: suicide is the second leading cause of death in this age group.<sup>20</sup> High school students seem especially vulnerable to attempting suicide.<sup>21</sup> This means most teenagers and young adults likely 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 may be why the public found Michelle's actions so appalling.

Even a cursory glance at the public's comments under news articles about Michelle's case will show that many people agree with the District Attorney's decision to charge Michelle.<sup>22</sup> Certainly, her

<sup>17</sup> See Henderdon & Ellement, *supra* note 7.

<sup>18</sup> 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 EDUC., [http://www.save.org/index.cfm?fuseaction=home.viewPage&page\\_id=705D5DF4-055B-F1EC-3F66462866FCB4E6](http://www.save.org/index.cfm?fuseaction=home.viewPage&page_id=705D5DF4-055B-F1EC-3F66462866FCB4E6) (last visited Mar. 19, 2016).

<sup>19</sup> See *10 Leading Causes of Death by Age Group*, CTRS. FOR DISEASE CONTROL AND PREVENTION (2013), [http://www.cdc.gov/injury/wisqars/pdf/leading\\_causes\\_of\\_death\\_by\\_age\\_group\\_2013-a.pdf](http://www.cdc.gov/injury/wisqars/pdf/leading_causes_of_death_by_age_group_2013-a.pdf).

<sup>20</sup> See *id.*

<sup>21</sup> In 2013, 8% of students in high school attempted suicide, compared to 0.6% of adults over eighteen years old. See *Suicide Facts at a Glance*, CTRS. FOR DISEASE CONTROL AND PREVENTION (2015), <http://www.cdc.gov/violenceprevention/pdf/suicide-datasheet-a.pdf>.

<sup>22</sup> See, e.g., Mrs. Be, Comment to *'It's now or never': Texts Reveal Teen's Efforts to Pressure Boyfriend into Suicide*, WASH. POST (Sept. 12, 2015, 10:02 PM), <https://www.washingtonpost.com/news/morning-mix/wp/2015/08/31/its-now-or-never-texts-reveal-teens-efforts-to-pressure-boyfriend-into-suicide/#comments> ("This girl is a sociopath or mentally ill, anyway, she should not be out of prison for a long time!"); Rs1123, Comment to *'It's now or never': Texts Reveal Teen's Efforts to Pressure Boyfriend into Suicide*, WASH. POST. (Sept. 12, 2015, 10:24 PM), <https://www.washingtonpost.com/news/morning-mix/wp/2015/08/31/its-now-or-never-texts-reveal-teens-efforts-to-pressure-boyfriend-into-suicide/#comments> ("What a load of BS. She actively worked to push him to commit suicide, pestered him, told him how much better off he would be if he was dead, it was a power trip on her part[,] and she deserves to be prosecuted for it."); Rwsmls, Comment to *'It's now or never': Texts Reveal Teen's Efforts to Pressure Boyfriend into Suicide*, WASH. POST. (Sept. 11, 2015, 4:34 PM), <https://www.washingtonpost.com/news/morning-mix/wp/2015/08/31/its-now-or-never-texts-reveal-teens-efforts-to-pressure-boyfriend-into-suicide/#comments> ("She should spend some serious time in prison. She was as close to pulling the trigger as you get.").

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."<sup>23</sup> But are her actions so blameworthy that she should spend twenty years in state prison?<sup>24</sup> Not all actions that insult society's conception of moral conduct give rise to criminal liability.

Part II of this Comment will discuss the particular circumstances of Conrad Roy's suicide and the role Michelle Carter played in it. Part III of this Comment will analyze the history of how various states have treated actions comparable to 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.<sup>25</sup> Afterwards, they developed a romantic relationship. Although they both lived in Massachusetts, their relationship was mostly online.<sup>26</sup> According to his family, Conrad had been struggling with suicidal thoughts and depression for several years.<sup>27</sup> Conrad had attempted suicide in 2012 by ingesting acetaminophen and was treated with medication,

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<sup>23</sup> Henderdon & Ellement, *supra* note 7.

<sup>24</sup> In Massachusetts, manslaughter carries a maximum sentence of twenty years in state prison. MASS. GEN. LAWS ANN. ch. 265, § 13 (West 2015).

<sup>25</sup> See Henderdon & Ellement, *supra* note 7.

<sup>26</sup> 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.

<sup>27</sup> See CBS BOS., *supra* note 6.

counseling, and hospitalizations at psychiatric facilities.<sup>28</sup> Conrad's grandmother, however, claimed that Conrad seemed to be "pulling out of [the depression]."<sup>29</sup> Text messages between Michelle and Conrad show the couple discussed suicide often and in great detail over the course of their relationship.<sup>30</sup> 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.<sup>31</sup>

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.<sup>32</sup> 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."<sup>33</sup> Michelle even conducted research and recommended methods of suicide.<sup>34</sup> On one occasion, Michelle specifically suggested that Conrad kill himself by carbon monoxide poisoning, which would be "painless" and would definitely work.<sup>35</sup> 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 gonna 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."<sup>36</sup> Michelle complained to him that he always had an excuse for not committing suicide.<sup>37</sup>

On July 6, 2014, six days before Conrad committed suicide, Conrad and Michelle discussed the logistics of his suicide plan.<sup>38</sup> Michelle told him that with carbon monoxide poisoning he would "lose consciousness with no pain. [He would] just fall asleep and die."<sup>39</sup> On July 9, Conrad realized that his father's generator, which he was

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<sup>28</sup> 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>.

<sup>29</sup> CBS BOS., *supra* note 6.

<sup>30</sup> See Phillip, *supra* note 11.

<sup>31</sup> See Commonwealth's Response to Defendant's Motion to Dismiss, *supra* note 1, at 2.

<sup>32</sup> See *id.* at 3.

<sup>33</sup> *Id.*

<sup>34</sup> See Phillip, *supra* note 11.

<sup>35</sup> See Commonwealth's Response to Defendant's Motion to Dismiss, *supra* note 1, at 2, 3.

<sup>36</sup> *Id.* at 4.

<sup>37</sup> See *id.* at 4–5.

<sup>38</sup> See *id.* at 6.

<sup>39</sup> *Id.*

going to use to produce carbon monoxide, did not work.<sup>40</sup> In the days that followed, Michelle and Conrad worked on finding another method to produce carbon monoxide and on ensuring that Conrad's parents did not find out about the plan.<sup>41</sup>

On July 12, 2014, Michelle and Conrad began their conversation at 4:19 a.m., when Michelle suggested that "[i]t's probably the best time now because everyone is sleeping."<sup>42</sup> 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."<sup>43</sup> Conrad sent his last text message at 6:25 p.m. that evening, when he left his mother's house for the K-Mart in Fairhaven, Massachusetts.<sup>44</sup> Conrad's phone records show two forty-minute phone calls with Michelle that evening.<sup>45</sup> 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."<sup>46</sup> The next morning, police found Conrad's car in the parking lot, after his mother reported him missing.<sup>47</sup> 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 Conrad planned to commit suicide.<sup>48</sup> The police searched Michelle's phone and noticed she had deleted her conversation with Conrad after 7:00 p.m. on the evening he committed suicide.<sup>49</sup> When she heard that police were looking into Conrad's text messages as part of his suicide investigation, Michelle texted her friend 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.<sup>50</sup> In September, Michelle began telling Samantha that Conrad's death was

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<sup>40</sup> *See id.* at 8.

<sup>41</sup> *See* Commonwealth's Response to Defendant's Motion to Dismiss, *supra* note 1, at 9–10.

<sup>42</sup> *See id.* at 11.

<sup>43</sup> *See id.* at 12–16.

<sup>44</sup> *See id.* at 17.

<sup>45</sup> *See id.*

<sup>46</sup> *See* Commonwealth's Response to Defendant's Motion to Dismiss, *supra* note 1, at 17. The police found this information in Michelle's text messages to her friend Samantha Boardman on September 15, 2014. *See id.* 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 that way the way he was living anymore.").

<sup>47</sup> *See id.*

<sup>48</sup> *See id.* at 17–18.

<sup>49</sup> *See id.* at 18.

<sup>50</sup> *See id.* at 21.

her fault because she could have stopped him but that Samantha would not understand because she had “never helped someone with a suicide.”<sup>51</sup>

*B. District Attorney’s Case*

In February 2015, a grand jury indicted Michelle Carter, then eighteen years old, for involuntary manslaughter.<sup>52</sup> The manslaughter statute in Massachusetts does not contain a definition for “manslaughter”; instead, its meaning is derived from the common law definition.<sup>53</sup> 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.”<sup>54</sup> According to the State, Michelle’s actions were both objectively and subjectively reckless.<sup>55</sup> Michelle was objectively wanton or reckless because “a normal ordinary 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.”<sup>56</sup> Alternatively, the prosecution argued that her conduct was also subjectively wanton or reckless because, under Michelle’s own admission, she knew that Conrad was susceptible to suicidal thoughts, and she had advance knowledge of his plan to commit suicide.<sup>57</sup> The State alleged that Michelle caused

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<sup>51</sup> See *id.* at 21–22.

<sup>52</sup> 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/>.

<sup>53</sup> See *Commonwealth v. Catalina*, 556 N.E.2d 973, 976 (Mass. 1990); see also MASS. GEN. LAWS ANN. ch. 265, § 13 (West 2015).

<sup>54</sup> See *Commonwealth v. Life Care Ctrs. of Am., Inc.*, 926 N.E.2d 206, 211 (Mass. 2010) (quoting *Commonwealth v. Gonzales*, 443 Mass. 799, 808 (2005)). For purposes of manslaughter, “wanton” and “reckless” 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.”).

<sup>55</sup> 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 *infra* Part II.C.

<sup>56</sup> Commonwealth’s Response to Defendant’s Motion to Dismiss, *supra* note 1, at 27.

<sup>57</sup> See *id.* at 27.

Conrad's death by enabling him to produce carbon monoxide<sup>58</sup> and by telling him to "get back in [the car]" when he had second thoughts.<sup>59</sup>

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.<sup>60</sup> 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.<sup>61</sup> 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.<sup>62</sup> Because she created the life-threatening condition, Michelle had a duty to take reasonable steps to alleviate the risk of him carrying out the plan.<sup>63</sup> 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.<sup>64</sup>

### C. Defendant's Argument<sup>65</sup>

In response to these allegations, Michelle argued that there was not enough evidence to sustain a charge of involuntary manslaughter because she was not wanton or reckless. First, Michelle argued she did not commit an affirmative act that constitutes wanton or reckless conduct because there was no evidence that "a physical act of force, pressure, violence, or any direct touching by the defendant whatsoever led to this manner of death."<sup>66</sup> For this argument, Michelle cited Massachusetts case law, which requires that a "physical act" cause the victim's death in a manslaughter charge that is not based on an omission.<sup>67</sup> She did not provide the physical means for Conrad to

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<sup>58</sup> See *id.* at 32.

<sup>59</sup> See *id.* at 30.

<sup>60</sup> See *Commonwealth v. Welansky*, 55 N.E.2d 902, 910–11 (Mass. 1944).

<sup>61</sup> 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.'").

<sup>62</sup> See *Commonwealth's Response to Defendant's Motion to Dismiss*, *supra* note 1, at 30.

<sup>63</sup> See *id.* at 29.

<sup>64</sup> See *id.* at 29–30.

<sup>65</sup> 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 15–18, *Commonwealth v. Carter*, No. 15YO0001NE (Mass. Dist. Ct. Aug. 21, 2015) [hereinafter Defendant's Memorandum], available at <https://www.scribd.com/document/278233136/Defense-motion-to-dismiss>.

<sup>66</sup> Defendant's Memorandum, *supra* note 65, at 4.

<sup>67</sup> See *Commonwealth v. Welansky*, 55 N.E.2d 902, 909 (Mass. 1944) ("Usually



commit suicide, and she was not physically present at the time that he committed the act.<sup>68</sup>

Second, Michelle contended she could not be charged under the alternative theory of wanton or reckless conduct by omission. 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.<sup>69</sup> Michelle also argued that she did not “create” the risk of death for Conrad because he had contemplated suicide before meeting Michelle; therefore, Michelle did not cause his suicidal condition.<sup>70</sup> Lastly, Michelle argued that her actions were protected by the First Amendment and the Massachusetts Declaration of Rights’ protections on free speech.<sup>71</sup> Based on these arguments, Michelle filed a motion to dismiss the charges against her.<sup>72</sup> On September 23, 2015, Bristol County Judge Bettina Borders rejected the motion to dismiss and ruled that the case would proceed.<sup>73</sup>

### III. PUNISHING SUICIDE AND RELATED OFFENSES

Courts have varied in their treatment of encouraging suicide over time, with recent cases tending to apply more lenient punishment. This section will examine the history of punishment for assisting suicide by discussing: (1) the common law in England and the early history of the United States; (2) cases that have punished suicide assistance or encouragement as murder; and (3) more recent cases tending to punish suicide assistance or encouragement as manslaughter.

#### A. Common Law

Common law treated suicide as murder and a felony.<sup>74</sup> Under the common law of England, it was a “crime against the laws of God and

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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) (requiring an intentional act); Commonwealth v. Pugh, 969 N.E.2d 672, 687 (Mass. 2012) (requiring a physical act).

<sup>68</sup> See Defendant’s Memorandum, *supra* note 65, at 14.

<sup>69</sup> *See id.* at 5.

<sup>70</sup> *See id.* at 9–10.

<sup>71</sup> *See id.* at 17–18 (citing State v. Melchert-Dinkel, 844 N.W.2d 13, 16 (Minn. 2014)).

<sup>72</sup> *See* Henderdon & Ellement, *supra* note 7.

<sup>73</sup> *See id.*

<sup>74</sup> *See* State v. Sage, 510 N.E.2d 343, 346 (Ohio 1987).

man.”<sup>75</sup> 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.<sup>76</sup> 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*.”<sup>77</sup> 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.<sup>78</sup> Nevertheless, suicide was still considered *malum in se* and a felony under Massachusetts common law.<sup>79</sup> An act is *malum in se* if it is “inherently immoral, such as murder, arson, or rape.”<sup>80</sup> 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.<sup>81</sup> Massachusetts was the only state to adopt the English practice of “ignominious burial.”<sup>82</sup> 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.”<sup>83</sup> This law remained in place even after the establishment of the Commonwealth of Massachusetts.<sup>84</sup>

Massachusetts was not the only state to reject the harsh

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<sup>75</sup> See *Commonwealth v. Mink*, 123 Mass. 422, 425 (1877).

<sup>76</sup> 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.”).

<sup>77</sup> *Id.* at 425. England abolished the practice of forfeiture in 1870 and finally abolished suicide as a crime in 1961. See David S. Markson, Note, *Punishment of Suicide - A Need for Change*, 14 VILL. L. REV. 463, 465 (1969).

<sup>78</sup> See *Mink*, 123 Mass. at 426.

<sup>79</sup> See *id.*

<sup>80</sup> 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, 646 (1999) (“[M]alum in se, . . . means wrong in and of itself.”).

<sup>81</sup> See *Mink*, 123 Mass. at 426.

<sup>82</sup> See Catherine D. Shaffer, Note, *Criminal Liability for Assisting Suicide*, 86 COLUM. L. REV. 348, 349 (1986) (citing G. WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 262, 260–61 (1957)).

<sup>83</sup> *Mink*, 123 Mass. at 426.

<sup>84</sup> See *id.*

punishment of suicide at English common law. For example, Michigan omitted suicide from its criminal law altogether.<sup>85</sup> Some states included provisions in their constitutions prohibiting forfeiture of property as punishment in general.<sup>86</sup> West Virginia went a step further in 1923 and enacted a statute that specifically prohibited forfeiture of a person's estate as punishment for suicide.<sup>87</sup> 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 the common law and shifted toward statutory crimes.<sup>88</sup> Other states retained the common law crime of suicide in order to allow them to punish suicide attempts.<sup>89</sup>

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.<sup>90</sup> The aider and abettor was treated as “a principal in the second degree to the self-murder of the other.”<sup>91</sup> Other sources suggest the common law punished assisting suicide under a theory of accomplice liability.<sup>92</sup> As a result, the accomplice was treated differently depending on whether he or she was present at the time of the suicide. If the accomplice was present at the time of the act, he or she was considered a principal and could be convicted of the crime of suicide.<sup>93</sup> If the accomplice encouraged suicide, but was not present at the time of the act, he or she was considered an accessory, but would avoid punishment because an accessory could not be convicted without the conviction of the principal.<sup>94</sup> 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.<sup>95</sup>

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<sup>85</sup> See Donald Wright, Note, *Criminal Aspects of Suicide in the United States*, 7 N.C. CENT. L.J. 156, 157 (1975).

<sup>86</sup> See *id.* (citing N.C. CONST. art. 1, § 1).

<sup>87</sup> See W. VA. CODE § 61-11-4 (2015) (“No suicide or attainder of felony shall work corruption of blood or forfeiture of estate.”).

<sup>88</sup> See Wright, *supra* note 85, at 157.

<sup>89</sup> See *id.*

<sup>90</sup> 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).

<sup>91</sup> *Id.*

<sup>92</sup> See Wright, *supra* note 85, at 161.

<sup>93</sup> See *id.*

<sup>94</sup> See Markson, *supra* note 77, at 473.

<sup>95</sup> 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).

### 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 defendant-Bowen for murder after he encouraged a fellow inmate to commit suicide.<sup>96</sup> Bowen's cell was adjacent to another prisoner's, which allowed the men to converse freely with one another.<sup>97</sup> 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.<sup>98</sup> The night before the other prisoner was scheduled for execution, he took Bowen's advice and hung himself in his cell.<sup>99</sup> 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."<sup>100</sup>

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.<sup>101</sup> Defendant-Mink threatened to kill herself when her fiancé threatened to leave her.<sup>102</sup> He tried to prevent her from committing suicide, and in the ensuing struggle, she shot and killed him.<sup>103</sup> 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."<sup>104</sup>

This approach to suicide is not unique to Massachusetts. In its 1872 decision, *Blackburn v. State*,<sup>105</sup> an Ohio court heard a case where the defendant administered poison to a woman, who eventually died

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<sup>96</sup> *Commonwealth v. Bowen*, 13 Mass. 356, 359-60 (1816). The facts of this case are largely laid out in a later Massachusetts case, *Commonwealth v. Mink*, 123 Mass. 422, 427 (1877).

<sup>97</sup> *Bowen*, 13 Mass. at 356.

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

<sup>99</sup> *Id.*

<sup>100</sup> *Commonwealth v. Mink*, 123 Mass. 422, 427 (1877).

<sup>101</sup> *See id.* at 422.

<sup>102</sup> *See id.* at 422-23.

<sup>103</sup> *See id.* at 423.

<sup>104</sup> *Id.* at 428.

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

as a result.<sup>106</sup> Evidence showed that the defendant and the decedent had agreed to commit suicide together.<sup>107</sup> 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.”<sup>108</sup> 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.”<sup>109</sup> The court found it immaterial whether the victim took the poison by choice or if she succumbed to pressure from the defendant.<sup>110</sup> 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.<sup>111</sup> 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.<sup>112</sup>

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*.<sup>113</sup> Campbell was drinking with another man who became depressed and suicidal during the course of their drinking together.<sup>114</sup> Campbell encouraged the man to buy a gun, and when he refused, Campbell went to his house to get his own gun.<sup>115</sup> Campbell left his gun with the other man, who used it to kill himself.<sup>116</sup> Michigan’s murder statute did not include a definition for homicide, so the court derived its definition from the common law, which defined homicide as the killing of one human being by another.<sup>117</sup> Since the man killed himself, there was no homicide to which

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<sup>106</sup> See *id.* at 147.

<sup>107</sup> See *id.* at 148–49.

<sup>108</sup> See *id.* at 148.

<sup>109</sup> *Id.* at 153.

<sup>110</sup> See *id.* at 162–63.

<sup>111</sup> *Blackburn*, 23 Ohio St. at 163–64.

<sup>112</sup> See *People v. Roberts*, 178 N.W. 690, 693 (Mich. 1920), *overruled by* *People v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994).

<sup>113</sup> See *People v. Campbell*, 335 N.W.2d 27, 29–30 (Mich. Ct. App. 1983).

<sup>114</sup> See *id.* at 28.

<sup>115</sup> See *id.*

<sup>116</sup> See *id.* at 29.

<sup>117</sup> See *id.*

Campbell could have been a party.<sup>118</sup> Furthermore, in order to find the defendant guilty, the court required that the defendant want to kill the man himself, not only that he want the man to die.<sup>119</sup> 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.”<sup>120</sup>

### 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.”<sup>121</sup> Instead, manslaughter derives its elements from its common law definition.<sup>122</sup> 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.”<sup>123</sup> Wanton or reckless conduct is defined as “intentional 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.”<sup>124</sup> 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.<sup>125</sup>

<sup>118</sup> See *id.* at 30.

<sup>119</sup> See *Campbell*, 335 N.W.2d at 30.

<sup>120</sup> See *id.*

<sup>121</sup> “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).

<sup>122</sup> See *Commonwealth v. Catalina*, 556 N.E.2d 973, 976 (Mass. 1990).

<sup>123</sup> 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.

<sup>124</sup> See *Commonwealth v. Welansky*, 55 N.E.2d 902, 910 (Mass. 1994).

<sup>125</sup> See *Commonwealth v. Life Care Ctrs. of Am., Inc.*, 926 N.E.2d 206, 211–12 (Mass. 2010).

Conduct satisfies the wanton or reckless requirement if it is either objectively or subjectively wanton or reckless.<sup>126</sup> Conduct is objectively wanton or reckless “if an ordinary normal [person] under the same circumstances would have realized the gravity of the danger.”<sup>127</sup> For conduct to be subjectively wanton or reckless, 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.”<sup>128</sup> 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.”<sup>129</sup>

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.<sup>130</sup> 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 instruction for manslaughter.<sup>131</sup> More recently, in *Commonwealth v. Power-Koch*, the Massachusetts Court of Appeals charged the defendant with involuntary manslaughter for shooting his friend in the chest.<sup>132</sup> 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.<sup>133</sup>

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. In *Persampieri v. Commonwealth*, defendant-Persampieri

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<sup>126</sup> 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.”).

<sup>127</sup> See *id.* (citing *Welansky*, 55 N.E.2d at 902).

<sup>128</sup> See *id.*

<sup>129</sup> See *Commonwealth v. Rhoades*, 401 N.E.2d 342, 351 (Mass. 1980) (citing California Jury Instructions, Criminal § 8.55 (4<sup>th</sup> rev. ed. 1979)); see also discussion *infra* Part IV.

<sup>130</sup> See *Commonwealth v. McCauley*, 246 N.E.2d 425, 426 (Mass. 1969).

<sup>131</sup> *Id.* at 429.

<sup>132</sup> See *Commonwealth v. Power-Koch*, 871 N.E.2d 1085, 1087 (Mass. App. Ct. 2007).

<sup>133</sup> See *id.* at 1089.

was charged with involuntary manslaughter after his wife committed suicide.<sup>134</sup> 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.<sup>135</sup> He also taunted her for being “too chicken” to kill herself, as she had attempted suicide twice before, but failed both times.<sup>136</sup> 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.<sup>137</sup>

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*.<sup>138</sup> In this 1980 case, the court 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.”<sup>139</sup> 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.<sup>140</sup> 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.<sup>141</sup>

#### 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

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

<sup>135</sup> See *id.*

<sup>136</sup> See *id.*

<sup>137</sup> See *id.* at 390.

<sup>138</sup> *State v. Marti*, 290 N.W.2d 570 (Iowa 1980).

<sup>139</sup> *Id.* at 581.

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

<sup>141</sup> See *id.*



“causation” element of the offense.<sup>142</sup> 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.<sup>143</sup> 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.<sup>144</sup> Second, the defendant’s act is the proximate cause of the suicide if it produced the death in a natural and continuous sequence of events.<sup>145</sup> 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*,<sup>146</sup> the defendant claimed that the man he 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.<sup>147</sup> 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.<sup>148</sup> Similarly, in 1981, 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.<sup>149</sup>

These cases fall easily into the category of murder or voluntary

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<sup>142</sup> 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).

<sup>143</sup> See DRESSLER, *supra* note 142, at 184.

<sup>144</sup> 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.

<sup>145</sup> 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).

<sup>146</sup> *People v. Matlock*, 336 P.2d 505 (Cal. 1959).

<sup>147</sup> See *id.* at 509.

<sup>148</sup> 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).

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

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. 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.<sup>150</sup> 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.<sup>151</sup> Cases that fall in this category include providing a suicidal individual with a gun;<sup>152</sup> loading the gun for a suicidal individual;<sup>153</sup> and providing poison to someone who is suicidal.<sup>154</sup> Cases like these have received more varied treatment from courts, ranging from murder convictions<sup>155</sup> to findings of no liability at all.<sup>156</sup>

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.<sup>157</sup> However, the defendant

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<sup>150</sup> See *Commonwealth v. Mink*, 123 Mass. 422, 427 (1877).

<sup>151</sup> 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.”).

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

<sup>153</sup> 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).

<sup>154</sup> See *People v. Roberts*, 178 N.W. 690, 693 (Mich. 1920), *overruled by* *People v. Kevorkian*, 527 N.W.2d 714, 716 (Mich. 1994).

<sup>155</sup> 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).

<sup>156</sup> See *Campbell*, 335 N.W.2d at 29.

<sup>157</sup> 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

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.<sup>158</sup> 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,<sup>159</sup> 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.<sup>160</sup> Thus, 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.<sup>161</sup> Melchert-Dinkel posed as a suicidal nurse on message boards that provided emotional support for people who were also suicidal.<sup>162</sup> Two of the people with whom Melchert-Dinkel had contact eventually committed suicide.<sup>163</sup> The individuals who committed suicide lived in England and Canada, while Melchert-Dinkel was in Minnesota.<sup>164</sup> Similarly, Michelle was thirty miles away when Conrad committed suicide.<sup>165</sup> She did not physically

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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].”).

<sup>158</sup> 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).

<sup>159</sup> See HART & HONORÉ, *supra* note 144, at 326.

<sup>160</sup> 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.

<sup>161</sup> See *State v. Melchert-Dinkel*, 844 N.W.2d 13 (Minn. 2014).

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

<sup>163</sup> 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.

<sup>164</sup> See *Melchert-Dinkel*, 844 N.W.2d at 16.

<sup>165</sup> See Slifer, *supra* note 5.

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.<sup>166</sup>

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.<sup>167</sup> 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.<sup>168</sup> 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 encouragement<sup>169</sup> 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 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

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<sup>166</sup> See Defendant's Memorandum, *supra* note 65, at 12.

<sup>167</sup> 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?").

<sup>168</sup> See, e.g., *People v. Roberts*, 178 N.W. 690, 691–92 (Mich. 1920) (defendant provided his wife with poison to relieve her of the pain caused by multiple sclerosis), *overruled by* *People v. Kevorkian*, 527 N.W.2d 714, 716 (Mich. 1994). This Comment will not discuss the specific circumstance of physician-assisted suicide, as that specific circumstance raises very different issues and requires different safeguards and treatment in law.

<sup>169</sup> 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).

legislature.<sup>170</sup> The Model Penal Code treats “causing” a suicide as criminal homicide “only if [the defendant] purposely causes such suicide by force, duress or deception.”<sup>171</sup> A separate provision makes it a crime to “aid or solicit” suicide.<sup>172</sup> 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.<sup>173</sup> 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.<sup>174</sup> 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.<sup>175</sup> Some states have enacted specific statutes that criminalize assisting or aiding suicide, but punish the offense at or about the same level as manslaughter.<sup>176</sup> 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

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<sup>170</sup> See *People v. Campbell*, 335 N.W.2d 27, 31 (Mich. Ct. 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).

<sup>171</sup> See MODEL PENAL CODE § 210.5(1) (1985).

<sup>172</sup> See *id.* at § 210.5(2).

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

<sup>174</sup> 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.”).

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

<sup>176</sup> 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).

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.<sup>177</sup> A suicide participant is a person, other than the victim, who “actively, affirmatively participates in the act of suicide.”<sup>178</sup> 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.<sup>179</sup> 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 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.<sup>180</sup> An adequate criminal punishment should achieve one or more of these goals.<sup>181</sup> This section will compare how well manslaughter and the proposed

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<sup>177</sup> See Shaffer, *supra* note 82, at 372.

<sup>178</sup> *Id.*

<sup>179</sup> See, e.g., GA. CODE ANN. § 16-5-5 (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).

<sup>180</sup> 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 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW*, § 1.5 (2d ed. 2015).

<sup>181</sup> 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).

specific statute achieves each of these goals.

### 1. 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, rather than others, from committing further crimes, by giving her an unpleasant experience she will not want to endure again.<sup>182</sup> 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.<sup>183</sup> There is also evidence that Michelle regretted not doing more to prevent Conrad from killing himself.<sup>184</sup> A statutory prohibition punishes Michelle, while allowing leniency to be tailored to the crime she committed. Restraint<sup>185</sup> and rehabilitation,<sup>186</sup> which are discussed further below, are often considered types of specific deterrence.<sup>187</sup>

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 the general deterrence 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.<sup>188</sup> 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.<sup>189</sup>

There is evidence that general deterrence is mildly effective for

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<sup>182</sup> See LAFAVE, *supra* note 180.

<sup>183</sup> See Phillip, *supra* note 11.

<sup>184</sup> See Defendant's Memorandum, *supra* note 65, at 20.

<sup>185</sup> See *infra* Part V.B.ii.

<sup>186</sup> See *infra* Part V.B.iii.

<sup>187</sup> See, e.g., Barnes, *supra* note 80, at 633.

<sup>188</sup> See *id.* at 631.

<sup>189</sup> See Wright, *supra* note 85, at 162.

*malum prohibitum*<sup>190</sup> offenses, but not for other kinds of crime.<sup>191</sup> Three requirements must be met in order for this kind of deterrence to be effective.<sup>192</sup> First, the potential offender must know of the law prohibiting the conduct.<sup>193</sup> 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.<sup>194</sup> Lastly, the potential offender must be able and willing to allow this knowledge to influence his or her actions.<sup>195</sup> Under this analysis, it 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.<sup>196</sup>

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

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<sup>190</sup> 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 80, at 646.

<sup>191</sup> See J. ANDENAES, PUNISHMENT AND DETERRENCE, at 45–46 (1974).

<sup>192</sup> 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).

<sup>193</sup> See *id.* at 954.

<sup>194</sup> See *id.*

<sup>195</sup> See *id.* at 954–56.

<sup>196</sup> 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.”).



would not be associated with his death.<sup>197</sup> Furthermore, prosecution for encouraging suicide is sporadic and often leads to wildly inconsistent outcomes.<sup>198</sup> 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.<sup>199</sup> 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.<sup>200</sup> 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.<sup>201</sup> 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.<sup>202</sup> Critics of the theory of both general and specific deterrence argue that the idea of a criminal rational actor is an oxymoron.<sup>203</sup> This is especially true in situations rife with emotion like those involving suicide.<sup>204</sup> Michelle probably did not

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<sup>197</sup> See Phillip, *supra* note 11.

<sup>198</sup> See Shaffer, *supra* note 82, 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).

<sup>199</sup> 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.

<sup>200</sup> See Robinson & Darley, *supra* note 192, at 954.

<sup>201</sup> Conrad committed suicide in July 2014, and the Judge decided the Defendant's motion to dismiss in September 2015. See Miller, *supra* note 52.

<sup>202</sup> See Robinson & Darley, *supra* note 192, at 954–56.

<sup>203</sup> See Barnes, *supra* note 80, 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.”).

<sup>204</sup> See generally Herbert Hendin, *Suicide and the Request for Assisted Suicide Meaning and Motivation*, 35 DUQ. L. REV. 285, 287–99 (1996) (identifying depression, ambivalence, and psychodynamics as factors that influence an individual's decision to commit suicide or request physician assisted suicide).

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.<sup>205</sup>

## 2. Restraint

Restraint, also called incapacitation, is a theory of punishment focused on removing the criminal from society.<sup>206</sup> According to this theory, if a defendant is imprisoned or restrained in some way, then he or she cannot commit more crimes and cannot possibly do more harm to society.<sup>207</sup> The only way to incapacitate an offender completely is to put them to death, since that will permanently remove them from society.<sup>208</sup> 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.<sup>209</sup> 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.<sup>210</sup> In the case of punishing suicide encouragement, prosecution for manslaughter would carry a longer prison term than would a specific statute, which would impose a lighter sentence. Therefore, if removing Michelle

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<sup>205</sup> 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 23. This is the first indication that Michelle was aware that her actions were wrong. She later sent text messages to her friend Samantha expressing her fear that she might be prosecuted. *See id.* at 29.

<sup>206</sup> *See* Jackson, *supra* note 180, at 637.

<sup>207</sup> *See* Dugger, *supra* note 180, at 401.

<sup>208</sup> *See id.* at 402.

<sup>209</sup> *Id.* (“[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 80, at 632 (“Is a murderer really incapacitated if he murders other prisoners while behind bars?”).

<sup>210</sup> 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. PROB. SERV. 1, <http://www.mass.gov/courts/docs/probation/elmofactsheet.pdf> (last visited Apr. 9, 2016).

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.<sup>211</sup> 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.”<sup>212</sup> Even trained therapists 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.<sup>213</sup> 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.<sup>214</sup> 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 further hurting society. Because incapacitation for any length of time does not protect society, the offender should only be restrained long enough 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.

### 3. 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.<sup>215</sup> Unlike the other goals

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<sup>211</sup> See Shaffer, *supra* note 82, 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).

<sup>212</sup> Shaffer, *supra* note 82, at 355 (internal citations omitted).

<sup>213</sup> See *id.* at 355–56.

<sup>214</sup> See *id.* at 355.

<sup>215</sup> 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 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.<sup>216</sup> 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.<sup>217</sup> 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.<sup>218</sup>

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.<sup>219</sup> However, a longer prison 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.<sup>220</sup> Incarceration itself has been found to have negative psychological effects on prison inmates.<sup>221</sup> A long prison term

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of various components).

<sup>216</sup> 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.

<sup>217</sup> See Barnes, *supra* note 80, at 634.

<sup>218</sup> 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.”).

<sup>219</sup> Some scholars have criticized this assumption, arguing that it fails to take account of recidivism rates among offenders. See Barnes, *supra* note 80, 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, because prosecution for encouraging or assisting suicide is sporadic and inconsistent, there is no data regarding rates of recidivism.

<sup>220</sup> 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”).

<sup>221</sup> See *id.* at 192 (“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

may 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.<sup>222</sup> 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.

#### 4. Retribution

Lastly, the theory of retribution argues that offenders should be punished because "crime inherently merits punishment."<sup>223</sup> 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.<sup>224</sup> Thus, 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.<sup>225</sup> Though sometimes considered the original purpose of punishment,<sup>226</sup> recent scholarship has recast retributivism as a method of limiting punishment, giving offenders only as much punishment as they deserve.<sup>227</sup> This gives rise to the difficulty with assigning desert: how

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to help produce positive change in the name of rehabilitation.") (discussing ELLIOT STUDD ET AL., C-UNIT: SEARCH FOR COMMUNITY IN PRISON 3 (1968)).

<sup>222</sup> 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).

<sup>223</sup> 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).

<sup>224</sup> See Cotton, *supra* note 223, at 1315–16.

<sup>225</sup> See *id.* at 1316.

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

<sup>227</sup> 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 Ryan, *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

does retributivist theory decide who deserves to be punished and how much punishment the offender deserves?<sup>228</sup> Under one theory, protective retributivism, punishment would look to the harms society suffered as a result of the offender's action.<sup>229</sup> 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.<sup>230</sup>

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."<sup>231</sup> In Michelle's case, many people might find what Michelle did morally repugnant—something even her lawyer, Joseph Cataldo, acknowledges.<sup>232</sup> Some have called her actions "horrendous," and others have commented that "there should be some way that society punishes this behavior."<sup>233</sup> 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.<sup>234</sup> 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 shooting<sup>235</sup> or providing a gun to someone intent on committing suicide.<sup>236</sup> Choosing between manslaughter and a specific

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the particular punishment within that range.").

<sup>228</sup> See Ryan, *Proximate Retribution*, *supra* note 226, at 1064–69.

<sup>229</sup> See *id.* at 1066–67.

<sup>230</sup> See *id.* at 1068–69.

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

<sup>232</sup> 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](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 charge. Her messages may be disturbing, but they are not criminal, he says. 'If you find it repugnant that's fine,' says Cataldo.").

<sup>233</sup> See Slifer, *supra* note 5.

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

<sup>235</sup> 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. Ct. App. 2007).

<sup>236</sup> *Persampieri v. Commonwealth*, 175 N.E.2d 387, 390 (Mass. 1961).

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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.<sup>237</sup>

#### 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.<sup>238</sup> 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 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.

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<sup>237</sup> See *supra* note 211 and accompanying text.

<sup>238</sup> See Zalkind, *supra* note 232.