NOTE

MICHELLE CARTER AND THE CURIOUS CASE OF CAUSATION: HOW TO RESPOND TO A NEWLY EMERGING CLASS OF SUICIDE-RELATED PROCEEDINGS

Nicholas LaPalme[*]

∗ J.D. Candidate, Boston University School of Law, 2019; B.A. in Political Science, George Washington University, 2015. I would like to offer my sincerest thanks to Professor Gerry Leonard for his invaluable advice and guidance during the drafting of this Note and the editors and staff of the Boston University Law Review for their diligent editorial work and willingness to provide feedback throughout the process.

INTRODUCTION

In the summer of 2017, Michelle Carter was found guilty of involuntary manslaughter in the Bristol County Juvenile Court in Massachusetts after she encouraged her boyfriend, Conrad Roy, to commit suicide.[1] Roy had pumped carbon monoxide into his vehicle, and during a moment of hesitation in which he exited the car, Carter virtually stepped in to seal his fate.[2] She instructed him to "get back in," the three words that allegedly encouraged his demise and created the perplexing issue analyzed in this Note.[3]

The case received immediate media recognition, largely because all communication between the Carter and Roy was via text messages and phone calls, meaning a potential conviction would be rooted in Carter's virtual actions alone. In the absence of an applicable cyberbullying or encouraging suicide statute in Massachusetts, the case was tried under a theory of common law involuntary manslaughter.[4] While Carter was convicted, the interesting question of whether her conduct satisfied the causation element of manslaughter was barely addressed. Surprisingly, between the opinion issued by the Supreme Judicial Court of Massachusetts (the "SJC") on the indictment and the ultimate verdict delivered in Bristol County Juvenile Court, just a few sentences were dedicated to the causation issue.[5] How is it that such a monumental and publicized case all but ignored an essential element of the crime?

Joseph Cataldo, one of Carter's attorneys, has argued from the beginning that Conrad Roy "took his own life. He took all the actions necessary to cause his own death."[6] "The key issue is going to be causation, of who actually caused the death," speculated Laurie Levenson, a criminal law professor at Loyola Law School.[7] While the causation question immediately became a key issue of scholarly debate among law professors and practitioners, the issue did not make its expected appearance in either court's opinion. The American Civil Liberties

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[1] Commonwealth v. Carter, No. 15YO0001NE (Mass. Juv. Ct. June 16, 2017).

[2] Commonwealth v. Carter, 52 N.E.3d 1054, 1057 (Mass. 2016).

[3] *Id.* at 1059.

[4] *Id.* at 1056.

[5] *See id.* at 1063-64 ("[T]he coercive quality of the defendant's verbal conduct overwhelmed whatever will-power the eighteen year old victim had to cope with his depression . . . ."); Melissa Hanson, *Why Michelle Carter was Found Guilty of Involuntary Manslaughter in Conrad Roy's Suicide*, MASSLIVE (June 16, 2017, 3:31 PM), http://www.masslive.com/news/index.ssf/2017/06/why_michelle_carter_was_found.html [https://perma.cc/2W9Q-ZUGN] (detailing brevity of trial court's attention to causation).

[6] Issie Lapowski, *The Texting Suicide Case Is About Crime, Not Tech*, WIRED (June 16, 2017, 4:29 PM), https://www.wired.com/story/texting-suicide-crime/.

[7] Jess Bidgood, *Text to Teenager Before His Suicide: 'You've Gotta Do It'*, N.Y. TIMES (June 6, 2017), at A12.

Union argued that "[t]o take the view that the murder weapon here . . . was Michelle Carter's words—that is a quite aggressive view of causation."[8]

Some law professors noted a parallel to the case of Dr. Jack Kevorkian, who was tried for murder after allowing patients to use his "suicide machine" to end their own lives.[9] Kevorkian was acquitted, however, because even though he "may well have wanted it, and believed [suicide] was the best thing for them . . . ultimately, they made the final choice. That act broke the causal chain."[10] Other commentators noted that "[h]istorically, suicide has been considered a superseding act which breaks the chain of legal causation."[11]

After the verdict, Daniel Medwed, professor of law and criminal justice at Northeastern University, noted, "I thought it was a square peg in a round hole, it wasn't a great fit for manslaughter . . . . Her behavior was so morally reprehensible, but I wasn't sure how, as a matter of law, it constituted . . . manslaughter."[12] This intuitive statement goes to the heart of the larger issue. In the absence of statutory direction, societal pressure and moral intuition may have led to a conviction for Michelle Carter that was rooted in disgust for her reprehensible behavior rather than a foundation in applicable law.

The behavior exhibited by Michelle Carter and the unfortunate result for Conrad Roy is not unique to this case. For the first time in history, a majority of our nation's youth has access to cell phones, tablets, laptops, and other devices that can be used to communicate at any time.[13] This creates a social state where victims are unable to retreat further than a few clicks away from their tormentors. Studies are still evaluating the effects of cyberbullying across race, gender, socioeconomic status, and other metrics.[14] However, a universal truth has already emerged—cyberbullying has profound effects on those with previously existing mental health issues, including an increased risk of suicide.[15]

This Note predicts that, unfortunately, the Michelle Carter case will not be the last of its kind. If justice requires a conviction for the Michelle Carters of the

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[8] *Michelle Carter: What the Texting Suicide Case Tells Us*, BBC NEWS (June 17, 2017), http://www.bbc.com/news/world-us-canada-40307210 [https://perma.cc/LE3K-L8KM] ("It's problematic to see prosecutors stretch the criminal law that much.").

[9] Lapowski, *supra* note 6.

[10] *Id.*

[11] Natisha Lance & Ray Sanchez, *Judge Finds Michelle Carter Guilty of Manslaughter in Texting Suicide Case*, CNN (June 17, 2017, 5:22 AM), http://www.cnn.com/2017/06/16/us/michelle-carter-texting-case/index.html [https://perma.cc/5BCA-JAM5].

[12] *Id.*

[13] *See* Michele L. Ybarra, *Linkages Between Depressive Symptomatology and Internet Harassment Among Young Regular Internet Users*, 7 CYBERPSYCHOLOGY & BEHAV. 247, 248 (2004).

[14] *See* Sameer Hinduja & Justin W. Patchin, *Bullying, Cyberbullying, and Suicide*, 14 ARCHIVES OF SUICIDE RES. 206, 209-10 (2010).

[15] *See* Iris Wagman Borowsky, Lindsay A. Taliaferro & Barbara J. McMorris, *Suicidal Thinking and Behavior Among Youth Involved in Verbal and Social Bullying: Risk and Protective Factors*, 53 J. ADOLESCENT HEALTH S4, S9 (2013).

world, then a more predictable standard must be instituted moving forward. In the absence of a sound statutory solution, an obvious alternative, as exhibited by *Commonwealth v. Carter*,[16] is to prosecute those who maliciously encourage the suicide of another under a theory of manslaughter. But regardless of the doctrinal approach taken, the *Carter* decision exists as bad precedent that promotes convictions based on the subjective heinousness of the act as opposed to established legal standards. To fix this problem, it will be crucial to recognize "encouraging suicide" cases as a distinct area of doctrine, and then to adopt a more formalized causation analysis within that framework. Accordingly, Part I of this Note will discuss the causation element in manslaughter proceedings generally and the unique difficulties it raises in suicide-related cases. Part II will analyze the Carter case specifically and evaluate the dangers it poses. Part III will delve into solutions and argue in favor of a new standard—"overwhelming the will"—that should apply to encouraging suicide cases.

I. MANSLAUGHTER AND THE COMPLEXITIES POSED BY THE CAUSATION ELEMENT IN SUICIDE-RELATED CASES

In Massachusetts, where Michelle Carter was tried, the elements of common law involuntary manslaughter are as follows: (1) the defendant's conduct must have been intentional, (2) it must have been wanton or reckless, and (3) it must have caused the victim's death.[17] While many cases conduct the above analysis in a formulaic manner, there is also an occasional tendency to collapse the analysis and focus almost entirely on how wanton or reckless the conduct was, without addressing in depth, or sometimes at all, the causation prong.[18] Even the involuntary manslaughter section of the Massachusetts Practice Series in Criminal Law, which includes a detailed section on the wanton or reckless prong, does not include a corresponding section for causation.[19]

The reality may simply be that in many cases, such as those in which a firearm is discharged into a crowd, the causation element is obviously met. This renders a detailed analysis of the element unnecessary. But establishing causation in encouraging suicide cases, such as Michelle Carter's case, involves a higher degree of complexity that cannot be overlooked. Part I will discuss causation

[16] No. 15YO0001NE (Mass. Juv. Ct. June 16, 2017).

[17] *E.g.*, Commonwealth v. Life Care Ctrs. of Am., 926 N.E.2d 206, 211 (Mass. 2010).

[18] *See* Persampieri v. Commonwealth, 175 N.E.2d 387, 390 (Mass. 1961) (failing to conduct any analysis of causation element in its holding that defendant husband exhibited wanton and reckless behavior by loading gun, presenting it to his wife, and calling her "chicken" when she threatened to commit suicide); Commonwealth v. Welansky, 55 N.E.2d 902, 912 (Mass. 1944) (finding in landmark manslaughter case that "[i]t was enough to prove that death resulted from his wanton or reckless disregard of the safety of patrons in the event of fire from any cause," without otherwise mentioning causation).

[19] *See* JOSEPH R. NOLAN & LAURIE J. SARTORIO, 32 MASS. PRAC., CRIM. LAW § 201 (3d ed. 2017).

principles in criminal law and the unique complications that arise in suicide-related proceedings.

A. *Causation Generally in Criminal Law*

The causation element in criminal law is composed of two requirements: actual causation ("cause-in-fact") and legal causation ("proximate cause").[20] Cause-in-fact is typically satisfied through the "but-for" test, a showing that "'but for' the antecedent conduct the result would not have occurred."[21] To satisfy proximate cause, "the forbidden result which actually occurs must be enough similar to, and occur in a manner enough similar to, the result or manner which the defendant intended . . . ."[22] Proximate cause exists as a limiting principle to liability, recognizing that "the legal eye cannot, and should not see [too] far."[23] There are no issues with proximate cause when the defendant is the "direct cause" of the resulting harm.[24] In other words, when "no other causal factor has intervened, there is no more proximate party to whom to shift legal responsibility for the result."[25]

It is possible, however, that the chain of causation may be broken by an "intervening cause."[26] An intervening cause is an act of another party that "comes between an antecedent and a consequence."[27] Sufficiently abnormal intervening acts can relieve the defendant of liability altogether, a phenomenon often referred to as a "superseding cause."[28] When such an intervening act occurs, a foreseeability standard usually governs the proximate cause analysis.[29] Consider the following example. During an argument, A recklessly aims his shotgun at B with his finger on the trigger. C interferes to remove the gun, which causes it to go off and kill B. In this case, A is guilty of manslaughter.[30] C is a "responsive" (or "dependent") intervening cause who acted only "in reaction or response to the defendant's prior wrongful conduct."[31] Because C's natural reaction was reasonably foreseeable, it is not sufficient to break the chain of

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[20] *See* 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4(b), (c), at 632, 638 (3d ed. 2018).

[21] *Id.* § 6.4(b), at 632.

[22] *Id.* § 6.4(a), at 630.

[23] ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 774 (3d ed. 1982).

[24] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 14.03, at 190 (7th ed. 2015). A direct cause means that "no event of causal significance intervened between [the defendant's] conduct and the social harm for which [the defendant] is being prosecuted." *Id.*

[25] *Id.*

[26] *E.g.*, 1 LAFAVE, *supra* note 20, § 6.4(f), at 655.

[27] PERKINS & BOYCE, *supra* note 23, at 790.

[28] DRESSLER, *supra* note 24, § 14.03, at 190-91.

[29] *See* 1 LAFAVE, *supra* note 20, § 6.4(g), at 665.

[30] *Id.* § 6.4(g), at 665-66.

[31] *See* DRESSLER, *supra* note 24, § 14.03, at 192.

causation.[32] It is often said that a dependent intervening cause can only relieve the defendant of liability if it is unforeseeable *and* abnormal or extraordinary.[33] Some scholars note that "if a human being responds to such a situation in a manner that is clearly abnormal this is treated by law as the equivalent of an independent intervening force and may be, in fact usually is, superseding."[34]

An intervening act can also occur on the part of the victim.[35] Consider the following hypothetical. A repeatedly shoots a gun at victim B with intent to kill. In his effort to escape A, B jumps out of a window and falls to his death. In this case, despite B's choice to jump out of the window, A is still guilty.[36] This is because his or her victim's instinctive response to avoid danger is not viewed as sufficiently abnormal or detached from the original act to break the causal chain.[37] The causal chain would have been broken if the victim acted in a way "so sufficiently out-of-the-ordinary that 'it no longer seems fair to say that the [social harm] was "caused" by the defendant's conduct.'"[38]

More difficult cases are presented when the victim's response is *voluntary* as opposed to *instinctive*.[39] In general, "voluntary harm-doing usually suffices to break the chain of legal cause . . . ."[40] Some refer to this principle as a "free, deliberate, and informed" choice of an intervening actor, which is "consistent with the retributive principle that accords special significance to the free-will actions of human agents."[41] Under this principle, when a victim freely makes the choice to harm him or herself, the act is superseding.[42] For example, in *Lewis v. State*,[43] the Alabama Criminal Court of Appeals found that the defendant's act of teaching the victim to play Russian roulette was superseded when the victim

[32] *See, e.g.*, Commonwealth v. Catalina, 556 N.E.2d 973, 980 (Mass. 1990).

[33] DRESSLER, *supra* note 24, § 14.03, at 192.

[34] PERKINS & BOYCE, *supra* note 23, at 794-95; *id.* at 809 ("An independent intervening cause is one which operates upon a condition produced by an antecedent but is in no sense a consequence thereof.").

[35] 1 LAFAVE, *supra* note 20, § 6.4(f), at 655-56.

[36] *See id.* Michelle Carter's attorneys allude to this argument in their appeal brief, to support the notion that proximate cause should not have been satisfied on these facts. Brief for Defendant-Appellant at 28-29, Commonwealth v. Carter, No. SJC-12501 (Mass. June 29, 2018).

[37] Brief for Defendant-Appellant, *supra* note 36, at 28-29; *see also* PERKINS & BOYCE, *supra* note 23, at 795 (describing "impulsive movement made in the effort to avoid sudden peril created by the [defendant's] prior act" as perhaps the "most typical instance" of dependent intervening cause, which is typically insufficient to relieve defendant of liability).

[38] DRESSLER, *supra* note 24, § 14.03, at 190 (quoting State v. Malone, 819 P.2d 34, 37 (Alaska Ct. App. 1991)).

[39] *See* 1 LAFAVE, *supra* note 20, § 6.4(f), at 656-57.

[40] *Id.* at 656.

[41] DRESSLER, *supra* note 24, § 14.03, at 195 (citing H.L.A. HART & TONY HONORÈ, CAUSATION IN THE LAW 326 (2d ed. 1985)).

[42] *See id.*

[43] 474 So. 2d 766 (Ala. Crim. App. 1985).

later returned to the room where the gun was stored, alone and of his own free will, and used it shoot himself.[44]

Turning to Michelle Carter's case, is it foreseeable that someone would follow through with suicide based on encouraging words alone? Is a victim's decision to take his or her own life abnormal or extraordinary when a defendant was deliberately coaxing him or her to do it? Is a victim's suicide truly voluntary when it occurred immediately after another's persuasive efforts? These are answers we do not have because neither courts' rulings on the Carter case addressed them.

In terms of verbally encouraging suicide, the defendant is even more tenuously involved than in the hypotheticals described above. In the Carter case, Michelle Carter did not wound or pose a physical threat to the victim that would lead to an impulsive response. She did not provide the means to commit the act. She was never more than virtually present in the time leading up to Conrad Roy's death. While Michelle Carter's words were arguably backed by malicious intent,[45] the current causation framework in criminal law appears to dictate that a victim's voluntary choice to commit suicide, while alone in his car, should break the chain of causation.[46] Professor Dressler confirms that an intervening cause "usually comes in the form of: wrongdoing by a third party [or] the victim's own contributory negligence *or suicidal act* . . . ."[47] That being said, the

[44] *Id.* at 771 ("Even though the victim might never have shot himself in this manner if the appellant had not taught him to play Russian Roulette, we cannot say that the appellant should have perceived the risk that the victim would play the game by himself or that he intended for him to do this. This case presents a tragic situation and we do not condone the appellant's conduct, in any manner. However, the causal link between the appellant's conduct and the victim's death was severed when the victim exercised his own free will.").

[45] There is an argument to be made that based on her intent, Michelle Carter would be guilty under the "intended consequences doctrine," which stands for the idea that the defendant should have no right "to complain if [she is held] responsible for [her] intended consequence." *See* DRESSLER, *supra* note 24, § 14.03, at 194. However, as Professors Perkins and Boyce note, the intended consequence "[m]ust be limited (for the purposes of this rule) to the infliction of a mortal wound by shooting, or an injury which should result fatally by reasons of the *risks which normally attend harm of this nature*." PERKINS & BOYCE, *supra* note 23, at 819 (emphasis added). It is unlikely that death can be included as a risk normally associated with malicious words. Furthermore, there does not appear to be an intended consequence case where the defendant's actions were his or her words alone.

[46] To the extent courts do not agree with this analysis and find that the causation element is satisfied on these facts, such a conclusion must be articulated clearly, as the murky state of the law requires further development. For an analysis of how this issue has been viewed in the civil context, see *infra* text accompanying notes 63-70.

[47] DRESSLER, *supra* note 24, § 14.03, at 190 (emphasis added). Professors Perkins and Boyce also note an intervening cause scenario directly involving suicide: "the act of one who goes into a burning building is a normal response (and hence not a superseding cause) if it is for the purpose of rescuing valuable property, or is the act of a fireman in line with his duty, *but is not normal (and hence is superseding) if it is for the purpose of committing suicide*." PERKINS & BOYCE, *supra* note 23, at 815 (emphasis added). Of course, here it can be assumed

limited world of existing case law and statutory solutions in this realm has proven varied, highly fact specific, and occasionally contradictory.

B. *The Ambiguous Nature of Causation in Suicide Cases*

Suicide was originally a common law crime in England.[48] Hence, in many U.S. jurisdictions, suicide was also traditionally a felony.[49] In such jurisdictions, "normal doctrines of complicity were thought to be fully applicable to the crime of suicide . . . ."[50] A defendant who aided or abetted the commission of a suicide could be a principal in the second degree, rendering him or her guilty of murder.[51] For example, by providing poison to someone who planned to commit suicide and then counseling or encouraging its administration, a defendant would become a principal in the second degree.[52] In many of these jurisdictions, it was also possible for a defendant to be ruled an accessory before the fact to a suicide.[53] This occurred when, despite the defendant's absence during the commission of the suicide, he or she "procure[d], counsel[ed], or command[ed]" the victim to take his or her life, and the victim subsequently complied.[54]

In multiple other states, however, suicide was not deemed a crime, and therefore neither was urging someone to commit it.[55] After all, one cannot be an accessory or a principal to an act that is not a crime itself. Some scholars believed this was an unfair technicality and argued that inducing suicide alone should be viewed as "the commission of murder through an innocent human agent, that agent being the victim himself."[56] To proponents of this theory, inducing suicide

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the building was not set on fire *with the intent* that the victim would enter the building to commit suicide.

[48] 2 LAFAVE, *supra* note 20, § 15.6, at 737; *see also* 2 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 176 (15th ed. 2017) ("Nevertheless, at common law, suicide was a felony punishable by ignominious burial and forfeiture of property to the king, and an attempt to commit suicide was punishable as a misdemeanor.").

[49] MODEL PENAL CODE § 210.5 cmt. 1 at 91-92 (AM. LAW. INST. 1980).

[50] *Id.* at 92-93.

[51] Richard Wolfrom, *The Criminal Aspect of Suicide*, 39 DICK. L. REV. 42, 45 (1934).

[52] *Id.* at 46.

[53] *Id.* at 47.

[54] *Id.* (citation omitted).

[55] *See* Grace v. State, 69 S.W. 529, 530 (Tex. Crim. App. 1902) ("It is not a violation of any law in Texas for a person to take his own life. Whatever may have been the law in England, or whatever that law may be now with reference to suicides, and the punishment of persons connected with the suicide, by furnishing the means or other agencies, it does not obtain in Texas."). This logic has been used more recently in states that have not created statutes to criminalize the requisite conduct. *See* State v. Sage, 510 N.E.2d 343, 346 (Ohio 1987) (finding surviving member of suicide pact not guilty of crime in Ohio). Refusing to find liability in the case of a suicide pact, however, is relatively uncommon today. *See infra* note 110.

[56] Wolfrom, *supra* note 51, at 47.

should be criminal regardless of whether the act of suicide itself is criminal in the applicable jurisdiction.[57]

While the common law of certain states has not expressly changed the characterization of suicide as "unlawful,"[58] the act today is no longer "strictly-speaking a crime" as it is not punishable in any state.[59] That being said, various circumstances involving suicide can still lead to criminal liability, whether through lingering common law influences or newer policy considerations. For example, if "through *force* or *duress*," the defendant causes a victim to commit suicide, the defendant shall be guilty of murder.[60] The analysis becomes more complicated though when the defendant only *encourages* another to commit suicide.

Few cases have directly addressed the causation issue posed by encouraging suicide. Some courts have found that if the defendant physically places his or her victim in an impossibly cruel and painful situation, then the victim's suicide as a result does not break the causal chain.[61] Other cases determined that providing someone the instrumentality to commit suicide can establish liability.[62] However, neither of these scenarios indicate the appropriate response in a case of mere encouragement.

A brief detour to the realm of civil law shows how the issue has been addressed in a different setting. In *McLaughlin v. Sullivan*,[63] the New Hampshire Supreme Court noted that the general rule in *negligence* cases is that a plaintiff will be precluded from obtaining damages for the suicide of another, because "the act of suicide is considered a deliberate, intentional and intervening act."[64] The court did note, however, that liability may be established "where the defendant is found to have actually *caused* the suicide, or where the defendant is found to have had a *duty to prevent* the suicide from occurring."[65] A defendant

[57] *Id.*

[58] *See, e.g.*, Commonwealth v. Mink, 123 Mass. 422, 429 (1877) (noting that suicide, while no longer "technically a felony," was still "unlawful" during this period).

[59] 2 LAFAVE, *supra* note 20, § 15.6, at 738.

[60] *Id.* § 15.6(c), at 740 (emphasis added).

[61] *See, e.g.*, People v. Lewis, 57 P. 470, 473 (Cal. 1899) (finding chain of causation was not broken by victim who cut his own throat to alleviate pain from defendant's mortal gunshot wound); Stephenson v. State, 179 N.E. 633, 639 (Ind. 1932) (establishing liability for defendant who kidnapped, violently beat, and raped innocent woman, leading her to commit suicide to avoid further torment). When placed in such a cruel scenario, the victim's choice to end his or her own life will not be viewed as "free, deliberate, and informed." *See* DRESSLER, *supra* note 24, § 14.03, at 195. However, in such cases where liability was established, the defendant's acts constituted much more than mere verbal encouragement.

[62] *See* People v. Roberts, 178 N.W. 690, 693 (Mich. 1920) (finding husband guilty of murder after he provided his sick wife with poison when she requested to kill herself).

[63] 461 A.2d 123 (N.H. 1983).

[64] *Id.* at 124. This is often referred to as the "suicide rule." BARRY A. LINDAHL, 1 MODERN TORT LAW: LIABILITY AND LITIGATION § 4:9 (2d ed. 2018).

[65] *McLaughlin*, 461 A.2d at 124.

may be found to have "actually caused" a suicide when his or her tortious act caused "an uncontrollable impulse to commit suicide, or prevented the decedent from realizing the nature of his act."[66] Some examples include "the infliction of severe physical injury, or, in rare cases, the intentional infliction of severe mental or emotional injury through wrongful accusation, false arrest or torture."[67]

Other courts have held that in the context of *willful* torts, "the doctrine of superseding cause is inapplicable" and is "discarded in favor of a cause-in-fact test."[68] In such jurisdictions, recovery will be much more likely when the plaintiff can show the defendant acted intentionally.[69] While Michelle Carter's calculated persuasion was intentional, it is still unclear whether liability would be appropriate in the civil context without her texts and calls alone being deemed tortious.[70]

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[66] *Id.*

[67] *Id.* (noting that this "exception is very narrow, allowing recovery in tort only where the defendant has caused a severe physical injury to the victim which leads to extraordinary mental incapacity resulting in suicide or where the defendant intentionally and maliciously has tormented the victim into a suicidal state" (citations omitted)).

[68] Kimberlin v. DeLong, 637 N.E.2d 121, 127-28 (Ind. 1994), *cert. denied*, 516 U.S. 829 (1995) ("We hold that an action may be maintained for death or injury from a suicide or suicide attempt where a defendant's willful tortious conduct was intended to cause a victim physical harm and where the intentional tort is a substantial factor in bringing about the suicide."). *Contra* Turcios v. DeBruler Co., 32 N.E.3d 1117, 1128 (Ill. 2015) ("Accordingly, we hold that where, as here, a plaintiff seeks to recover damages for wrongful death based on the decedent's suicide allegedly brought about through the intentional infliction of emotional distress, the plaintiff must do more than plead facts which, if proven, would establish that the defendant's conduct was a cause in fact of the suicide. The plaintiff must plead facts which, if proven, would overcome application of the general rule that suicide is deemed unforeseeable as a matter of law.").

[69] *Kimberlin*, 637 N.E.2d at 126-27.

[70] This could potentially happen through a sufficiently persuasive argument that her coaxing an already suicidal individual into following through with the act was an intentional infliction of emotional distress. *See, e.g.*, Tate v. Canonica, 5 Cal. Rptr. 28, 33-34 (Cal. Ct. App. 1960). As an example, the court in *Rowe v. Marder* found that "a sickly [decedent] led astray by a malevolent and misguided sister" did not constitute "the kind of conduct [the defendant] would have known exposed her to liability for the intentional infliction of emotional distress." Rowe v. Marder, 750 F. Supp. 718, 727 (W.D. Pa. 1990). The court also made a point to note that there was no allegation that the decedent was mentally impaired or unstable. *Id.* This signals that at least some courts may find the case of maliciously encouraging the suicide of someone that is chronically depressed and contemplating suicide sufficient to impose liability. Other jurisdictions have proven less likely to accept this argument, especially in a situation like that of Conrad Roy, as he was *already* in a suicidal state, independent of Michelle Carter's words. *See Turcios*, 32 N.E.3d at 1128 ("Thus, we believe it is the rare case in which the decedent's suicide would not break the chain of causation and bar a cause of action for wrongful death, even where the plaintiff alleges the defendant inflicted severe emotional distress.").

To achieve convictions, it has become common for states to handle this issue through statutory means, such as defining manslaughter to include "causing," "encouraging," or "soliciting" another to commit suicide.[71] Other state statutes criminalize "aiding" or "assisting" suicide, or criminalize some variation of the above categories and simply group them together.[72] But under these statutes it often remains "unclear what it takes to amount to causation."[73] This is because their approach has largely been to "describe the kinds of conduct that constitute the offense," while "omit[ting] any reference to causation."[74] These statutes are seemingly trying to circumvent the causation question altogether in order to avoid unresolved difficulties.

Such ambiguous statutes could have far-reaching consequences. The most glaring problem with this approach is that it "fail[s] to deal at all with the difficulty of potential overinclusiveness."[75] Consider the situation of a contentious breakup or a relationship-ending fight between friends. One party maliciously suggests, backed by the requisite intent, that the other party commit suicide. Those words alone may be viewed as sufficient to sustain a conviction if the victim ultimately follows through with the act, so long as it can reasonably be argued that this behavior falls within the statute's conduct element. Without a causation requirement to act as a limiting principle, a key factual development—the victim's voluntary choice to take his or her own life—loses its significance.[76] Conducting the analysis this way could lead to unpredictable results based entirely on whether the individual judge finds the defendant's words to be vicious enough.

The Model Penal Code (the "MPC") has also tried to address this difficulty. Under the MPC, committing or attempting suicide is not a crime.[77] However, Section 210.5 delves into circumstances where "causing or aiding suicide" can still be criminal.[78] Subsection (1) limits criminal liability to situations where an actor "purposely causes such suicide by force, duress, or deception."[79] The MPC commentary states that the drafters thought it necessary to require purposeful conduct "on the ground that merely creating the risk that another will commit

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[71] 2 LAFAVE, *supra* note 20, § 15.6(c), at 742-44; *see also* MODEL PENAL CODE § 210.5 cmt. 5 at 104 n.33 (AM. LAW. INST. 1980).

[72] 2 LAFAVE, *supra* note 20, § 15.6(c), at 742-44; *see also* TORCIA, *supra* note 48, § 176 ("Depending upon a particular state's approach, it is an unlawful homicide or an independent offense to aid, solicit, or otherwise cause a suicide.").

[73] 2 LAFAVE, *supra* note 20, § 15.6(c), at 743.

[74] MODEL PENAL CODE § 210.5 cmt. 5 at 104 (AM. LAW. INST. 1980) (noting that, among others, applicable statutes in California and New Mexico have eliminated causation element entirely).

[75] *Id.*

[76] *See* 2 LAFAVE, *supra* note 20, § 15.6(c), at 744-45.

[77] MODEL PENAL CODE § 210.5 cmt. 2 at 93 (AM. LAW. INST. 1980).

[78] *Id.* § 210.5.

[79] *Id.* § 210.5(1).

suicide would cast the net of liability too wide."[80] Accordingly, "[i]t is only where the actor actively participates in inducing the suicide of another, as by the use of force, duress, or deception, that criminal penalties seem warranted."[81] The commentary notes that, "[a]s morally distasteful" as it is to break off relations with a distraught lover with the intent that he or she will commit suicide, it does not make the act criminal.[82]

The MPC also addresses potential criminal liability in cases where the suicide did not occur as a result of force, duress, or deception. Subsection (2) creates the offense of "[a]iding or [s]oliciting" the suicide of another.[83] This provision was originally satisfied "if suicide occur[red]" from the requisite conduct.[84] However, for fear of that construction being "too broad," a causation requirement was added.[85] This was done to "express the idea . . . that . . . felony sanctions should obtain in cases where the actor's aid or solicitation was a *significantly contributing factor* to a suicide or attempted suicide."[86] In a footnote, the commentators express concern that simply applying but-for causation could lead to an interpretation of this subsection "that does not accomplish the purpose" of adding a causation requirement, and suggest that in this situation, perhaps the offense itself "should be interpreted as imposing more stringent causation requirements than are generally required by the [MPC]'s concept of causation."[87] But no further clarification or solution is provided. The commentary also condemns states that have created statutory provisions to circumvent the causation issue, as that approach can be overinclusive and criminalize unintended conduct.[88] Thus, the MPC recognizes that there is a need to criminalize the more egregious cases of encouraging suicide, while simultaneously acknowledging the necessity of a more stringent causation requirement to act as a limiting principle.

The intersection between manslaughter, causation, and encouraging suicide is largely undefined. Collapsing the analysis and focusing in detail on the conduct element in place of causation is a problem stemming from this area of doctrine. The Carter case is a model of this problem.

II. WHAT HAPPENED HERE AND WHY IS IT DANGEROUS?

The encouraging suicide question is difficult to place in a particular doctrinal category. Because suicide is no longer criminally punishable in any U.S. jurisdiction, one cannot be complicit in another's choice to end his or her own

[80] *Id.* § 210.5 cmt. 4 at 99.

[81] *Id.*

[82] *Id.*

[83] *Id.* § 210.5(2).

[84] *Id.* § 210.5 cmt. 5 at 103.

[85] *Id.*

[86] *Id.* (emphasis added).

[87] *Id.* at 103 n.32.

[88] *Id.* at 104.

life.[89] States have differed in their approaches to criminalizing such encouragement. With no statutory direction in Massachusetts, the SJC in *Commonwealth v. Carter*[90] analyzed the issue through common law manslaughter doctrine.[91] The third element of manslaughter in Massachusetts is causation.[92] The causation element acts as a limiting principle, requiring the defendant's acts be deemed an actual and proximate cause of the result.[93] But the chain of causation can be broken by a voluntary, intervening act of self-harm on the part of the victim.[94] Therefore, when the defendant merely encourages a victim to commit suicide, that victim should relieve the defendant of liability if he or she voluntarily follows through with the act.

Some states have attempted to criminalize the most heinous forms of encouraging suicide by creating statutes that proscribe, among other constructions, "aiding," "assisting," or "causing" someone to commit suicide.[95] However, many of these statutes fall completely silent on the issue of causation.[96] This approach effectively eliminates an important prong of the legal analysis and promotes convictions based on the subjective heinousness of the defendant's words as opposed to established doctrine. The Carter case was thus a perfect opportunity to clarify how, if at all, a conviction for encouraging suicide can be proper in light of the causation element.

The SJC (in ruling on whether the indictment for manslaughter could proceed) and Judge Lawrence Moniz of the Bristol County Juvenile Court (in delivering Ms. Carter's verdict) each justified the manslaughter charge in different ways; however, both approaches glossed over the complex causation issue.[97] Part II will discuss the proceedings in each court and demonstrate the importance of properly addressing the causation issue moving forward.

A. *The Proceedings*

While both courts searched the realm of Massachusetts case law for helpful precedent, they each recognized that the pool of applicable cases was highly limited. The unique strategies taken by each court, and the relative viability of each, are analyzed in turn.

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[89] 2 LAFAVE, *supra* note 20, § 15.6(c), at 741.

[90] 52 N.E.3d 1054, 1057 (Mass. 2016).

[91] *Id.* at 1060 n.11.

[92] *See, e.g.*, Commonwealth v. Life Care Ctrs. of Am., 926 N.E.2d 206, 211 (Mass. 2010).

[93] *E.g.*, 1 LAFAVE, supra note 20, § 6.4(a), at 630-31.

[94] *See id.* § 6.4(f), at 656-57.

[95] *Id.* § 15.6(c), at 742-43.

[96] MODEL PENAL CODE § 210.5 cmt. 5 at 104 (AM. LAW. INST. 1980). Ironically, Professor LaFave notes even the statutes that specifically proscribe "causing" suicide tend to be "unclear [on] what it takes to amount to causation." 2 LAFAVE, *supra* note 20, § 15.6(c), at 742 n.28.

[97] Hanson, *supra* note 5.

1. The SJC's Decision: Applicability of Precedent Cited

In determining whether the grand jury was justified in returning an indictment of involuntary manslaughter in the first place, the SJC found that there were two previous manslaughter cases involving self-inflicted deaths that were applicable.[98] The first was *Commonwealth v. Atencio*,[99] where the court held that after a man died playing Russian roulette with his friends, the other members of the group could be charged with manslaughter.[100] The *Atencio* court determined the victim's act of pulling the trigger was not an "independent or intervening act."[101] Rather, there was "mutual encouragement in a joint enterprise," the overall atmosphere of which caused the deadly result.[102]

The SJC's analysis in *Carter* focused largely on whether the conduct could be viewed as wanton or reckless, and only one short paragraph was dedicated to analyzing the causation element.[103] In that paragraph, the court cited *Atencio* as its only measure of support, and concluded that because there was "evidence that the defendant's actions overbore the victim's willpower," there was probable cause to conclude the victim's actions did not constitute "an independent or intervening act."[104] However, the court chose not to acknowledge the factual gap in similarity between "mutual encouragement" to play a deadly game, and pressuring someone miles away via text message to enter a car filling with poisonous gas.[105] In *Atencio*, all parties were physically present, encouraging each other to play the game, and an environment of pressure was created by each member's willingness to actually put the gun to his head and pull the trigger.[106] It is hard to imagine that the participants would have been willing to play Russian roulette if they were alone in separate locations and each had to wait for a text message to provide the results after every turn. In fact, in *Lewis v. State*,[107] the act of teaching someone to play Russian roulette was deemed insufficient to establish liability when the victim subsequently made the choice to seek out the same gun and use it to shoot himself, as he was no longer in the presence of the defendant.[108] Michelle Carter, unlike the participants in *Atencio*, was not a member of a "joint enterprise,"[109] did not provide the means to commit

[98] *See* Commonwealth v. Carter, 52 N.E.3d 1054, 1062 (Mass. 2016).

[99] 189 N.E.2d 223 (Mass. 1963).

[100] *Id.* at 224.

[101] *Id.* at 225.

[102] *Id.*

[103] *Carter*, 52 N.E.3d at 1063-64.

[104] *Id.* at 1063.

[105] *Id.* at 1063-64.

[106] *Atencio*, 189 N.E.2d at 224.

[107] 474 So. 2d 766 (Ala. Crim. App. 1985).

[108] *Id.* at 771.

[109] *Atencio*, 189 N.E.2d at 225.

suicide,[110] and was not physically present when the death occurred.[111] Yet, the SJC viewed her situation as analogous to a decision rooted in the concept of "mutual encouragement."

The SJC also cited, though only in its discussion of the wanton or reckless prong, *Persampieri v. Commonwealth*,[112] a case where the defendant's wife threatened to commit suicide while intoxicated and highly distressed.[113] In response, the defendant called her "chicken," handed her a loaded rifle, instructed her how to use it, and watched as she followed through with the act.[114] The defendant was convicted of manslaughter.[115] While the *Persampieri* court ruled that his conduct was so "criminally wanton or reckless" as to justify a manslaughter conviction, it did not once address the causation element in its opinion.[116] This case is another prime example of the court choosing to dedicate its analysis to the egregious nature of a defendant's conduct while avoiding the causation question altogether. In its discussion of *Persampieri*, the SJC once again declined to address the factual differences between the precedent it was citing and the case at issue.[117] Most notably, in *Persampieri*, the defendant actually loaded and provided his victim with the means to commit suicide, and then stood right in front of her as she committed the act, constituting a much higher level of involvement than encouraging the act via text message.[118]

Michelle Carter's situation, unlike the others the SJC cited, should be classified as a purely "encouraging suicide" case. It is the only recent case where encouragement alone was deemed sufficient to sustain a conviction.

2. The Verdict in Juvenile Court: Applicability of Precedent Cited

At the highly anticipated verdict reading, Judge Lawrence Moniz of the Bristol County Juvenile Court did not even mention the cases cited by the SJC. Instead, he found that Conrad Roy "breaks that chain of self-causation by exiting the vehicle . . . ."[119] Accordingly, the judge concluded that "the Commonwealth

[110] *See* TORCIA, *supra* note 48, § 176 ("A person who assists another in committing suicide, *as by supplying him with the means of killing himself or by killing him as part of a suicide pact*, is guilty of murder for the suicide's death, the latter's consent not being a bar to prosecution." (emphasis added)).

[111] *See Carter*, 52 N.E.3d at 1057-59.

[112] 175 N.E.2d 387 (Mass. 1961).

[113] *Carter*, 52 N.E.3d at 1062 (citing *Persampieri*, 175 N.E.2d at 389).

[114] *Persampieri*, 175 N.E.2d at 389.

[115] *Id.* at 390.

[116] *Id.*

[117] *See Carter*, 52 N.E.3d at 1062.

[118] In other words, in *Persampieri*, the defendant provided the means *and* was physically present—two key factors that were absent in *Carter*.

[119] Hanson, *supra* note 5.

has proven beyond a reasonable doubt that [Michelle Carter's] conduct caused the death of Mr. Roy."[120]

The short quotation above constitutes the entirety of Judge Moniz's discussion of the causation element. To support his ruling, Judge Moniz cited *Commonwealth v. Bowen*,[121] a two hundred year old decision.[122] *Bowen* involved a prisoner, Jewett, who convinced an inmate in a neighboring cell to commit suicide in advance of his public execution.[123] The court in that case noted that "if one counsel[s] another to commit suicide, and the other, by reason of the advice, kills himself, the adviser is guilty of murder, as principal."[124] However, at the time, suicide was a punishable crime in Massachusetts, and the outdated policy rationale of satisfying the community's "interest in the public execution" was an important facet of the court's reasoning.[125] Furthermore, the jury acquitted Bowen, "probably from a doubt whether the advice given by him was, in any measure, the procuring cause of Jewett's death."[126]

Bowen may be the most directly applicable Massachusetts case from a factual perspective, as it involves a purely "encouraging suicide" situation, but it is doubtful that the logic of *Bowen* is sufficient to satisfy the causation element today. Judge Moniz in *Carter*, did not acknowledge that suicide was a crime at the time *Bowen* was decided.[127] This means that *Bowen* implicated an entirely different backdrop of legal considerations that no longer exist, such as the possibility of being complicit in the crime of suicide.[128] Furthermore, Judge Moniz did not explain how the but-for and proximate cause requirements were satisfied, he failed to mention the issue of intervening cause, and he did not refer to any state statutes that have tried to address the problem more recently. Thus, the use of the *Bowen* case alone constitutes shaky precedent to serve as the basis for a manslaughter conviction today, and yet it was the only measure of support cited here.

In their application for direct appellate review to the SJC, Michelle Carter's attorneys now assert that she "is the first defendant to have been convicted of killing a person who took his own life, even though she neither provided the

[120] *Id.*

[121] 13 Mass. 356 (1816).

[122] Hanson, *supra* note 5.

[123] *Bowen*, 13 Mass. at 356.

[124] *Id.*

[125] *Id.* at 360.

[126] *Id.* at 360-61.

[127] *Id.* at 356 (classifying suicide as "self-murder"); *see also* Wolfrom, *supra* note 51, at 46 n.19 ("[*Bowen*] was decided when suicide was still punished for forfeiture of goods and ignominious burial.").

[128] *See* Wolfrom, *supra* note 51, at 45-46 (examining criminality of various actions related to another's suicide, when suicide itself was criminal).

fatal means nor was present when the suicide occurred."[129] Only time will tell if the SJC stays consistent with its original reasoning, adopts Judge Moniz's articulation in Juvenile Court, or reverses the decision on other grounds.

B. *Why Encouraging Suicide Is Distinct from Assisting Suicide*

As mentioned above, there are scholars that have drawn parallels between this case and the realm of assisting suicide.[130] Some states have also created statutes that group assisting and encouraging suicide into one broad category, and even the MPC does not to draw a distinction between the two.[131] However, an analysis of each category highlights their dissimilarities. The entirety of Michelle Carter's conduct was virtually talking her boyfriend into committing suicide. The most famous, and perhaps most applicable assisting suicide case is that of Dr. Kevorkian and his "suicide machine," adjudicated in *People v. Kevorkian*.[132] In that case, patients requested use of Dr. Kevorkian's machine, which allowed them to administer an IV that would quickly and painlessly terminate their lives.[133] The machine was successful for one woman, and when it was not for another, Dr. Kevorkian provided a carbon monoxide face mask, which he taught her how to operate in advance of her suicide.[134] The *Kevorkian* court found that in a murder case, "[o]nly where there is probable cause to believe that death was the direct and natural result of a defendant's act can the defendant be properly bound over on a charge of murder. Where a defendant merely is involved in the events leading up to the death, *such as [by] providing the means*, the proper charge is assisting in a suicide."[135]

Assisting suicide cases, such as *Kevorkian*, tend to focus on physician-assisted suicide.[136] The motivations behind a medical professional attempting to

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[129] Application for Direct Appellate Review at 14, Commonwealth v. Carter, No. 2018-P-0028 (Mass. Feb. 5, 2018). They further provide in their appeal brief: "Carter is the first person ever convicted, anywhere, in such unusual circumstances. If this Court affirms, Massachusetts would be the only state to uphold an involuntary manslaughter conviction where an absent defendant, with words alone, encouraged another person to commit suicide." Brief for Defendant-Appellant, *supra* note 36, at 3.

[130] *See* Lapowski, *supra* note 6.

[131] MODEL PENAL CODE § 210.5 cmt. 5 at 102 (AM. LAW. INST. 1980) ("There seems, moreover, no basis for distinguishing between aiding and solicitation in this context.").

[132] 527 N.W.2d 714, 733-34 (Mich. 1994).

[133] *Id.*

[134] *Id.*

[135] *Id.* at 716 (emphasis added). Assisting suicide was not a statutory crime in Michigan at the time of this case. *Id.* at 739.

[136] In *Washington v. Glucksberg*, a landmark assisting suicide case, the Court held that a Washington statute prohibiting "caus[ing]" or "aid[ing]" a suicide was not violative of the Due Process Clause. *See* Washington v. Glucksberg, 521 U.S. 702, 702 (1997). However, the opinion focuses on physician-assisted suicide. As one of its justifications for upholding the law, the Court cited "protecting the medical profession's integrity and ethics and maintaining physicians' role as their patients' healers." *Id.* at 704. The case of maliciously encouraging

respect his or her terminally ill patients' wishes and a layperson maliciously provoking another to commit suicide are likely divergent. Michelle Carter was certainly not Conrad Roy's doctor, and she did not create a device or other instrumentality that he could use to end his own life. Viewing these cases as indistinguishable has the effect of holding a teenager to the same standard as a medical doctor making ethical judgments regarding the law and his or her practice.

Even cases of assisting suicide that do not involve a physician are conceptually distinct from encouraging suicide cases. The Minnesota Supreme Court was able to address this issue directly in *State v. Melchert-Dinkel*.[137] In that case, the court held that a state statute prohibiting one from "assisting," "advising," or "encouraging" a suicide must be severed, because the prohibitions on "advising" and "encouraging" suicide were "not narrowly drawn to serve the State's compelling interest in preserving human life," in violation of the First Amendment.[138] The court cited the dictionary definition of each term to highlight the inherent disparity between them and concluded that grouping the categories together was inappropriate.[139] It further contended that "[w]hile the prohibition on assisting covers a range of conduct and limits only a small amount of speech, the common definitions of 'advise' and 'encourage' broadly include speech that provides support or rallies courage."[140] "However distasteful" speech encouraging suicide may be, it is by its very nature "more tangential to the act of suicide" than assisting.[141]

By definition, assisting requires that the defendant *provide* his or her victim with "what is needed for [the suicide]."[142] Therefore, assisting suicide is not an appropriate framework by which to contextualize this case. Encouraging suicide necessarily involves less conduct and most likely encapsulates a divergent intent

suicide through words alone, by a party other than a physician, was never discussed. Legitimate policy justifications surrounding respect for the medical profession are inapplicable to encouraging suicide cases, and they shed further light on the difference between the two types of cases.

[137] 844 N.W.2d 13, 23-24 (Minn. 2014).

[138] *Id.* This Note will focus on the causation element alone and will not delve into other Constitutional concerns surrounding the issue. The First Amendment analysis in *Melchert-Dinkel* is only cited for purposes of establishing that there is an inherent disparity between "assisting" suicide and "encouraging" suicide, which that case eloquently demonstrates.

[139] *Id.* Specifically, the court noted that "[t]he ordinary definition of the verb "advise" is to "[i]nform," and "[t]he ordinary definition of the verb 'encourage' is to '[g]ive courage, confidence, or hope.'" *Id.* at 23. Because "[t]he ordinary definition of the verb 'assist' is 'help,'" which is defined as "provid[ing] (a person etc.) with what is needed for a purpose," it by definition requires a "direct, causal connection to a suicide" that advising and encouraging do not. *Id.*

[140] *Id.*

[141] *Id.* at 23-24.

[142] *Id.* at 23.

from assisting suicide.[143] While this is an admittedly small realm of case law and the overly broad grouping of these categories has not yet led to much harm, Section II.D of this Note will explain why a proliferation of purely encouraging suicide cases is expected in the coming years, and why the distinct category of encouraging suicide must be clearly established sooner rather than later.

C. *The Lack of Directly Applicable Precedent*

In what may be the most factually similar case nationally to the one at hand, *United States v. Drew*,[144] a woman created a fake Myspace account impersonating a sixteen-year-old boy, and then used the account to convince a young girl who had spread rumors about her daughter to commit suicide.[145] The woman was only charged with a misdemeanor violation of the Computer Fraud and Abuse Act ("CFAA"), and the conviction was later vacated in federal district court.[146] While this case is less than ten years older than *Carter*, manslaughter was not even discussed as a possibility for conduct that was highly similar to that of Michelle Carter.[147] Otherwise, there has been a near total lack of case law that addresses encouraging suicide by remote communication.

In the short period since *Drew*, and the mere months since *Carter*, there has been an increase in public outcry surrounding cyberbullying and maliciously encouraging suicide.[148] The spotlight of public opinion may have been a silent factor in the *Carter* verdict. As an editor of the Harvard Journal of Law and Technology argued, "[t]he difference in 2017 [since *Drew* was decided] is that an individual being present only virtually is far more common and ubiquitous, leading to Judge Moniz's ruling that physical presence is not necessary."[149]

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[143] While discerning the intent of each defendant tends to be a highly fact-specific inquiry, the Carter case provides a strong example of how different a teenager's intent is compared to a medical professional or other party who actively participates in a suicide by providing the means for it to happen.

[144] 259 F.R.D. 449 (C.D. Cal. 2009).

[145] *Id.* at 542.

[146] *Id.* at 449.

[147] *Id.*

[148] *See, e.g.*, Julia Glum, *Who Is Tyrell Przybycien? Teen Accused of Encouraging Girl's Suicide Compared to Michelle Carter*, NEWSWEEK (Oct. 19, 2017, 10:55 AM), http://www.newsweek.com/tyerell-przybycien-video-suicide-jchandra-brown-688526; Andrew Rossow, *Cyberbullying Taken to a Whole New Level: Enter the "Blue Whale Challenge,"* FORBES (Feb. 28, 2018, 7:55 AM), https://www.forbes.com/sites/andrewrossow/2018/02/28/cyberbullying-taken-to-a-whole-new-level-enter-the-blue-whale-challenge/#6b7d48012673 [http://perma.cc/WQ4G-VL3G]. While these cases are factually distinct from that of Michelle Carter and may not fall into the encouraging suicide framework that this Note proposes, they show the increasing level of publicity surrounding cyberbullying and suicide.

[149] Daniel Etcovitch, Recent Development, *Commonwealth v. Michelle Carter: Involuntary Manslaughter Conviction for Encouraging Suicide Over Text and Phone*, HARV. J.L. & TECH. DIG. (June 25, 2017), http://jolt.law.harvard.edu/digest/commonwealth-v-

Others claim "the [Carter] case is not fundamentally about technology: it is about an application of existing criminal law doctrines to novel situations created by our new technology-centric reality."[150] The fact that not even a misdemeanor violation of the CFAA could be sustained for conduct nearly identical to what is now being ruled manslaughter speaks to the traction this issue has gained nationally. As the concept of virtual presence is now firmly engrained in everyday life, the *Carter* decision constitutes one of the only cases that can serve as precedent on this issue moving forward. As it does not adequately address the causation element, the case does not clear up this complicated area of doctrine.

D. *Related Studies and the Increasingly Relevant Technological Component of Encouraging Suicide*

While the profound impact that bullying has on its young victims is well documented, recent studies are beginning to show the problem may be further exacerbated by developments in technology. By 2004, reports indicated "97% of people in the United States between the ages of 12 and 18 years old use the Internet."[151] One of the first studies on the topic found that youths who have been harassed on the internet report symptoms of major depression at nearly three times the rate of those who reported having major depressive-symptomatology but were not victims of online harassment.[152]

Today, the term *cyberbullying* refers to "willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices."[153] Some examples of cyberbulling include "sending harassing or threatening messages (via text message or e-mail), posting derogatory comments about someone on a Web site or social networking site (such as Facebook . . .), or physically threatening or intimidating someone in a variety of online settings."[154] Recent studies have started to explore in detail the implications of cyberbullying, specifically in terms of suicidal thoughts and tendencies.[155] One such study agreed that the bullying landscape has evolved beyond school hallways as "[r]apid advances in information and communication technology (ICT) have provided bullies with new tools."[156] This development has in many

michelle-carter-involuntary-manslaughter-conviction-for-encouraging-suicide-over-text-and-phone [https://perma.cc/WL9S-R8MH].

[150] *Id.*

[151] Ybarra, *supra* note 13, at 248 (citation omitted); *id* at 247 ("Internet harassment is an important public mental health issue affecting youth today.").

[152] *Id.* at 252.

[153] Hinduja & Patchin, *supra* note 14, at 208 (citations omitted).

[154] *Id.* (citations omitted).

[155] *See, e.g.*, Sheri Bauman, Russell B. Toomey & Jenny L. Walker, *Associations Among Bullying, Cyberbullying, and Suicide in High School Students*, 36(2) J. ADOLESCENCE 341, 346 (2013) (discussing as background studies that have been conducted and evaluating their results).

[156] *Id.* at 342.

ways changed "[t]he nature of adolescent peer aggression" as evidenced by "several high-profile cases involving teenagers taking their own lives in part because of being harassed and mistreated over the Internet."[157]

Results are beginning to indicate that "experience with traditional bullying *and cyberbullying* is associated with an increase in suicidal ideation."[158] Furthermore, "logistic regression analyses [in one study] revealed that bullying and cyberbullying victims and offenders were almost twice as likely to have reported that they attempted suicide as youth who were not victims or bullies."[159] Regardless of the means by which bullying is executed, research has shown that suicide contemplation is observed most dramatically by those with pre-existing depression or other mental health issues.[160]

Virtually encouraging suicide creates a higher chance that victims, especially those with depression, will follow through with the act.[161] These dangers are further exacerbated by the current state of technology and the fact that bullies can now access their victims at any time. The serious nature of the cyberbullying problem coupled with constantly increasing access to mediated forms of communication suggest that the risks posed by the Michelle Carter case are only intensifying with time.[162]

Encouraging suicide does not fit cleanly into any category of existing doctrine. The problem is becoming increasingly prevalent due to cyberbullying. Accordingly, there is a pressing need to recognize encouraging suicide as a distinct and novel area of legal doctrine. This will allow judges to properly address complexities posed by the causation element as similar cases inevitably begin to appear on the docket.

III. PROPOSED SOLUTIONS

The encouraging suicide problem is unique in that the entirety of the defendant's conduct tends to be his or her malicious words. This situation is

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[157] Hinduja & Patchin, *supra* note 14, at 207 (citations omitted).

[158] *Id.* at 216 (emphasis added).

[159] *Id.*

[160] *E.g.*, Borowsky, Taliaferro & McMorris, *supra* note 15, at S9 ("[T]he most powerful risk factor associated with thinking about or attempting suicide [across all means of bullying studies] was a history of self-harm."); Hinduja & Patchin, *supra* note 14, at 217-18 (finding that cyberbullying "tends to exacerbate instability and hopelessness in the minds of adolescents already struggling with stressful life circumstances," and calling for depression to be included in future models as "it previously has been found to mediate the relationship between bullying experiences and suicidal ideation").

[161] Hinduja & Patchin, *supra* note 14, at 217.

[162] *See* Ashley Surdin, *States Passing Laws to Combat Cyber-Bullying*, WASH. POST (Jan. 1, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2008/12/31/AR2008123103067.html ("Such are a few of the anguished stories of cyber-bullying that are increasingly cropping up around the country, as more and more children and teenagers wage war with one another on computers and cellphones.").

unlike other types of suicide cases, such as that of suicide pacts or assisting a suicide, because the defendant in an encouraging suicide case did not create an atmosphere of mutual encouragement, did not provide the means for it to happen, and was not physically present when the result occurred.[163] In the case of virtually encouraging suicide, to uphold a conviction, the content of a digital message alone must be deemed sufficient to have caused the deadly result, despite the victim's subsequent and voluntary choice to take his or her own life.[164] As pure encouraging suicide cases were rare in the past, there was a less pressing need to acknowledge them as a unique class.[165] That need is being bolstered as access to technology rapidly evolves and cyberbullies gain the ability to communicate with their victims at all hours of the day or night, right from their pockets.[166]

As a threshold matter, this Note contends that a conviction is the appropriate result for the Michelle Carters of the world. It is well-established that the "State has a compelling interest in preserving human life."[167] In *Melchert-Dinkel*, the National Alliance on Mental Illness of Minnesota filed an amicus brief noting that there were over thirty-eight thousand suicides in the United States in 2010 alone, making it the "second leading cause of death for people aged 10 to 24."[168] Furthermore, "30 percent of all clinically depressed patients attempt suicide."[169] This led the court to conclude that "suicide is a significant public health concern."[170] The appropriate response should not be to shield those who maliciously provoke suicide under the protection of the law, but rather to find the line where verbally encouraging suicide goes too far and to criminalize solely that conduct. The first step is to establish that encouraging suicide constitutes a distinct area of doctrine that does not fall into other seemingly similar categories such as assisting suicide. As Michelle Carter's attorneys correctly argue: "[This appeal] will set precedent for [those] who may be prosecuted for encouraging suicide with words alone."[171]

Once encouraging suicide cases are recognized as a conceptually distinct type of suicide-related criminal proceedings, a solution regarding the causation element can be developed. Recognizing a causation standard that applies distinctly to encouraging suicide cases is the best way to address this problem.

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[163] *See* 2 LAFAVE, *supra* note 20, §15.6(c), at 741 n.23.

[164] *See generally* Sue Woolf Brenner, *Undue Influence in the Criminal Law: A Proposed Analysis of the Criminal Offense of "Causing Suicide,"* 47 ALB. L. REV. 62 (1982) (discussing issues posed by causation element in suicide-related proceedings).

[165] *See* Commonwealth v. Carter, 52 N.E.3d 1054, 1062-64 (Mass. 2016).

[166] *See* Hinduja & Patchin, *supra* note 14, at 208 (describing evolution of bullying with advent of internet).

[167] State v. Melchert-Dinkel, 844 N.W.2d 13, 22 (Minn. 2014).

[168] *Id.* at 22 n.4.

[169] *Id.*

[170] *Id.*

[171] Application for Direct Appellate Review, *supra* note 129, at 10.

As an alternative, the MPC's categorical approach could be expanded in a way that clearly criminalizes the requisite conduct. To the extent the above changes are not instituted through common law developments, an improved statutory solution that involves a thoughtful analysis of the causation element, as opposed to avoiding it altogether, would expedite the process.

A. *Creating a New Causation Standard*

In general, a key facet of the proximate cause requirement is to focus on "the predictability of the result."[172] In encouraging suicide cases, complexities posed by the causation element hinder predictability. By overlooking unresolved difficulties entirely or grouping an encouraging suicide case into a seemingly similar category of doctrine in order to achieve the desired result, more convictions will be improperly rooted in judges' subjective opinions.

An important problem in suicide-related proceedings is that the victim is always the last person to have acted before the deadly result occurs, arguably shattering the chain of causation. This makes it difficult to establish liability, especially when it is shown that the victim's choice to commit suicide was made of his or her own volition.[173] However, the creation of a causation standard to deal with encouraging suicide cases is a possible solution that has already been employed in other unconventional scenarios. For example, when the victim of a violent attack subsequently "intervenes" to refuse life-saving medical treatment at the hospital, so long as the refusal was not "so extremely foolish as to be abnormal," the choice will not be deemed a superseding cause.[174] It has also been held in the case of drag racing, when one of the participants is killed, the "defendant's conduct in participating in [the race] constituted a sufficiently direct causal connection to victim's death to support defendant's conviction for involuntary manslaughter, even though victim lost control of his own car and thereby contributed to his own death."[175]

These results may not initially seem proper in light of the victim's personal choice to intervene. However, rather than ignoring the causation element, the complexities posed by each issue have at least been addressed through clear analysis. Today, both of these situations are recognized as unique areas of causation doctrine, which allows for immediate recognition of the issue and increased predictability. A causation standard should likewise be recognized in encouraging suicide cases to explain why a conviction is proper despite apparent complications.

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[172] SAMUEL H. PILLSBURY, HOW CRIMINAL LAW WORKS 243 (2009).

[173] *See* DRESSLER, *supra* note 24, § 14.03, at 194.

[174] 1 LAFAVE, *supra* note 20, § 6.4(f), at 656-67; *see also* Franklin v. State, 51 S.W. 951, 952-53 (Tex. Crim. App. 1899) (affirming manslaughter conviction where victim refused amputation and then died). This scenario typically arises when the victim refuses medical treatment for personal reasons such as his or her religion.

[175] TORCIA, *supra* note 48, § 26 (citing Goldring v. State, 654 A.2d 939, 944 (Md. Ct. Spec. App. 1995)).

1. Overwhelming the Will: Mental Health and Pre-Existing Weaknesses

To start, the causation requirement should be deemed met when an actor deliberately encourages the suicide of someone that he or she knows battles with severe mental health issues, especially those who have previously attempted suicide. Conrad Roy was suffering from severe depression,[176] which caused him to attempt suicide in the past.[177] Michelle Carter was fully aware of this fact and had discussed it with him numerous times.[178] Studies have shown that Conrad Roy's situation placed him statistically in the group of individuals at the highest risk of youth suicide, even before falling victim to Michelle Carter's cyberbullying.[179] Articulating a causation standard that opens the door to liability for those taking advantage of people in this fragile mental state seeks to deter the most malicious actors while protecting potential victims in the highest risk group.[180]

Furthermore, it is already well established that the liability analysis in criminal cases is altered when the victim has a pre-existing weakness.[181] This phenomenon is typically seen with victims who have a pre-existing *physical* weakness.[182] For example, "where A intends to kill B, he takes his victim as he finds him, so that if B would not have died but for some highly unusual condition (as where B is a hemophiliac) A is still the legal cause of B's death."[183] By this logic, if A intends for B to die as a result of A's actions, homicide liability can be established, even if A only succeeds in inflicting a small wound (provided it triggers B's pre-existing condition and leads to death).[184] It does not matter that B's condition was unknown to A, theoretically making the exact manner of the death unforeseeable to him.[185] The doctrine of pre-existing weakness should be expanded to include a victim's mental condition as well as his or her physical

[176] Application for Direct Appellate Review, *supra* note 129, at 3 (noting that Conrad Roy suffered from "severe social anxiety and depression").

[177] Commonwealth v. Carter, 52 N.E.3d 1054, 1057 (Mass. 2016).

[178] *Id.*

[179] *See* Borowsky, Taliaferro & McMorris, *supra* note 15, at S9. The expert evidence at the *Carter* trial corroborated that the "single greatest predictor of suicide risk is a prior suicide attempt." Application for Direct Appellate Review, *supra* note 129, at 6.

[180] Interestingly, some courts in the civil context are beginning to recognize exceptions to the causation problem based on the profound effects of bullying. *See* Patton v. Bickford, 529 S.W.3d 717, 729 (Ky. 2016) ("[W]e determine that bullying (and similar behavior intended to torment another person) may form the basis of a wrongful death claim when death by suicide is a direct consequence. In such instances, suicide is not intrinsically a superseding and intervening event which under all circumstances terminates the liability of those whose conduct led to the death.").

[181] *See, e.g.*, 1 LAFAVE, *supra* note 20, § 6.4(g), at 663.

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.*

condition. However, to avoid an overly broad prohibition, only malicious acts that target victims who are already chronically depressed or suicidal should be deemed sufficient to satisfy causation.

Consider the following hypothetical. Actor A, who is aware that potential victim B has attempted suicide in the past, persuades B to commit suicide. In defense of A, studies show that most people without a pre-existing mental condition would not commit suicide based on someone else's encouraging words alone.[186] Therefore, A will likely argue that his or her words were not actually a but-for cause of the suicide, and that the proximate cause requirement is not satisfied.[187] Once a standard is instituted that recognizes how potent the defendant's words are when his or her victim is already battling with depression, it becomes easier to address A's arguments.

In the case of coaxing someone who is already chronically depressed to commit suicide, establishing actual causation should not prove overly difficult, especially when there is a record of messages to reference. For a depressed victim, it is much easier to show that but for the defendant's encouraging words, the deadly result would not have occurred.[188] In terms of proximate cause, it should be deemed *per se* foreseeable that encouraging someone in such a vulnerable mental state can lead to suicide.[189] Finally, in terms of the intervening cause issue, it can be established that the victim does not truly make the voluntary choice to commit suicide,[190] but rather is overwhelmed by the persuasion of the defendant who effectively makes the choice for him or her.[191] In other words, the victim cannot be an intervening cause, because the victim did not have the mental capacity at the time to choose to intervene.

The SJC's decision in this case, while it does not delve into as much detail on the issue, is logically consistent with this solution. Specifically, the SJC concluded:

> [T]here was probable cause to show that the coercive quality of the defendant's verbal conduct *overwhelmed whatever willpower* the eighteen year old victim had to cope with his

[186] *See, e.g.*, Hinduja & Patchin, *supra* note 14, at 217 ("It should also be acknowledged that many of the teenagers who committed suicide after experiencing bullying or cyberbullying had other emotional and social issues going on in their lives . . . . *[I]t is unlikely that experience with cyberbullying by itself leads to youth suicide*. Rather, it tends to exacerbate instability and hopelessness in the minds of adolescents already struggling with stressful life circumstances." (emphasis added)).

[187] *See, e.g.*, 1 LAFAVE, *supra* note 20, § 6.4(f), (g), at 655-68.

[188] *See id.* § 6.4(b), at 632. More difficult cases may arise when there is no paper trail of messages or conversations, or when the defendant and the victim had much less contact than was seen in the Carter case.

[189] *See id.* § 6.4(f), at 655 (distinguishing between coincidence and intervening cause).

[190] There are multiple avenues for this to be done, such as establishing a presumption of law or through the use of expert testimony to make a determination based on the behavior and medical history of each individual victim.

[191] *See* 1 LAFAVE, *supra* note 20, § 6.4(f), at 655.

> depression, and that but for the defendant's admonishments, pressure, and instructions, the victim would not have gotten back into the truck and poisoned himself to death.[192]

Although the court barely discussed the intervening cause issue, its logic supports the notion that when one's willpower is entirely overwhelmed, he or she becomes mentally incapable of making the choice to intervene, rendering the suicide insufficient to break the chain of causation.[193]

Without explicitly using the term "overwhelming the will," other authorities have also agreed that intentionally targeting individuals in a fragile mental state warrants liability. For example, Professors Perkins and Boyce argue that death resulting from a "'mental force' caused by another human being" should be sufficient to establish homicide liability.[194] "[T]o the extent to which science has torn away the veil of secrecy from this phenomenon, it will receive juridical recognition."[195] They further assert that a particular significance should be attached to words "reasonably calculated to produce . . . an act which is the immediate cause of death" in "person[s] of unsound mind."[196] Furthermore, within the MPC's proposed category of aiding or soliciting suicide, the commentary asserts that "*some persons* will be susceptible to persuasion to commit suicide or will be unusually likely to attempt suicide if offered assistance. Aid or encouragement to those individuals is highly dangerous and certainly blameworthy, and a greater sanction is clearly called for."[197]

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[192] Commonwealth v. Carter, 52 N.E.3d 1054, 1064 (Mass. 2016) (emphasis added).

[193] This theory has the potential to clarify the reasoning of prior cases with surprising results. For example, while the victim's mental health status was not discussed in *Persampieri*, the court did note that she had attempted suicide on two prior occasions. Persampieri v. Commonwealth, 175 N.E.2d 387, 389 (Mass. 1961). This demonstrates a higher likelihood that her will was entirely overwhelmed by her husband's malicious provocation and instruction. Acknowledging the importance of this detail could have spurred a well-reasoned causation analysis, as opposed to staying silent on the issue. This logic could also potentially extend beyond victims with severe depression alone, and cover momentary incidents when the will is overwhelmed. There is some academic support for this argument. Professors Perkins and Boyce argue that a victim's acts do not constitute an intervening cause when the victim has been "deprived of his [or her] reason" and that a victim should be relieved of liability for terminating his or her own life when placed in a situation by the defendant that rendered him or her "distracted and mentally irresponsible." PERKINS & BOYCE, *supra* note 23, at 796-97. That being said, to avoid casting the net of liability too wide, this Note focuses on the creation of a standard and argues it is most appropriate, at least initially, to apply it only in the most egregious circumstances—those of targeting victims in the highest risk group of committing suicide.

[194] PERKINS & BOYCE, *supra* note 23, at 822-23.

[195] *Id.* at 823.

[196] *Id.* at 821.

[197] MODEL PENAL CODE § 210.5 cmt. 5 at 103 (AM. LAW. INST. 1980) (emphasis added). There is no more appropriate group for this to apply to than those in the *highest* risk group for committing suicide.

The standard should be articulated clearly: encouraging the suicide of one who is already severely depressed or suicidal can overwhelm the victim's will, and liability will be established if the victim ultimately follows through with the act. This solution will protect those most in need while simultaneously avoiding an overly broad net of liability.

2. Viewing Targeted Encouragement as an Instrumentality

Another potential approach, albeit less efficient, is to eliminate the gap between encouraging suicide and assisting suicide altogether. This would call for a determination that virtually "encouraging" suicide is the technical equivalent of "aiding" or "assisting." The theoretical hurdle with this approach is that assisting a suicide typically involves providing the *means* to an actor contemplating suicide, while encouraging suicide tends to involve malicious words, but less overt action.[198] This is one of the reasons why statutes that have already attempted to group these categories together are inadequate. To effectively bridge the gap, it could be held that communicating virtually with someone in a manner that encourages him or her to commit suicide provides them with the necessary confidence—which can be viewed as a tool or instrumentality—sufficient to "assist" or "aid" in the suicide.[199]

By not distinguishing between these two categories, the MPC is, at least textually, in line with this approach.[200] However, the issue would still have to be further fleshed out to avoid running afoul of the First Amendment concern of protecting immoral speech.[201] This approach requires adopting the view that malicious digital messages have a more tangible quality than we typically associate with spoken words. Because text messages remain on a cellular device, allowing the victim to consistently go back and view them whenever he or she sees fit, they are arguably more dangerous than something hurtful that is said to the victim in person. That message or series of messages can be viewed as a weapon of sorts, sent with the deliberate intention of pushing the victim over the edge. The messages in this case would appear similar to Kevorkian's "suicide machine," designed to induce suicide while technically leaving the final choice in the victim's hands.[202]

If it were to be adopted, this solution would require increased clarity, as it simply moves the issue to the more developed, yet still ambiguous, realm of assisting suicide cases. Therefore, even if situations like Michelle Carter's were viewed from the beginning as assisting suicide cases, a highly fact-specific inquiry would likely be necessary to determine whether the communications rose to the level of assistance. This could prove highly subjective in application,

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[198] *See* State v. Melchert-Dinkel, 844 N.W.2d 13, 23-24 (Minn. 2014).

[199] *See* People v. Kevorkian, 527 N.W.2d 714, 733-34 (Mich. 1994).

[200] *See* MODEL PENAL CODE § 210.5 cmt. 5 at 104 (AM. LAW. INST. 1980).

[201] *See Melchert-Dinkel*, 844 N.W.2d at 23-24 (finding portions of statute prohibiting "advis[ing]" and "encourag[ing]" suicide violate First Amendment).

[202] *See Kevorkian*, 527 N.W.2d at 733.

and may require the pronouncement of a unique standard in its own right. Overall, these categories should not be merged, as they speak to divergent conduct, and including them under the same provision causes confusion.[203] In addition, as seen in *Melchert-Dinkel*, statutes that have grouped together these categories have already been partially invalidated due to First Amendment considerations.[204] While this solution is risky and certainly not ideal, it could nevertheless fill a void that is left wide open by *Carter* if the solution is crafted with a heightened attention to detail.

B. *Expanding the Model Penal Code Approach*

Another potential approach would be to create a system that expands upon the MPC's theory. Under MPC section 210.5(1), one can only be found guilty of "causing" a suicide if the act is done through force, duress, or deception.[205] But many encouraging suicide cases, such as that of Michelle Carter, tend to be insufficient to check one of those boxes.[206] For example Black's Law Dictionary defines duress as "a threat of harm made to compel a person to do something against his or her will or judgment."[207] However, no threat of harm actually occurs in purely encouraging suicide cases, as the result is achieved through persuasion. Therefore, while this approach creates liability for some extreme actors, it fails to cover the broad swath of conduct posed by the cyberbullying problem. To address this gap, the MPC's "causing suicide" provision could be expanded to include encouraging words targeted at the severely depressed or suicidal.

As previously discussed, MPC section 210.5(2) also has a provision that speaks to "[a]iding or [s]oliciting" the suicide of another.[208] As "causing" a suicide must be done through force, duress, or deception to establish homicide liability under the MPC, the "soliciting" suicide provision may be a more appropriate alternative to impose liability for malicious words of encouragement.[209] The MPC commentary notes that "the general complicity provisions of the Model Code have no application to the situation where one

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[203] *See supra* Section II.B (discussing differences between assisting and encouraging suidice).

[204] *Melchert-Dinkel*, 844 N.W.2d at 23-24.

[205] MODEL PENAL CODE § 210.5(1) (AM. LAW. INST. 1980) ("A person may be convicted of criminal homicide for causing another to commit suicide only if he purposely causes such suicide by force, duress or deception.").

[206] Perhaps if the courts took a broad view of duress a similar result could be achieved, but this solution would undeniably leave the door open to subjectivity and highly inconsistent decisions.

[207] *Duress*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[208] MODEL PENAL CODE § 210.5(2) (AM. LAW. INST. 1980) ("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.").

[209] *Id.* § 210.5.

aids [or solicits] another to commit suicide" and that "the crime of solicitation [is typically limited] to cases where the solicited conduct is itself prohibited by the criminal law."[210] This means that because suicide is not a punishable crime, the MPC's general complicity or solicitation frameworks cannot be used to achieve liability for encouraging suicide. However, because "[s]elf-destruction is surely not conduct to be encouraged or taken lightly," MPC section 210.5(2) was created as "a separate offense."[211] As solicitation typically refers to verbal conduct, this subsection may be the most logical place to address "induc[ing] another to take his own life."[212]

One remaining issue is that soliciting and aiding suicide remain grouped together under MPC section 210.5(2). The differences between these categories must be addressed, as encouraging suicide cases should fall only in the solicitation category.[213] In addition, beyond its critique of state statutes that have inadequately provided a solution, the MPC does not currently address the causation issue in detail.[214] In normal solicitation cases, the MPC only requires "encourag[ing] or request[ing] another person to engage in specific conduct . . . with the purpose of promoting or facilitating its commission."[215] In the suicide context, MPC section 210.5(2) has a causation requirement that remains largely undefined.[216] This is an ideal avenue to codify "overwhelming the will" as an example of a "significantly contributing factor" that can satisfy causation.[217] Clarifying this provision to properly address the complexities posed by cyberbullying could be another effective option moving forward.

C. *Statutory Solutions*

While many jurisdictions have developed statutory schemes to address the problem of encouraging suicide, their approaches tend to inadequately address the causation issue.[218] This does not mean that the statutory route is not a viable one. Lawmakers can draft a statute that criminalizes the appropriate behavior

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[210] *Id.* § 210.5 cmt. 5 at 99-100.

[211] *Id.* at 100.

[212] *Id.*

[213] Additionally, the MPC must require a more heinous, targeted form of encouragement than is required in typical solicitation cases to avoid the First Amendment roadblock previously mentioned. *See supra* Section II.B.

[214] MODEL PENAL CODE § 210.5 cmt. 5 at 99 (AM. LAW. INST. 1980).

[215] *Id.* § 5.02. Of course, following this approach opens the door to the possibility that malicious words delivered with the purpose of encouraging another to commit suicide, when unsuccessful, could nevertheless be actionable.

[216] *See id.* § 210.5 cmt. 5 at 103.

[217] *Id.*

[218] *See, e.g.*, *id.* at 104 (determining that current statutes "fail to deal at all with the difficulty of potential overinclusiveness"); 2 LAFAVE, *supra* note 20, § 15.6(c), at 742 n.28 (finding it "unclear" what level of conduct is required to constitute causation under existing statutes).

without shielding those who maliciously encourage suicide or subjecting anyone who sends a malicious text message to liability. In fact, improved statutes are likely the quickest way to resolve existing ambiguities, and the right statute could serve as a model for other jurisdictions.

A new law would have the potential not only to address the causation problems discussed in this Note, but could also bring increased national attention to this issue by specifically being branded as a cyberbullying statute. Unfortunately, efforts to pass federal cyberbullying laws that would criminalize this conduct have failed in the past.[219] But in light of the developing scientific knowledge in this area and the increasing number of suicides every year, the success of such legislation may be more likely now than ever before.[220] Especially given the publicity surrounding *Carter* and other recent cases, the issue would help ignite a national discussion about how to craft the proper solution.

Regardless of whether the avenue taken is a state or federal law, the solution must properly address any issues posed by the causation analysis. An overly vague statutory solution leaves us in no better position than the present, and an overly strict solution that seeks to criminalize *any* form of verbally encouraging suicide exposes more individuals than necessary to liability, in addition to raising free speech concerns.[221] If a statutory solution is adopted, it will have to speak to causation, and it can do so by pronouncing a standard that criminalizes "overwhelming the will" of certain victims.

CONCLUSION

The Carter case gave a national spotlight to a problem that exists in numerous forms. Whether it is evaluated through common law manslaughter doctrine or some form of a statutory solution, the issue of encouraging suicide is a unique legal problem of rapidly increasing importance and it has yet to be adequately addressed. What has occurred thus far is an urge, perhaps fueled by a shift in public opinion, to impose liability on those who maliciously encourage the suicide of another.

But the emotional argument hits a legal roadblock when it comes to the doctrinal analysis. To impose liability for the death of another, the defendant's actions must have been a but-for and proximate cause of the unfortunate result. That chain of causation, however, can be broken by the voluntary, intervening choice of the victim to take his or her own life. Therefore, it seems that merely encouraging another to take his or her own life is insufficient to satisfy causation

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[219] David Kravets, *Cyberbullying Bill Gets Chilly Reception*, WIRED (Sept. 30, 2009, 6:37 PM), https://www.wired.com/2009/09/cyberbullyingbill/ (reporting that federal cyberbullying bill which was proposed after teen committed suicide had been "met with little enthusiasm by a House subcommittee" and ultimately was never passed).

[220] *Id.*

[221] MODEL PENAL CODE § 210.5 cmt. 5 at 104 (AM. LAW. INST. 1980).

if the victim subsequently, and of his or her own volition, chooses to follow through with the act.

Recognizing a need for justice in this realm, some states have adopted statutory solutions.[222] Unfortunately, they have all proved inadequate in one way or another. Some of these statutes group together "assisting" and "encouraging" suicide as if they were the same thing. However, providing someone with the means to incite his or her own death, often in the medical context, is not factually comparable to maliciously provoking a teenager through months of text messages to commit suicide. Other statutes have failed to reference the causation element entirely. This is a very dangerous approach, as it comes hand-in-hand with overcriminalization. Without a causation element in place, simply telling someone once to commit suicide with the requisite intent could lead to homicide liability. Throughout the Carter case, only a few sentences in total were dedicated to the complicated causation issue. The short discussions of the issue ranged from cases that were two hundred years old to cases that did not even speak to the causation element at all. This is an insufficient justification for such a groundbreaking result.

The question remains: can this conduct be criminalized in a way that fairly and predictably imposes liability on the Michelle Carters of the world? This Note argues the answer is yes. While the SJC may have cited shaky precedent, they did announce an important idea that is worth holding onto: the concept of "overwhelming the will." Those with severe depression or suicidal thoughts are at the highest risk of actually following through with the deadly result. Deliberately encouraging someone from this group is unlike provoking anyone else with malicious words, because there is a much higher chance that death will occur.

While voluntarily engaging in self-harm can break the chain of causation, that result should not hold for victims who did not have the mental capacity at the time to make the choice for themselves. An "overwhelming the will" standard is the avenue by which to properly analyze causation in encouraging suicide cases. Hopefully the SJC will elaborate on this concept when it hears the case on appeal. Furthermore, while federal cyberbullying legislation attempting to criminalize this conduct has failed in the past, now is the time change can realistically happen due to enhanced publicity surrounding the issue.

In conclusion, the Carter case as it stands is dangerous precedent, and given our developing technological reality, it will likely not be the last of its kind. An "overwhelming the will" causation standard will provide structure to the newly emerging class of encouraging suicide cases, and lead to predictable results that are rooted in sound precedent rather than subjectivity.

[222] *See* text accompanying notes 93-96.