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THE PUZZLE OF INCITING SUICIDE

Guyora Binder* and Luis Chiesa**

ABSTRACT

In 2017, a Massachusetts court convicted Michelle Carter of manslaughter for encouraging the suicide of Conrad Roy by text message, but imposed a sentence of only fifteen months. The conviction was unprecedented in imposing homicide liability for verbal encouragement of apparently voluntary suicide. Yet if Carter killed, her purpose that Roy die arguably merited liability for murder and a much longer sentence. This Article argues that our ambivalence about whether and how much to punish Carter reflects suicide's dual character as both a harm to be prevented and a choice to be respected. As such, the Carter case requires us to choose between competing conceptions of criminal law, one utilitarian and one libertarian. A utilitarian criminal law seeks to punish inciting suicide to reduce harm. A libertarian criminal law, on the other hand, justifies voluntary suicide as an exercise of liberty, and incitement of suicide as valuable speech. Utilitarian values are implicit in the foreseeability standards prevailing in the law of causation, but libertarian values are implicit in the reluctance of prosecutors to seek, and legislatures to define, homicide liability for assisting suicide. The prevalence of statutes punishing assisting—but not encouraging—suicide as a nonhomicide offense reflects a compromise between these values. These statutes are best interpreted as imposing accomplice liability for conduct left unpunished for two antithetical reasons: it is justified in so far as the suicide is autonomous and excused in so far as the suicide is involuntary. This explains why aiding suicide is punished, but less severely than homicide. Yet even these statutes would not punish Carter's conduct of encouragement alone. Her conviction although seemingly required by prevailing causation doctrine, is unprecedented.

Introduction

Should the criminal law punish inciting suicide? And if so, as homicide, or as some lesser crime?

In 2014, 18-year-old Conrad Roy committed suicide, two years after a previous unsuccessful attempt.[1] Police soon discovered that in the preceding week,

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1. Commonwealth v. Carter, 52 N.E.3d 1054, 1056–57 (Mass. 2016).

17-year-old Michelle Carter, who described Roy as her boyfriend, had sent him many text messages urging him to develop and carry out a plan to kill himself. Moreover, Carter had pressed Roy to proceed in a phone call when he hesitated in the very process of killing himself.[2] And yet Carter had originally tried to talk Roy out of suicide, and only changed her position after he persuaded her that nothing else could relieve his misery.[3]

Carter was charged with manslaughter in a Massachusetts juvenile court.[4] The charge was upheld by the Massachusetts Supreme Judicial Court[5] and, in 2017, Carter was convicted, and sentenced to a fifteen-month term of imprisonment.[6] Yet the high court's decision upholding the charge would have permitted a much higher penalty. It held that if Roy would not have died when he did without Carter's urging, Carter caused his death.[7] Under Massachusetts law, as under the law of most states, one who causes death with premeditated deliberation is guilty of first degree murder and subject to a life sentence.[8] So in one sense, Carter was lucky.

Yet in another sense, Carter was unlucky. As we will see, homicide liability for the suicide of another is rare, and almost always involves some more tangible contribution to the killing than Carter's.[9] Indeed, we have found no previous American case where the victim intentionally killed himself and the defendant was convicted of homicide for verbal encouragement only. Nor have we found another case of homicide liability where the encourager was never in the presence of the suicide.

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2. *Id*. at 1063–64. The Court stated:

> [Carter told] the victim, who was mentally fragile, predisposed to suicidal inclinations, and in the process of killing himself, to get back in a truck filling with carbon monoxide and 'just do it.' . . . [T]he grand jury heard evidence suggesting a systematic campaign of coercion on which the virtually present defendant embarked—captured and preserved through her text messages—that targeted the equivocating young victim's insecurities and acted to subvert his willpower in favor of her own.

Id.

3. *See* Nik DeCosta-Klipa, *Read the Facebook Messages Between Michelle Carter and Conrad Roy After His First Suicide Attempt*, BOSTON.COM (June 12, 2017), https://www.boston.com/news/local-news/2017/06/12/read-the-facebook-messages-between-michelle-carter-and-conrad-roy-after-his-first-suicide-attempt.

4. *Carter*, 52 N.E.3d at 1056.

5. *Id*. at 1065.

6. Ray Sanchez et al., *Woman Sentenced to 15 Months in Texting Suicide Case*, CNN (Aug. 3, 2017), https://www.cnn.com/2017/08/03/us/michelle-carter-texting-suicide-sentencing/index.html.

7. "On the specific facts of this case, there was sufficient evidence to support a probable cause finding that the defendant's command to the victim in the final moments of his life to follow through on his suicide attempt was a direct, causal link to his death." *Carter*, 52 N.E.3d at 1064.

8. Joeseph R. Nolan & Laurie J. Sartorio, 32 MASS. PRACTICE, *Criminal Law* §§ 174, 190 (3d ed. 2017).

9. *See infra* Part III.

In most states, participants in another's suicide risk prosecution for the lesser crime of assisting suicide.[10] Yet we will see that only a few statutes prohibit encouragement alone, and courts have often required tangible aid in applying these few statutes.[11] In one recent case, the Minnesota Supreme Court struck down a provision permitting liability for encouraging suicide as a violation of the First Amendment.[12]

Does the rarity of criminal punishment for encouraging suicide reflect the rarity of the underlying conduct? Probably not. Suicide itself is far more prevalent than homicide in most wealthy societies.[13] Although the U.S. has historically had a high homicide rate, its suicide rate is almost three times as great, with over 40,000 suicides a year.[14] Moreover, actual suicide appears to be the tip of a much larger iceberg. According to the CDC in 2013, 0.6% of adults and 8% of high school students attempted suicide.[15] One percent of adults and 13.6% of teens reported planning suicide, and 17% of teens seriously considered it.[16] With so much interest in suicide among teens, it seems inevitable that many teens will become accepting of and adjusted to suicide.[17] This may lead to communication and even encouragement among teens. In an age of electronic communication, such encouragement must often leave a trail of evidence, as it did in the Carter case.

If inciting suicide is widespread and detectable, we could be punishing it quite a lot. And if it causes death, we arguably should be punishing it quite severely. Yet it seems we do neither. Why?

Perhaps our ambivalence about punishing inciting suicide reflects more fundamental conflicts in our conception of criminal wrongdoing. In judging what conduct to condemn we can draw on two plausible but potentially inconsistent strands

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10. *See infra* Part III.

11. *See infra* Part III.

12. State v. Melchert-Dinkel, 844 N.W.2d 13, 24 (Minn. 2014) ("Speech in support of suicide, however distasteful, is an expression of a viewpoint on a matter of public concern, and, given current U.S. Supreme Court First Amendment jurisprudence, is therefore entitled to special protection as the 'highest rung of the hierarchy of First Amendment values.'").

13. The ratio of suicides to homicides in other states in the top 25 in both total and per capita GDP are: Canada 6.25, Belgium 7.79, Sweden 10.7, Australia 12.45, Netherlands 15.9, and Switzerland with 16.52. *See* WORLD HEALTH ORG., SUICIDE RATES BY COUNTRY (May 2018); WORLD HEALTH ORG., HOMICIDE RATES BY COUNTRY (Apr. 2017); Jonathan Gregson, *The Richest Countries in the World*, GLOBAL FINANCE (March 1, 2017), https://www.gfmag.com/global-data/economic-data/richest-countries-in-the-world.

14. WORLD HEALTH ORG., HOMICIDE RATES BY COUNTRY (Apr. 2017); CENTERS FOR DISEASE CONTROL AND PREVENTION, SUICIDE AND SELF-INJURY, https://www.cdc.gov/nchs/fastats/suicide.htm (last visited Sep. 5, 2018).

15. CTR.'S FOR DISEASE CONTROL AND PREVENTION, NAT'L CTR. FOR INJURY PREVENTION DIV. OF VIOLENCE PREVENTION, SUICIDE FACTS AT A GLANCE 2015 - NONFATAL SUICIDAL THOUGHTS AND BEHAVIOR (2015), https://www.cdc.gov/violenceprevention/pdf/suicide-datasheet-a.pdf.

16. *Id*.

17. *See generally* Evan M. Kleiman, *Suicide acceptability as a mechanism of suicide clustering in a nationally representative sample of adolescents*, 59 Comprehensive Psychiatry, 17-20 (May 1, 2015) (demonstrating that suicide acceptability is in part a possible reason why suicides tend to cluster in adolescents); *See also* Sean Joe, Daniel Romer, and Patrick E. Jamieson, *Suicide Acceptability is Related to Suicide Planning in U.S. Adolescents and Young Adults*, 37(2) Suicide and Life-Threatening Behavior 165, (2007).

of the liberal tradition in political thought: utilitarianism and libertarianism. The first assumes that government has a collective responsibility to serve the general welfare, and sees criminal punishment as a social cost worth bearing in so far as it deters conduct expected to be even more socially costly. The second sees government as a limited delegation of the inherent authority of individuals to govern themselves, for the purpose of better protecting that autonomy. Criminal punishment is compatible with this kind of political liberty in so far as the person punished waived some of his liberty rights by freely choosing to infringe the liberty rights of others. These two perspectives of course do not exhaust the values influencing our views on criminalization, which include religiously based and other possibly illiberal value commitments. However, they are sufficient to show that the criminalization of encouraging suicide poses a policy dilemma.

From a utilitarian perspective, inciting suicide seems well worthy of criminalization. Suicide is a serious public health problem, the fourth leading cause of "lost" years of life.[18] Those who commit suicide may do so to alleviate current misery, but there are several reasons to expect that this decision will often be shortsighted. First, misery, and pessimism about interventions to alleviate it, can be co-occurring symptoms of depression.[19] Second, cognitive psychology has established present-bias as a common cognitive error in evaluating choices.[20] Third, cognitive psychology has shown that we are more resilient than we suppose: where unhappiness is caused by a catastrophic event like a disabling accident, it is often surprisingly ephemeral, as we adjust our expectations to our circumstances.[21] Not only may individuals underestimate their own welfare loss from suicide in these ways, they may also undervalue the welfare loss to others who will grieve, or be deprived of their productive contributions. Since, on these assumptions, suicide is generally quite harmful, causing it is also generally harmful. Many social scientists believe that social influence, including media coverage of suicides, is a cause of

18. CTR.'S FOR DISEASE CONTROL AND PREVENTION, WISQARS YEARS OF POTENTIAL LIFE LOST (YPLL) REPORT, 1981 AND 2016 (last visited Sep. 6, 2018), https://webappa.cdc.gov/sasweb/ncipc/ypll.html (Change "Calculate YPLL before Age" to "85"; then click "Submit Request").

19. *See* Adam G. Horwitz et al., *Positive and Negative Expectations of Hopelessness as Longitudinal Predictors of Depression, Suicidal Ideation, and Suicidal Behavior in High-Risk Adolescents*, 47 SUICIDE & LIFE-THREATENING BEHAV. 168, 169 (2017); Regina Miranda et al., *Cognitive Content-Specificity in Future Expectancies: Role of Hopelessness and Intolerance of Uncertainty in Depression and GAD Symptoms*, 46 BEHAV. RES. & THERAPY 1151, 1151 (2008); Ryan Y. Hong et al., *The Role of Event-Specific Pessimistic Inferences in the Etiological Chain of Hopelessness Depression*, 41 PERSONALITY AND INDIVIDUAL DIFFERENCES 1119, 1119–29 (2006).

20. *See, e.g.*, David J. Hardisty et al., *Good or Bad, We Want it Now: Fixed-cost Present Bias for Gains and Losses Explains Magnitude Asymmetries in Intertemporal Choice*, 26 J. BEHAV. DECISION MAKING 348, 348–61 (2013).

21. *See generally* Philip Brickman et al., *Lottery Winners and Accident Victims: Is Happiness Relative?*, 36 J. OF PERSONALITY AND SOC. PSYCHOL. 8 (Aug. 1978).

suicide.[22] Speech encouraging suicide is, from a utilitarian standpoint, mistaken and therefore of little epistemic value.

Punishing encouragement of suicide is less appealing from a libertarian perspective. It is hard to imagine a choice more fundamental to autonomy than the decision to live or die.[23] We recognize health care choices as essential to liberty and treat individuals as presumptively competent to make them. Health law scholar Susan Stefan has observed that, as a society, we are more likely to accept the choice to die as rational in so far as the person so choosing is elderly, terminally ill, in physical pain, or disabled.[24] These tendencies are consistent with utilitarian reasoning. From a libertarian standpoint, however, individuals are under no obligation to measure the worth of their lives by their own or others' net happiness over time. Their autonomy includes freedom to choose and – constrained only by the liberty rights of others – pursue their own conception of the good. Literature is replete with admiring portrayals of those who choose death for love or honor.[25] Stefan argues that emotional anguish can be as unbearable and as disabling as physical pain.[26] As an advocate for the rights of the mentally ill, she argues that mental illness does not automatically deprive the sufferer of capacity to choose rationally, and that a patient can rationally conclude that medical treatment is powerless to sufficiently alleviate her suffering.[27] In short, suicide may serve a number of values that a competent autonomous agent should be free to choose. From a libertarian perspective,

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22. *See* Madelyn Gould et al., *Media Contagion and Suicide Among the Young*, 46 AM. BEHAV. SCIENTIST 1269, 1269–71 (2003); Keith Hawton & Kathryn Williams, *Influences of the Media on Suicide*, 325 BMJ 1374, 1374 (2002); *see generally* David D. Luxton et al., *Social Media and Suicide: A Public Health Perspective*, 102 AM. J. PUB. HEALTH S2, 195–200, (May 2012) (discussing the influence of the internet and social media on suicidal behavior and trends).

23. *See* Tom L. Beauchamp, *The Right to Die as the Triumph of Autonomy*, 31 J. OF MED. & PHIL. 643, 650–51 (2006); S. B. Chetwynd, *Right to Life, Right to Die and Assisted Suicide*, 21 J. OF APPLIED PHIL. 173, 173–82 (2004).

24. SUSAN STEFAN, RATIONAL SUICIDE, IRRATIONAL LAWS: EXAMINING CURRENT APPROACHES TO SUICIDE IN POLICY AND LAW, 212-13 (2016) ("The U.S. public (although not its mental health professionals) have accomplished a conceptual separation between 'rational' suicide of terminally ill (and more ominously, elderly or disabled) people, who are to be admired for their courage, and make the cover of *People* magazine, and the 'irrational' suicide of everyone else, with the extraordinarily misleading and incorrect statistic that 90% of people who commit suicide have some kind of mental illness.").

25. *See* JOHANN WOLFGANG VON GOETHE, THE SORROWS OF YOUNG WERTHER (1774); PLUTARCH, LIVES, VOLUME VIII: SERTORIUS AND EUMENES, PHOCION AND CATO THE YOUNGER (Jeffrey Henderson ed., Bernadotte Perrin trans, Harvard Univ. Press) (1919); WILLIAM STYRON, SOPHIE'S CHOICE, Random House Large Print (1979). There are at least thirteen suicides in Shakespeare's tragedies, of which seven are arguably portrayed as admirable. Larry R. Kirkland, *To End Itself by Death: Suicide in Shakespeare's Tragedies*, 92 SOUTHERN MED. J. 660, 660 (1999).

26. *See* STEFAN, *supra* note 24, at 91 ("The general public doesn't really understand how terrible this emotional pain can be. Recent brain studies have shown that the parts of the brain that are associated with suicidality are the same parts affected when people are raped or experience combat trauma, and not the same as those related to physical pain.").

27. *Id*. at 32 ("And yet, mental health professionals acknowledge that there are some—as many as a third of all patients—for whom no treatment works (or works long-term). For these people, their mental and emotional pain can be truly agonizing, robbing them of their sense of self and autonomy and independence as surely as many terminal illnesses.").

then, a competently chosen suicide is not an injury.[28] If so, neither assistance nor encouragement from another person can be said to injure the suicide victim unless it impairs his or her autonomy. This would arguably be true even of concrete assistance, like providing an otherwise lawful weapon. It would be even more true of the communication of information or values. We ordinarily think of such information as enhancing rather than diminishing the liberty of the hearer.[29] In addition, the speaker has a liberty interest in such speech. Where the forbidden conduct is speech, we might wish to be especially careful in defining it and ensuring it is harmful lest we chill the exercise of liberty.[30]

Inciting suicide brings the conflict between utilitarian and libertarian perspectives into focus because of suicide's dual character as both a tragic injury and a liberty enhancing choice, and the dual character of incitement as both causal influence on harmful conduct and as liberty enhancing speech. These conflicts will be apparent in our discussions of two doctrinal issues arising in inciting suicide cases: causation and complicity. Both causation and complicity involve the attribution of responsibility for a wrong to a particular actor.

Causation of death is a crucial element of homicide liability. Although homicide once required a physical blow causing death, causation is now the only conduct element.[31] Yet because causation does not require any particular kind of act, it is little more than a normative attribution of responsibility for a result. Accomplice liability attributes one person's offense to another who assists or encourages. Suicide was formerly a crime and one who assisted or encouraged suicide could therefore have been liable as an accomplice.[32] Today, when suicide is no longer a crime, statutory offenses of assisting suicide impose liability for death on the basis of a similar attribution of responsibility for another's act. As with causation, the decision as to what facilitating conduct and which encouraging words suffice to make another's conduct one's own, depends on a normative judgment.

The attribution of homicide liability for another's suicide requires us to choose between two competing conceptions of causation, one utilitarian and one libertarian. A utilitarian conception of causation holds the actor responsible for all probable consequences, while a libertarian conception holds each actor responsible only for his or her own voluntary act. The first makes the actor causally responsible for

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28. *See, e.g.*, THOMAS SZASZ, FATAL FREEDOM: THE ETHICS AND POLITICS OF SUICIDE (2002); *see also* MICHAEL CHOLBI, SUICIDE: THE PHILOSOPHICAL DIMENSIONS (2011) (arguing that suicide can be morally defensible if the decision to kill oneself is rationally made).

29. *See* Virginia v. Hicks, 539 U.S. 113, 119 (2003) ("[A]n overbroad law may deter or 'chill' constitutionally protected speech . . . Many persons . . . will choose simply to abstain from protected speech [citation omitted]—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas."); *see also* Hill v. Colorado, 530 U.S. 703, 716 (2000) ("The right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience.").

30. *See* Thornhill v. Alabama, 310 U.S. 88, 95–96 (1939).

31. *See infra* Part II.

32. *See infra* Part III.

any expected result to which his act was necessary. The second makes an act necessary to death a cause only if not superseded by the similarly necessary independent voluntary act of another. Incitement may cause death under the first conception of causation, where it will not under the second conception.

Similarly, whether we attribute liability for participating in suicide on the basis of encouragement depends on a choice between the goals of minimizing the danger of injury and protecting liberty. If we are primarily concerned with reducing harmful conduct, we have reason to punish those who advocate it. If we are primarily concerned with protecting liberty, we have reason to permit self-harm and dangerous speech. American law leans one way in conditioning complicity generally on mere encouragement, but leans the other in requiring concrete assistance for criminal participation in suicide.

Our analysis proceeds in three parts. Part I recounts the Carter case and distills the doctrinal puzzles it provokes, especially concerning causation and complicity. We find that a libertarian approach to causation suggests absolving Carter, while a utilitarian approach would justify punishing Carter, and perhaps quite harshly. The case's outcome—punishing Carter for involuntary manslaughter rather than murder—reveals a puzzling compromise between these two views. Additional perplexities arise when Carter's conduct is viewed as complicity in Roy's suicide. The decision to charge Carter with involuntary manslaughter may reflect the libertarian intuition that complicity in voluntary suicide is less wrongful than complicity in homicide. But the all-or-nothing quality of causation and complicity in American law makes it difficult to accommodate our conflicting normative intuitions about suicide openly.

Part II explicates the criminal law of causation, showing how it has been subject to two competing standards. One imposes causal responsibility for results of an unlawful act not followed by an intervening voluntary action. The other imposes causal responsibility for the foreseeable consequences of a culpable act. The former standard reflects libertarian values, whereas the latter reflects utilitarian values. Over time, utilitarian inspired foreseeability standards have become dominant in American criminal law doctrine. Yet homicide liability for aiding foreseeable suicide has been rare, while Carter's liability for encouraging foreseeable suicide is unprecedented. In short, causing suicide remains a libertarian island within a utilitarian sea. This reluctance to ascribe causal responsibility for suicide is also reflected in the prevalence of legislation defining assistance of suicide as a distinct and lesser offense.

Part III examines these laws punishing assisting suicide and compares them to prevailing doctrines assigning complicity in another's crime. It observes that only a minority of these statutes punish mere encouragement of suicide, and that courts have resisted imposing such liability. It argues that assisting suicide statutes are best viewed as criminalizing complicity in a partially justified and partially excused suicide. Although voluntary suicide is discouraged as wrongful, this wrongfulness is mitigated by the victim's exercise of autonomy. The choice to

ascribe responsibility for another's suicide on the basis of complicity rather than causation, the choice to partially justify suicide by mitigating liability for aiding it, and the choice to punish only aid rather than persuasive speech, all reflect a libertarian view of suicide as an exercise of autonomy. Nevertheless, in continuing to punish assisting suicide rather than fully justifying it, assisting suicide laws also serve the utilitarian aim of reducing suicide. By combining libertarian and utilitarian values, these laws achieve a result similar to that reached in the Carter case: punishing participation in suicide, but less than participation in homicide.

I. THE MICHELLE CARTER CASE: FACTS AND PUZZLES

A. Michelle Carter Case: Facts

On June 16, 2017, Michelle Carter was convicted of manslaughter by a Massachusetts juvenile court, for encouraging the July 2014 suicide of Conrad Roy by text message.[33]

Roy and Carter met on family vacations in 2012 when he was 16 and she was 15.[34] They lived about thirty-five miles apart, and communicated electronically extensively over the next two and a half years.[35] Although Carter referred to Roy as her boyfriend at the time of his death, they had seen each other in person very few times.[36] Both were treated for depression.[37] Roy attempted suicide by overdosing on acetaminophen in October of 2012.[38] A female friend in whom he confided alerted his family that he was ill.[39]

In 2012 and again in July 2014, Roy expressed the desire to kill himself and Carter repeatedly urged him not to, but instead to seek help.[40] In June of 2014, Carter wrote to a friend:

> "Hes [sic] suicidal and has severe depression and social anxiety which is the bad part but I'm the only one he has and he needs me. I mean it's not helping that I'm kinda going thru my own stuff but if I leave him he will probably kill himself and it would be all my fault. I'm keeping him alive basically."[41]

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33. Commonwealth v. Carter, 52 N.E.3d 1054, 1064-65 (Mass. 2016).

34. *See* Erin Moriarty, *Death by Text: The Case Against Michelle Carter*, CBS NEWS, (June 16, 2017), https://www.cbsnews.com/news/death-by-text-the-case-against-michelle-carter/.

35. *Id.* ("But, while Michelle called Conrad her boyfriend, his family says the two rarely saw each other, and, like so many teens, their interactions were mostly over text messages.").

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. Nik DeCosta-Klipa, *Read the Facebook messages between Michelle Carter and Conrad Roy after his first suicide attempt "Are you sure you want to do this?,"* BOSTON.COM (June 12, 2017), https://www.boston.com/news/local-news/2017/06/12/read-the-facebook-messages-between-michelle-carter-and-conrad-roy-after-his-first-suicide-attempt.

41. Katharine Q. Seelye & Jess Bidgood, *Trial Over Suicide and Texting Lays Bare Pain of 2 Teenagers*, N.Y. TIMES (June 12, 2017), https://www.nytimes.com/2017/06/12/us/suicide-texting-manslaughter-teenagers.html.

In July of 2014, however, Carter – then 17 – abandoned her efforts to talk Roy out of suicide. She accepted Roy's desire to kill himself, and urged him to make concrete plans and carry them out.[42] When Roy expressed doubts about the reliability of using exhaust fumes from a vehicle, Carter recommended other methods of suicide, and suggested that he research methods of manufacturing carbon monoxide on the internet.[43] He did so, developed plan of buying and running a generator inside his enclosed truck cab,[44] and ultimately used a water pump.[45] In the days leading up to Roy's suicide, Carter repeatedly asked him when he was going to carry out his plan, complained that he kept putting it off, said he "need[ed]" to do it, threatened that she would seek counseling for him if he did not proceed to kill himself (he professed not to want this), and urged him not to "break a promise."[46] When he hesitated and expressed concern for the grief his act would cause his family, Carter assured him that his family members would accept his act, and promised to provide them emotional support.[47]

On the evening of July 12, Roy drove to a Kmart parking lot, ran the water pump inside his truck, and poisoned himself with carbon monoxide.[48] Carter talked to him twice on the phone that evening and later described those conversations in text messages with another friend as follows:

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42. Nik DeCosta-Klipa, *Read the text messages at the heart of the Michelle Carter trial*, BOSTON.COM (June 5, 2017), https://www.boston.com/news/local-news/2017/06/05/read-the-messages-at-the-heart-of-the-michelle-carter-suicide-by-text-manslaughter-trial ("Carter: 'Yeah, it will work. If you emit 3200 ppm of it for five or ten minutes you will die within a half hour. You lose consciousness with no pain. You just fall asleep and die. You can also just take a hose and run that from the exhaust pipe to the rear window in your car and seal it with duct tape and shirts, so it can't escape. You will die within, like, 20 or 30 minutes all pain free.'").

43. *Id*. ("Carter: 'Oh, okay. Well I would do the CO. That honestly is the best way and I know it's hard to find a tank so if you could use another car or something, then do that. But next I'd try the bag or hanging. Hanging is painless and takes like a second if you do it right.'").

44. *See* Michelle Williams, *Michelle Carter trial: In days before Conrad Roy's death, teens shared suicidal plan, selfies*, MASS LIVE (updated June 9, 2017), http://www.masslive.com/news/index.ssf/2017/06/michelle_carter_trial_in_days.html ("Included with her selfie, Carter asked, 'Did you get it?' Roy responded with a photo of a portable generator. Roy took the photo of the generator sitting on the seat of his car.").

45. *See* Lindsey Bever, *Michelle Carter, who urged her boyfriend to commit suicide, found guilty in his death*, WASH. POST (June 16, 2017), https://www.washingtonpost.com/news/true-crime/wp/2017/06/16/shes-accused-of-pushing-him-to-suicide-now-a-judge-has-decided-her-fate/?utm_term=.8371ed80fa69 ("[H]e used a gas-powered water pump to commit suicide.").

46. DeCosta-Klipa, *supra* note 3. ("Carter: 'You just need to do it Conrad.'
Roy: 'Okay I'm gonna do it today.'
Carter: 'You promise?'
Roy: 'I promise, babe. I have to now.'
Carter: 'Like right now?'
Roy: 'Where do I go?'
Carter: 'And you can't break a promise. And just go in a quiet parking lot or something.'").

47. *Id*. ("Carter: 'Everyone will be sad for a while but they will get over it and move on. They won't be in depression. I won't let that happen. They know how sad you are, and they know that you are doing this to be happy and I think they will understand and accept it. They will always carry you in their hearts.'").

48. "In the summer of 2014, 18-year-old Conrad Roy drove to a deserted Kmart parking lot in Fairhaven, Massachusetts with a gasoline-operated water pump sitting on the back seat of his truck." Williams, *supra* note 44.

> [His] death is my fault like honestly I could have stopped him I was on the phone with him and he got out of the [truck] because it was working and he got scared and I f– told him to get back in Sam because I knew he would do it all over again the next day and I couldnt [sic] have him live the way he was living anymore I couldnt [sic] do it I wouldnt [sic] let him.[49]

She also wrote,"I helped ease him into it and told him it was okay . . . I could've easily stopped him or called the police but I didn't."[50]

Examination of Roy's phone prompted a police investigation of Carter. She texted a friend, "[If the police] read my messages with him I'm done. His family will hate me and I can go to jail."[51] Yet this was by no means obvious. Like other American jurisdictions, Massachusetts does not criminalize suicide.[52] Accordingly, Carter could not have been liable as an accomplice or co-conspirator in a crime committed by Roy. Like most American jurisdictions, Massachusetts also has no statute defining incitement to commit suicide as a criminal offense.[53] Moreover, unlike most American jurisdictions, Massachusetts lacks any statute defining assisting suicide as an offense.[54] Accordingly, the only way Carter could go to jail for her conduct would be for a homicide offense, which would require proof that she caused Roy's death. Alternatively, failing such proof, she might have been convicted of attempted homicide, if she were found to have intended death.

On February 16, 2015, Carter was indicted for manslaughteras a "youthful offender."[55] Massachusetts law provides for criminal trial of offenders over 14 charged with crimes subject to a penalty of incarceration and involving the threat or infliction of bodily harm.[56] Manslaughter is left undefined in the Massachusetts statute criminalizing it.[57] Its elements, as defined in common law decisions, are "wanton and reckless conduct" causing death.[58] Recklessness is defined in an

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49. *See* Dan Glaun, *'Honestly I could have stopped him;' Friend of Michelle Carter testifies about texts received after suicide of Conrad Roy*, MASS LIVE, (June 16, 2017, 11:57 AM), http://www.masslive.com/news/index.ssf/2017/06/michelle_carter_trial.

50. Kristine Phillips, *Her texts pushed him to suicide, prosecutors say. But does that mean she killed him?*, WASH. POST (June 6, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/06/06/just-do-it-babe-woman-accused-of-pushing-her-boyfriend-to-kill-himself-is-on-trial-this-week/?.

51. Abby Phillip, *'I can go to jail': Michelle Carter's text to friend about Conrad Roy suicide messages*, SYDNEY MORNING HERALD, (September 1, 2015, 9:07 AAM), http://www.smh.com.au/world/i-can-go-to-jail-michelle-carters-text-to-friend-about-conrad-roy-suicide-messages-20150831-gjc5nj.html.

52. ACLU of Massachusetts Statement on Michelle Carter Guilty Verdict, ACLU, (June 16, 2017), https://www.aclum.org/en/press-releases/aclu-massachusetts-statement-michelle-carter-guilty-verdict ("There is no law in Massachusetts making it a crime to encourage someone, or even to persuade someone, to commit suicide).

53. *Id.*

54. Kligler v. Healy, 34 Mass. L. Rptr. 239 1, 5 (Super. Ct. 2017) ("In contrast to the majority of states, Massachusetts has not expressed a public policy against assisted suicide by enacting a statute imposing criminal liability on one who assists another in committing that act.").

55. *See* Commonwealth v. Carter, 52 N.E.3d 1054, 1059 (Mass. 2016).

56. MASS. GEN. LAWS ANN. ch. 119, § 52 (West 2018).

57. MASS. GEN. LAWS ANN. ch. 265, § 13 (West 2018).

58. *See* Commonwealth v. Welansky, 316 Mass. 383, 401 (1944).

unusual way in Massachusetts law, requiring not subjective foresight of a substantial risk of death, but objective foreseeability of a very substantial risk of death.[59] Causation is also defined by common law decision, and requires that conduct be the "efficient cause" "without which the result would not have occurred" and that it be the "proximate cause" producing the result in a "natural and continuous sequence."[60]

Carter moved to dismiss the indictment on the grounds that there was no probable cause to believe that Carter had caused Roy's death or inflicted bodily harm upon him.[61] Carter argued that Roy freely chose to kill himself and carried out all the necessary actions without any assistance from Carter.[62] Roy had attemptedto kill himself years before Carter's texts encouraging him to do so.[63] She added that she engaged only in speech, not conduct, and inflicted no injury upon him.[64] The trial court upheld the indictment, a decision then affirmed by the Massachusetts Supreme Judicial Court.[65] In doing so, the Court was not obliged to find beyond a reasonable doubt that Carter caused Roy's death, only that there was probable cause to think he did.

Regarding culpability, the Supreme Judicial Court found that Carter's alleged speech acts probably satisfied the requirement of recklessness, because a reasonable person would have realized that they could have influenced Roy to kill himself.[66] Indeed, the Court observed, Carter's statements indicated that it was her purpose that he kill himself, thus satisfying the more culpable mental state of intent to kill required for murder.[67]

Regarding causation, the Court reached four conclusions. First, whether or not Roy would have killed himself at some other time without Carter's

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59. *See id.*

60. *See* Commonwealth v. Rhoades, 379 Mass. 810, 825 (1980).

61. Commonwealth v. Carter, 52 N.E.3d 1054, 1056 (Mass. 2016) ("The defendant moved in Juvenile Court to dismiss the youthful offender indictment, arguing that the Commonwealth failed to present the grand jury with sufficient evidence of involuntary manslaughter and that the defendant's conduct did not involve the infliction or threat of serious bodily harm. The motion was denied.").

62. *Id.* at 1061 ("The defendant argues that, because she neither was physically present when the victim killed himself nor provided the victim with the instrument with which he killed himself, she did not cause his death by wanton or reckless conduct.").

63. *Id.* at 1056 ("In 2013, the victim attempted to commit suicide by overdosing on acetaminophen.").

64. *Id.* at 1061632–33 ("She maintains that verbally encouraging someone to commit suicide, no matter how forcefully, cannot constitute wanton or reckless conduct.").

65. *Id.* at 1065.

66. *Id.* at 1063 ("The grand jury could have found that an ordinary person under the circumstances would have realized the gravity of the danger posed by telling the victim, who was mentally fragile, predisposed to suicidal inclinations, and in the process of killing himself, to get back in a truck filling with carbon monoxide and 'just do it.'").

67. *Id.* at 1064 ("These situations are easily distinguishable from the present case, in which the grand jury heard evidence suggesting a systematic campaign of coercion on which the virtually present defendant embarked — captured and preserved through her text messages — that targeted the equivocating young victim's insecurities and acted to subvert his willpower in favor of her own. On the specific facts of this case, there was sufficient evidence to support a probable cause finding that the defendant's command to the victim in the final moments of his life to follow through on his suicide attempt was a direct, causal link to his death.").

encouragement, he likely would not have done so when he did. In particular, her statement that he had left the vehicle and only returned after she told him to, and that she could have stopped him, indicated that he returned to the vehicle because she told him to.[68]

Second, Roy was not an independent intervening voluntary actor because (like Carter) he was immature and depressed and Carter knew this.[69]

Third, the Court held, there is no requirement in Massachusetts that death be caused by a physical act.[70] The Court relied on two well-known prior cases. In *Commonwealth v. Atencio*, two defendants who played Russian Roulette were held liable for the death of a third who shot himself in the head after the other two took their turns.[71] Although Marshall handed the gun to Atencio, who handed the victim the gun, the Court reasoned that this assistance was irrelevant and that it was not necessary that the defendants suggest or propose the suicidal act as long as they cooperated in it (each fired the gun at himself before the victim did) or agreed to do so (they would have been liable even if the victim's fatal turn had been the first, because there was "mutual encouragement").[72] In *Commonwealth v. Persampieri*, the defendant's wife – who was mentally instable and had previously attempted suicide – threatened suicide.[73] Persampieri thereupon loaded the gun, handed it to her, pointed out the safety was off, and showed her how she could reach the trigger.[74] Of course, as her husband he arguably had a legal duty to prevent death, whereas Carter's texting romance with Roy established no such duty.[75]

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68. *Id*. at 1063 n.16 ("The defendant admitted to Boardman: 'I helped ease him into it and told him it was okay, I was talking to him on the phone when he did it I could have easily stopped him or called the police but I didn't.'").

69. *See id*. at 1063 ("Because there was evidence that the defendant's actions overbore the victim's willpower, there was probable cause to believe that the victim's return to the truck after the defendant told him to do so was not 'an independent or intervening act' that, as a matter of law, would preclude his action from being imputable to her."); *see also* Commonwealth v. Atencio, 189 N.E.2d 223, 224 (Mass. 1963); Commonwealth v. Persampieri, 343 Mass. 19 (1961).

70. *Carter*, 52 N.E.3d at 1061. ("We have never required in the return of an indictment for involuntary manslaughter that a defendant commit a physical act in perpetrating a victim's death.").

71. *See Atencio*, 189 N.E.2d at 224.

72. *Carter*, 52 N.E.3d at 1062. ("Indeed, had the deceased been the first to participate in the 'game,' and killed himself before either Atencio or Marshall touched the gun, his acts would still have been imputable to the defendants. It was, instead, the atmosphere created in the decision to play the 'game' that caused the deceased to shoot himself, as there was 'mutual encouragement' to participate.").

73. Commonwealth v. Persampieri, 175 N.E.2d 387, 389-90 (Mass. 1961).

74. *See Carter*, 52 N.E.3d at 1062 ("In Persampieri . . . the jury were warranted in returning a verdict of involuntary manslaughter based on the theory of wanton or reckless conduct, noting that the defendant, "instead of trying to bring [the victim] to her senses, taunted her, told her where the gun was, loaded it for her, saw that the safety was off, and told her the means by which she could pull the trigger.") (citation omitted).

75. *See, e.g*., Commonwealth v. Levesque, 766 N.E.2d 50, 56 (Mass. 2002); *see also* People v. Beardsley, 13 N.W. 1128 (Mich. 1907) (liability for causation of death by omission requires a legal duty to act affirmatively to prevent death, such as that imposed by family relationship); Jones v. U.S., 308 F. 2d 307, 310 (D.C. Cir. 1962).

However, fourth, like the defendants in *Commonwealth v. Levesque*[76] – who were charged with the manslaughter of firefighters after negligently starting a fire and then failing to report it – Carter had an affirmative duty to prevent Roy's death because she had recklessly created a danger that he would kill himself.[77] She admitted that she could have prevented his death by talking him out of it or calling the police and failed to do so.[78] This combination of a legal duty to prevent harm, an available prophylactic strategy, and an omission to use it, suffices for causation by omission.[79]

Carter was convicted in a bench trial and sentenced to serve fifteen months with another fifteen months suspended during a five-year probation.[80] In announcing the judgment of conviction, the trial judge found that Carter had created a danger to Roy by admonishing him to return to the truck, creating a duty to prevent Roy's death analogous to the duty created in *Commonwealth v. Levesque*.[81] The court found that Carter then caused Roy's death wantonly and recklessly by omitting to dissuade him from killing himself while also omitting to contact his family or police.[82] The trial judge added that the possibility that Roy might have killed himself at a later time was immaterial and, although acknowledging "the law was different in those days," recalled the 1816 case of *Commonwealth v. Bowen*, in which one prisoner had been charged as an accomplice in the suicide of a condemned prisoner, although he was condemned to be a hung a few hours later.[83]

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76. *Levesque*, 766 N.E.2d at 59 ("The Commonwealth has presented sufficient evidence to allow a grand jury to conclude that the defendants' choice not to report the fire was intentional and reckless . . . . [T]hey possessed a cellular telephone and passed several open stores after their exit from the warehouse, thus allowing the grand jury to infer that the defendants had multiple opportunities and the means to call for help if they chose to do so.").

77. *See Carter*, 52 N.E.3d 1054, 1063.

78. *See supra* text accompanying note 49*; see also Carter*, 52 N.E.3d at 1059.

79. *See, e.g.*, WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 26 at 183 (1972).

80. Crimesider Staff, *Texting Suicide Case: Michelle Carter Sentenced to Serve at Least 15 Months*, CBS NEWS (Aug. 3, 2017, 2:07 PM), https://www.cbsnews.com/news/texting-suicide-case-michelle-carter-sentencing-hearing/ ("A judge sentenced Michelle Carter to 2½-years in jail, but ruled she would be eligible for probation after 15 months and suspended the rest of her sentence until 2022. He also sentenced her to five years of probation.").

81. *See* Steven L. Sheppard, *Michelle Carter Trial: Transcription of Verdict*, SCRIBD (Dec. 10, 2017), https://www.scribd.com/document/366775455/Michelle-Carter-Trial-Transcription-of-verdict; *see also* LadyJustice2188, *Michelle Carter Trial – Verdict*, YOUTUBE (Jun. 16, 2017), https://www.youtube.com/watch?v=A4i6bGFfQ9E (video recording of entire sentencing colloquy).

82. *See id.*

83. *Id.* (quoting Commonwealth v. Bowen, 13 Mass. 356 (1816)). Bowen advised the deceased, Jewett to kill himself, but was charged with participating in the self-murder as an accomplice, not for causing it. Thus the court instructed the jury that "[t]he government is not bound to prove that Jewett would not have hung himself, had Bowen's counsel never reached his ear. The very act of advising to the commission of a crime is of itself unlawful." *Bowen*, 13 Mass. at 358–360. However, "[t]he jury found the prisoner not guilty; probably from a doubt whether the advice given him was, in any measure, the procuring cause of *Jewett's* death." *Id.* at 360–61. *See also* Jack Tager, *"Murder by Counseling": The 1816 Case of George Bowen (Northanmpton)*, HIST. J. OF MASS., Fall 2010, at 102, 104 (explaining that jury found Bowen not guilty likely because prosecution did not prove beyond a reasonable doubt that the deceased committed suicide solely because of Bowen's advice).

B. Michelle Carter Case: Doctrinal Puzzles

The *Carter* case is puzzling on many levels. Intuitively, Michelle Carter's role in bringing about Conrad Roy's suicide seems worthy of condemnation. Some punishment appears warranted. But if Conrad Roy killed himself, how can Michelle Carter be said to have killed him? Even if we conclude that Carter did kill Roy, what kind of homicide should she be held liable for? While the Court convicted her of manslaughter, her conduct does not appear to fit the offense elements of this crime. Manslaughter in Massachusetts is defined as the reckless or negligent killing of a human being.[84] In turn, murder is defined as the intentional killing of a human being.[85] Assuming that Carter killed Roy, it seems that she was not merely careless of a risk that he would die, but intended that result. But if she intended death, why did the prosecutor charge her with unintentional homicide, and why did the judge sentence her to only fifteen months in custody? In what follows, we flesh out in more detail these conceptual puzzles.

1. Utilitarian vs. Libertarian Accounts of Causation

Carter's lawyer argued that her client should not be liable for homicide because her conduct did not legally cause the death of Roy.[86] More specifically, she argued that Roy's voluntary decision to commit suicide amounted to an intervening and superseding cause that severed the link between Carter's acts and Roy's death.[87] The district attorney disagreed, contending that Carter's acts were a legal cause of Roy's death because "a person should reasonably foresee that death from carbon monoxide" may result under these circumstances.[88]

These arguments pit two competing conceptions of causation against each other. The defense offered a *libertarian* account that privileges autonomy over prevention of knowable risks. In treating Roy's decision to commit suicide as a superseding cause, we recognize Roy as an autonomous actor who made a choice, for which he – and not Carter – is primarily responsible. On the other hand, the prosecution offered a *utilitarian* view of causation that prioritizes management of risk over the autonomy of the actors involved. By holding Carter liable for Roy's death, we deter future actors from encouraging suicide in order to reduce the number of suicides.

The tension between these views manifests itself not only in the Carter case, but also in the broader context of the criminalization a and grading decisions regarding inciting suicide. Criminalization of inciting suicide is suspect under the libertarian view, since respect for autonomy encompasses decisions about whether and how

84. *See* Commonwealth v. Welansky, 316 Mass. 383, 396–401 (1944).

85. MASS. ANN. LAWS ch. 265, § 2 (West 2018).

86. Commonwealth v. Carter, 52 N.E.3d 1054, 1056 (Mass. 2016).

87. *Id.*

88. Commonwealth's Response to Defendant's Motion to Dismiss at 35–36, Commonwealth v. Carter, 52 N.E.3d 1054 (Mass. 2016).

to end one's life. Punishing speech is also suspect in the libertarian view since speech is an exercise of the speaker's liberty that also – unless coercive or deceptive – enhances rather than diminishes the choice of a competent hearer. Even where a factfinder concludes that a speaker wrongly coerced, deceived or exploited the incapacity of a suicide victim, the libertarian may worry that excessive punishment will chill the exercise of liberty in other cases. If there is discretion to punish severely, the libertarian may worry it will be misused to punish unpopular opinion or minority religious views. In contrast, punishing inciting suicide is less problematic under the utilitarian view. If suicide causes a net reduction of utility, then punishing its incitement would follow naturally from this view. In the context of grading, the utilitarian view would lead to considerable punishment if the risk of suicide and its incitement is significant enough to outweigh the costs of increased punishment. At least in principle, then, the utilitarian view would pose no barrier to punishing inciting suicide as homicide, and even murder.

Returning to the Carter case, whether she should be punished at all, and if so, how much, would seem to depend at least in part on the view of causation that one adopts. A libertarian view would suggest acquitting Carter. In contrast, the utilitarian view could justify punishing Carter, and possibly quite severely. Carter was charged and convicted of involuntary manslaughter, even though she could have been charged and convicted of murder. While intuitively plausible, this outcome seems to cherry pick features of both the libertarian and utilitarian conceptions of criminality. By holding Carter causally responsible for death despite Roy's intervening decision to commit suicide, the outcome signals adherence to the utilitarian view that imposes punishment to control the risks inherent in suicide and its incitement. But by charging and punishing for reckless manslaughter instead of intentional murder, the outcome seems deferential to the libertarian views that speech cannot cause choice and that consensual injury is no harm.

2. All or Nothing vs. Comparative Accounts of Causation

The most natural way of describing what happened in the Carter case is that Conrad Roy killed himself and Michelle Carter encouraged him to do so. Roy was the one who first proposed killing himself and he was the one who acquired the weapon and finally used it to poison himself. As such, he bears some responsibility for bringing about his own death. Yet this does not mean that Carter is free from blame. While Roy was already inclined to commit suicide prior to Carter's encouragement, her support seemed to firm up Roy's commitment to act. The most glaring example of Michelle Carter's part in bringing about Roy's death was when she told Roy to get back into his truck after he expressed second thoughts about committing suicide.[89] It is conceivable – though hardly certain – that Roy would otherwise have failed to complete his planned suicide. One can imagine an alternative

89. *See supra* text accompanying note 49.

universe in which Roy survived to enjoy his natural lifespan because Carter spoke differently, or not at all. We can also imagine intermediate possibilities, in which, absent Carter's speech, Roy continues his struggle with depression, only to succumb to suicide at some later time.

If Roy's death is best explained by reference to both his own desire to commit suicide and Carter's encouragement of his suicide, it is sensible to allocate some amount of blame for the death to both Roy and Carter. Readers may divide the blame equally, or in some other proportion. Our purpose is not to decide the exact percentage of blame that should be assigned to each party, but to highlight that both Roy and Carter seem partially responsible for Roy's death. If so, it may seem that Carter merits some liability, but less than she would if she bore all the responsibility for the death.

Yet American criminal law doctrine is ill-equipped to accommodate the intuition that two or more actors are partially responsible for bringing about legally relevant harm. The most obvious place to accommodate this intuition is in the criminal law's doctrine of causation. We discuss causation in the criminal law in more depth in Part II.[90] For present purposes, however, it suffices to point out that American criminal law views causation as all-or-nothing. That is, if the defendant's conduct is found to be a legal cause of the resulting harm, then defendant is fully liable for the harm that ensued. If not, then the defendant may not be held liable for the resulting harm. Say that A, with intent to kill, stabs B, inflicting serious bodily injury. As B is rushed to the hospital, the ambulance collides with a vehicle. B dies in the car accident. Given that A intended to kill B and that B died, A is charged with murdering B. Defense counsel argues that A is not liable for murder because B's death was legally caused by the ambulance driver's careless driving, causing the accident that eventuated in B's death. More specifically, A contends that the car accident amounted to an intervening and superseding cause that severs the causal link between his conduct and B's death and so absolves him of responsibility.[91] While courts can go either way in scenarios like these, what matters for our purposes is that if they conclude that the car accident is a superseding cause, A cannot be held liable for homicide at all. In contrast, if they conclude that the car accident is not a superseding cause, then A is fully and solely liable for the death. There is, therefore, no room for partial causation in the criminal law.

Things do not need to be this way. It is perfectly coherent to argue that B's death is a product of both A's stabbing and the ambulance driver's careless conduct. As such, blame for B's death could be shouldered both by A and by the ambulance driver, assuming that he piloted the ambulance negligently or recklessly. In terms of punishment, A's liability could be mitigated in a way that is proportional to the ambulance driver's blame for bringing about the harm. This is the approach often taken by modern tort law, which, pursuant to the doctrine of comparative

90. *See infra* Part II.

91. On intervening and superseding causes, *see infra* Part II.

responsibility or fault, reduces the damages owed by the defendant in proportion to the degree of blame that the plaintiff and/or third-parties had for bringing about the harm.[92] By contrast, the criminal law does not allow for such a result.[93]

This comparison reveals that the criminal law attributes causal responsibility in what we can call "unitary" fashion. Attribution of responsibility via the criminal law doctrine of causation can be described as "unitary" because it presupposes that responsibility cannot be fractured or apportioned between defendant and victim. On the other hand, tort law approaches attributions of responsibility in what we can call "fractional" fashion. Pursuant to this approach, attribution of responsibility can be divided amongst all of the parties that contributed to bringing about the harm, including the victim.[94] The result is a system in which the damages owed to the plaintiff-victim will decrease as the plaintiff-victim's contribution to the harm increases. If the plaintiff's contribution is impactful enough, it may fully negate compensation. But in most cases the plaintiff's contribution to her own harm simply diminishes the damages to be paid by the defendant.

The unitary approach to causation in the criminal law and the fractional approach to comparative liability in tort law stand in contrast with what we call the "multiple" liability approach of the criminal law's complicity doctrine. This approach authorizes holding *multiple* actors *fully* liable for helping the perpetrator engage in criminal wrongdoing. Unlike the criminal law doctrine of causation, an accomplice may be punished even when his contribution to bringing about the harm is not causal. As a result, the accomplice is held fully liable even if the outcome would have taken place without the accomplice's assistance. The criminal law doctrine of complicity is also unlike the fractional approach to responsibility of tort law. While tort law often divides responsibility amongst the different actors who contribute to the outcome in a way that is proportional to their level of fault, complicity simply holds all accomplices and perpetrators fully liable without attempting to match the liability imposed with the degree in which the different actors contributed to the wrongdoing.

Returning to the Carter case, Roy's voluntary decision to commit suicide may be viewed as a superseding cause under the criminal law's causation doctrine. If so, then the link between Carter's conduct and Roy's death would be severed, with the result that Carter would be fully acquitted of homicide. If, however, Roy's conduct is not viewed as a superseding cause, then Carter is held to be fully responsible for his death, and, therefore, liable for homicide.

What if we analyze Carter's encouragement as establishing her complicity in Roy's suicide? This thought experiment requires us to imagine that suicide is a

92. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS (APPORTIONMENT OF LIABILITY), § 1 (AM. LAW. INST. 2000).

93. *See infra* Part II. *But see* VERA BERGELSON, VICTIMS' RIGHTS AND VICTIMS' WRONGS: COMPARATIVE LIABILITY IN CRIMINAL LAW (2009) (arguing that a criminal defendant's liability should often be reduced in proportion to the victim's degree of responsibility for having brought about her own harm).

94. *See* RESTATEMENT (THIRD) OF TORTS (APPORTIONMENT OF LIABILITY), § 1 (AM. LAW. INST. 2000).

criminal offense. If so, Carter's encouragement of Roy's suicide would arguably make her complicit in his offense. Yet Roy's agency in committing a criminal offense would neither preclude nor reduce an accomplice's liability for the same offense.[95] Since the complicity doctrine punishes accomplices as severely as perpetrators even when the accomplice's contribution is not causal, Carter could, in principle, be punished as severely as if she had actually killed Roy.

Criminal law thus allows no middle ground in which Carter's liability can be mitigated in a way that is proportional to Roy's contribution to bringing about his own death. From the perspective of criminal law's causation requirement, either Roy's decision to commit suicide fully absolves Carter of liability for his death, or it is deemed legally irrelevant.[96] From the perspective of complicity, Roy's responsibility for causing his own death would not reduce Carter's liability for helping or encouraging him to do so.[97]

The all-or-nothing nature of the criminal law's standards of causation and complicity allow us to better understand the dilemma faced by both the prosecutor and the sentencing judge in the Carter case. On the one hand, Carter's involvement in Roy's death seemed significant enough to warrant formal condemnation and the imposition of at least some criminal sanctions. On the other hand, Roy also appears to bear some responsibility for bringing about his own demise. If so, it is plausible to argue that Carter's punishment should be mitigated in a way that is roughly proportional to the degree of Roy's involvement in causing his own death. Nevertheless, in light of the criminal law doctrines of causation and complicity, the trial court cannot invoke Roy's contribution as a source of (partial) mitigation. Instead, it must hold either that Roy's contribution fully absolves Carter of criminal liability for his death, or that his conduct is entirely irrelevant to assessing her liability. Both alternatives are problematic. Holding Carter fully liable for Roy's death ignores the import of Roy's contributions to his own demise. But completely acquitting her disregards her blameworthy participation in the acts leading up to Roy's suicide.

The all-or-nothing approach to causation and complicity also impedes reconciliation of the competing utilitarian and libertarian considerations that confront us in cases of assisting or inciting suicide. If the criminal law adopted a fractional approach to allocating responsibility, we could accommodate these two views by treating an actor's autonomous decision to commit suicide as mitigating, without fully eliminating, an aider's or inciter's responsibility for the resulting death.

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95. This assumes that suicide is viewed as unjustified and, therefore, wrongful. If, however, suicide is viewed as justified, then complicity in the suicide ought to be viewed as justified as well. For more on these distinctions, *see* Part III, Subsection C of this Article.

96. To clarify, if Roy's decision to commit suicide is not considered a superseding cause, then his conduct is legally irrelevant at the liability stage. That is, the conduct is irrelevant for determining (1) whether Carter committed homicide, and, if so, (2) what kind of homicide she committed. Roy's conduct could, however, be relevant at the sentencing stage.

97. Once more, this assumes that suicide is wrongful.

Nevertheless, since causation and complicity are all-or-nothing, courts cannot invoke partial causation or complicity in a partial wrong as a way of reducing punishment in these cases. Instead, they may try to achieve mitigation by finding that aid or encouragement was furnished with a less blameworthy mens rea than it actually was – thereby arguably doing "the right deed for the wrong reason."[98]

3. Assisting Suicide as Complicity in Someone Else's Suicide

As we explain in Part III, suicide at common law was considered a punishable form of self-homicide. Consequently, inciting suicide could be punished as complicity in someone else's self-homicide. Although the modern trend is to criminalize assisting suicide as a separate crime, the language of complicity still finds its way into contemporary assisting suicide statutes. One way of squaring these modern statutes with the older common law view of aiding or encouraging suicide as complicity in a crime is to think about aiding or encouraging suicide as a kind of complicity in someone else's wrongful but excused suicide. The idea is that while suicide itself remains wrongful, the law personally exempts the actor from liability either because she cannot be deterred or because it would be cruel to punish her. This personal exemption, however, would not extend to those who aid or encourage the suicide, given that they could typically be deterred by the criminal sanction and punishing them for contributing to the death of another would not be manifestly cruel. Instead of wasting resources prosecuting and excusing every single person who attempts to commit suicide, modern statutes exempt them as a class, while leaving punishment of assistance and incitement of suicide in place.

Massachusetts has no assisted suicide statute. But if we think of Roy's suicide as an excused homicide, we have reason to convict Carter of homicide. Carter's encouragement of the suicide should not benefit from Roy's excuse. Instead, application of standard complicity principles would lead to holding Carter liable as an accomplice to homicide, unless she can show that she should also be acquitted because of mental illness or some other excusing condition.

But if Roy killed himself purposely, why would Carter's purposeful encouragement of the killing give rise to liability only for involuntary manslaughter rather than liability for purposeful murder? A libertarian answer is that Roy's suicide is not entirely wrongful – that it is partially *justified* as an exercise of self-determination and autonomy. Because this would diminish the wrongfulness of the suicide itself, it would mitigate the wrongfulness of Carter's complicity in it. The problem is that the prosecution and trial judge did not have doctrinal categories at hand that allowed for making these distinctions. Nevertheless, the prosecution's decision to charge Carter with involuntary manslaughter rather than murder and the judge's decision to convict for this lesser offense could reflect an inchoate

98. T.S. ELIOT, MURDER IN THE CATHEDRAL 44 (2nd ed. 1935).

understanding that complicity in a suicide is not as wrongful as complicity in a homicide. In the absence of categories that allowed for mitigating punishment in the way suggested here, it seems that the prosecutor and judge chose instead to reduce punishment by appealing to gradations in *mens rea*.

4. Gaps in the Law

The *Carter* case reveals a gap in Massachusetts criminal law. Having no assisting suicide statute, the prosecutor and trial judge were forced to make an unattractive choice. One option was to allow Carter to go unpunished because there is no statute specifically criminalizing assistance to suicide. This is compatible with a fully libertarian approach to criminal law that views suicide as an autonomy enhancing choice. The other was to punish her for homicide in spite of the fact that she did not bear full causal responsibility for Roy's death. In this case, the appropriate offense with which to charge her was murder, given that Carter's conduct reveals that she intentionally advised Roy to kill himself and murder is the intentional killing of a human being. This would reflect full commitment to the utilitarian view that seeks to prevent the harms and costs associated with suicide. The prosecutor chose instead to charge her with unintentionally causing Roy's death. This brings the punishment more in line with her desert, but it does so at the expense of doubly distorting what happened in the case, by exaggerating Carter's causal responsibility and understating her culpability. So the doctrinal perplexity remains. In what follows, we will explore in more detail the criminal law's rules regarding causation and how they may apply in a case like *Carter's*. Subsequently, we will explore whether the doctrinal puzzles raised by *Carter* would be avoided in the American jurisdictions that, unlike Massachusetts, have criminalized inciting and assisting suicide as a separate offense. As we will see, these statutes do sidestep some of the issues that presented themselves in *Carter*, but they create others.

II. ASSISTING SUICIDE AND CAUSATION

From a libertarian perspective, voluntary suicide might be seen as self-regarding conduct, and encouraging such conduct might be seen as valuable speech. But even conceding the harmfulness of voluntary suicide and of conduct causing it, there are two further libertarian objections to punishing the inciter of suicide for killing.

First, encouragement does not seem a sufficiently physical act to count as killing. Carter inflicted no wounds or injuries and provided no weapon. Nor did her speech provide information essential to completing suicide. Absent coercion, deception, or facilitation, how can speech kill?

Second, the deceased's own agency in suicide seems to preclude an inciter's causal responsibility for death. How can one person's encouragement be said to cause another person's voluntary choice?

Resistance to holding one person causally responsible for another's conduct is deeply rooted in the history of Anglo-American criminal law. We will see that the common law conditioned homicide liability on tangible violence, precluding liability for influencing thoughts or emotions.[99] During the nineteenth century criminal law redefined homicide as a crime of causation, but made the libertarian[100] assumption that each individual was ordinarily causally responsible for his or her own actions.[101] Turn of the century criminal law therefore treated an intervening voluntary act as a superseding cause.[102] Today, many jurisdictions retain this rule.[103] The assumption that one person cannot cause another's voluntary act is also reflected in criminal law's attribution of responsibility for another person's crime on the basis of complicity rather than causation.

Yet in upholding charges against Carter, the Massachusetts Supreme Judicial Court invoked a competing conception of causation. According to a utilitarian view of human behavior, human will is not free from causal determination. Instead, choice is the predictable product of hedonistic drives and situational incentives.[104] On this view of choice, an inciter can kill if her words cause death, and speech can cause death if it foreseeably hastens the time at which another person chooses to kill himself. This makes causal responsibility a matter of culpable expectations. The fact that a causal pathway runs through another voluntary actor, who could choose to do otherwise is irrelevant as long as the result is within the scope of the foreseeable risk. Such a foreseeability standard of causation was recommended by the Model Penal Code,[105] and employed by the Supreme Judicial Court in *Carter*. We will see that foreseeability standards have now been adopted by a majority of jurisdictions.

Although such foreseeability standards are prevalent, and appear to require homicide liability for inciting suicide, we will see that such liability has almost never been imposed. Why is that? We will identify two possible causes. One is the practical difficulty of proving that encouragement made a difference. But another important factor is the prevalence of specialized statutes punishing assisting

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99. *See infra* text accompanying notes 106–17.

100. Here we use "libertarian" in two distinguishable senses. One of these senses is political: the view that government may coerce only in so far as necessary to protect liberty. The second is metaphysical: the view of action as freely willed rather than causally determined. *See* Mark Balaguer, *Libertarianism as a Scientifically Reputable View*, 93 PHIL. STUD., Feb. 1999, at 189; Robert F. Allen, *Free Will and Indeterminism: Robert Kane's Libertarianism*, 30 J. PHIL. RES., 2005, at 341. Neither type of libertarianism entails the other, but the metaphysical libertarian is more likely than the determinist to see individuals as responsible for their choices, and to think these choices should not be interfered with.

101. *See infra* text accompanying notes 118–38.

102. *See infra* text accompanying note 137.

103. *See infra* text accompanying note 181-82.

104. *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Oxford at the Clarendon Press 1907) (1789); *see also* Guyora Binder, *Foundations of the Legislative Panopticon, Bentham's Principles of Morals and Legislation*, *in* FOUNDATIONAL TEXTS IN MODERN CRIMINAL LAW 79, 83–84 (Markus Dubber ed., 2014).

105. MODEL PENAL CODE § 2.03 (AM. LAW INST. 1963).

suicide as a distinct and less serious offense. Courts and prosecutors often presume that such legislation obviates or even precludes homicide liability for another's suicide. We will argue in Part III that these statutes reflect the continuing pull of libertarian ideas about suicide.

A. Two Conceptions of Causation

In the early common law, criminal liability for verbally persuading someone to harm himself would have been impossible, as crime required tangible violence. Causation as such was not an element of homicide. Instead, murder and manslaughter required "killing," originally a middle English word meaning striking a blow.[106] Even as late as the eighteenth century indictments for homicide invariably specified a weapon and described a wound, because these were seen as essential to the charge of killing.[107] Matthew Hale's History of Pleas of the Crown observed that "death without the stroke or other violence makes not the homicide or murder."[108] His discussion implied that this rule was jurisdictional:

> If a man either by working on the fancy of another, or possibly by harsh or unkind usage put another into such passion of grief or fear, that the party die suddenly, or contract some disease, whereof he dies, tho [sic] . . . this may be murder or manslaughter in the sight of God, yet *in foro humano* it cannot come under the judgment of felony, because no external act of violence was offerd, whereof the common law can take notice, and secret things belong to God.[109]

Where ecclesiastical courts might concern themselves with guilty thoughts, the common law of crimes enforced in the royal courts was concerned only with trespasses breaching the King's peace.[110] It was characterized by a "pattern of manifest criminality," limiting "the appropriate jurisdiction of the criminal courts" to conduct "manifest[ing] discernible danger" at "the time that it occurs."[111] At common law, homicides were unauthorized killings, fatal acts of manifest violence.

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106. *See* Guyora Binder, *The Meaning of Killing*, *in* MODERN HISTORIES OF CRIME AND PUNISHMENT 88, 91 (Markus Dubber & Lindsey Farmer eds., 2007).

107. *Id*. at 94.

108. MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF PLEAS OF THE CROWN 426 (London: In the Savoy: Printed by E. and R. Nutt, and R. Gosling for F. Gyles 1736).

109. *Id*. at 429.

110. *See* JOHN H. LANGBEIN, RENEE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW 31–32, 103 (2009) (royal criminal jurisdiction confined to breaches of King's Peace and writ of trespass originally had to allege commission *vi et armis* against the king's peace); *See also* S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 353–55 (trespasses against king's peace were both crimes and torts) (1969); FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 44–45, 464, 525–26 (1968) (king's peace basis of royal jurisdiction; every trespass is a breach of king's peace; close connection between appeal of felony and writ of trespass; writ of trespass requires force and arms and breach of king's peace).

111. GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 116–17 (1978).

This jurisdictional focus on manifestly violent conduct usually ensured a close connection in time and space between conduct and injury. Francis Bacon, the scientist and jurist, conceived the relation between wrong and injury as a question of causation, but observed that "in law not the remote but the proximate cause is considered."[112] Nevertheless, a defendant was sometimes responsible for indirect injury. In the 1576 case of *R. v. Saunders*, the defendant was liable for murder when his intended victim (his wife), unwittingly passed on a poisoned apple to their child.[113] The 1773 trespass case of *Scott v. Shepherd* similarly extended tort liability for injuries to an unintended victim from a firecracker thrown in a crowded market and then successively thrown away by two potential victims.[114] "[T]he natural and probable consequence of the act done by the defendant was injury to somebody, and therefore the act was illegal at common law. . . . [T]he defendant was liable to answer for the consequences, be the injury mediate or immediate." [115] Despite the intervention of other actors between the throw and the injury, lighting and throwing an explosive was the sort of manifestly violent act that constituted a trespass when it impacted a victim.

If an assailant could be responsible for injuries "mediate[d]" by the actions of potential victims that displaced danger onto others, it seemed plausible to hold assailants responsible for injuries mediated by the self-endangerment of the victim. Thus, the 1662 decision in *Rew's Case* imposed homicide liability when a wound was a necessary condition to death, even if the victim's failure to have the wound treated was also necessary to his death: "if one gives wounds to another, who neglects to cure of them . . . it is murder or man-slaughter . . . because if the wounds had not been, the man had not died."[116] On the other hand, if, the victim would have recovered without treatment, the assailant was not causally responsible for the fatal effects of treatment.[117] So these early cases established that the defendant was causally responsible for injuries that would not have occurred but for his trespass, and that were "natural and probable" for the type of weapon used. These rules of causation would assume more importance once trespassory conduct was no longer required to start the causal chain.

By the nineteenth century, a liberal conception of the function of criminal law as the protection of rights had supplanted the idea of the enforcement of a royal peace. With this shift in focus from violent conduct to injury, causation became more important. Blackstone justified law in Lockean terms, as a social contract among equals for the protection of rights, and so organized criminal law into offenses

112. 4 THE WORKS OF FRANCIS BACON 16 (1819).
113. R. v. Saunders (1575) 75 Eng. Rep. 706, 706–07.
114. Scott v. Shepherd (1773) 96 Eng. Rep. 525.
115. *Id.* at 526.
116. Raven's Case (1662) 84 Eng. Rep. 1065, 1066.
117. *See* HALE, *supra* note 108.

against various legal interests.[118] Bentham treated criminal prohibition and punishment as the coercion necessary to prevent harm and enforce legal entitlements.[119] Bentham and Mill exempted harmless conduct from prohibition, while using the criminal law to protect such "liberty" from interference.[120] The classical liberalism embraced by leading turn of the century lawyers portrayed the legal system as defining and enforcing spheres of autonomy within which each individual was free to act without affecting anyone else.[121] Because this model required that criminal prohibitions have clearly discernible boundaries, it still required tangible conduct. In striking down a law punishing associating with criminals, the Missouri Supreme Court echoed Hale: "with mere guilty intention, unconnected with overt act or outward manifestation, the law has no concern."[122] This conception of law combined libertarian and utilitarian values.

During the nineteenth century, causal analysis of remote injuries became more important in both tort and criminal law. In tort, presumptive liability for physical trespass was abandoned in favor of a broader category of negligence. In *The Common Law*, Oliver Wendell Holmes critiqued the requirement of a trespass, and reconceptualized wrongdoing as the culpable causation of harm.[123] For Holmes, the function of legal liability was to deter foreseeable harm. With the shift in focus from trespass to culpable causation, it no longer seemed important that the connection between conduct and injury be manifest at the time of the conduct. Drawing on a conception of action developed by Bentham and Mill, Holmes reasoned, "[a]n act is always a muscular contraction, and nothing else. The chain of physical sequences which it sets in motion or directs to the plaintiff's harm is no part of it, and very generally a long train of such sequences intervenes."[124]

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118. *See* 1 WILLIAM BLACKSTONE, *Of the Nature of Laws in General*, *in* COMMENTARIES ON THE LAWS OF ENGLAND 38 (1765-1769).

119. *See* JEREMY BENTHAM, OF LAWS IN GENERAL 196, 220–21 (H.L.A. Hart ed., Athlone Press 1970); Binder, *supra* note 104, at 91.

120. *See* JOHN STUART MILL, ON LIBERTY 11–13, 75–76 (1976); *see also* Joseph William Singer, *The Legal Rights Debate in Analytic Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 995–97, 1001–03 (explaining Bentham and Mill's shared conceptualization of law as a targeted restriction on liberty intended to protect individuals from harm).

121. *See* Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise 1870-1920*, *in* PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70, 88–89 (Gerald L. Geison, ed., 1983); *see also* Elizabeth Mensch, *The History of Mainstream Legal Thought*, *in* THE POLITICS OF LAW 18, 23–24 (David Kairys ed., 1982).

122. *Ex parte* Smith, 36 S.W. 628, 629 (Mo. 1896); Proctor v. State, 176 P. 771, 773 (Okla. Crim. App. 1918); JOEL PRENTISS BISHOP, BISHOP ON CRIMINAL LAW § 204 (1865).

123. OLIVER WENDELL HOLMES, THE COMMON LAW 77–129 (1881) (minimizing the significance of historic requirement that trespasses be committed "vi et armis" and in breach of king's peace; argues that there was always an implied requirement of culpability; endorses early decisions in Leame v. Bray 3 East 593 (1803), Wakeman v. Robinson 1 Bing. 213 (1823) (conditioning trespass on negligent collisions), and Brown v. Kendall 60 Mass. 292 (1850), and Morris v. Platt 32 Conn. 75 (1864) (requiring similar negligence for injuries inflicted with weapons)).

124. *See Holmes*, at 91.

In criminal law, liability expanded to include intangible property crimes,[125] and inchoate crimes defined largely by culpable intentions.[126] Battery was broadened from direct contact to include remote injury.[127] Nineteenth century courts extended causal responsibility for the predictably destructive effects of spreading fires in arson cases.[128] Several American courts imposed homicide liability for deaths resulting from careless acts of endangerment.[129] By the late nineteenth century, utilitarian reformers like Thomas Macaulay, J.F. Stephen, and Holmes had redefined homicide as causing death with a culpable expectation, rather than killing without an excuse.[130]

Mill criticized the lawyers' distinction between direct and remote causes, arguing that the "real [c]ause" of an event is the whole "set of antecedents . . . but for which it would not have happened . . . and we have, philosophically speaking, no right to give the name of cause to one of them, exclusively of the others."[131] From this perspective, no single event was truly the cause of death, and later necessary conditions were no more causal than earlier.[132] According to Nicholas St. John Green, proximate cause simply meant whatever results seemed normatively ascribable to the defendant's wrongdoing. Thus, Green concluded that "[i]n actions for negligence, a defendant is held liable for the natural and probable consequences of his misconduct . . . . [H]is misconduct is called the proximate cause of those results which a prudent foresight might have avoided."[133]

Although liability for remote causation expanded over the nineteenth century, lawyers continued to see it as problematic. One English formulation, recalling Bacon's maxim, was that "[a] man is liable only for the natural and proximate consequence of his actions, and not for remote consequences resulting directly from

125. JEROME HALL, THEFT, LAW AND SOCIETY 104–09 (1935); George P. Fletcher, *The Metamorphosis of Larceny*, 89 HARV. L. REV. 469, 471–72, 504–05 (1976).

126. *See* GUYORA BINDER, THE OXFORD INTRODUCTIONS TO U.S. LAW: CRIMINAL LAW 286 (2016); *see generally* FLETCHER, *supra* note 111, at 132–57 (discussing the expansion of attempt liability in 19th century as corresponding to a decline of manifest criminality).

127. 1 WILLIAM L. CLARK & WILLIAM L. MARSHALL, A TREATISE ON THE LAW OF CRIMES 421 (1900).

128. Grimes v. State, 63 Ala. 166, 169 (1879); Combs v. Commonwealth, 20 S.W. 221, 221 (Ky. 1892); Hennessey v. People, 21 How.Pr. 239, 242 (N.Y. Gen. Term 1861).

129. *See* U.S. v Warner, 28 F. Cas 404 (C.C.D. Ohio 1848) (negligent maritime collision followed by negligent failure to repair and land vessel results in drownings); *see also* White v. State, 4 So. 598 (Ala. 1888) (handcar rider brakes abruptly, throwing another rider in the handcar's path); Belk v. People, 17 N.E. 744 (Ill. 1888) (collision with wagon causes loss of control of horses, throwing victim from wagon); Mayes v. People, 106 Ill. 306 (1883) (throwing mug breaks oil lamp, igniting victim); People v. Buddensieck, 9 N.E. 44 (N.Y. 1886) (shoddy construction leads to collapse of building on victim).

130. T.B. MacAulay et al., 1888 THE INDIAN PENAL CODE, ch. 18, § 294, at 51; JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 119-20 (1883); O. W. HOLMES, THE COMMON LAW 53–56 (1881).

131. JOHN STUART MILL, A SYSTEM OF LOGIC, 399–400 (1843).

132. *See* Nicholas St. J. Green, *Proximate and Remote Cause*, 4 AM. L. REV. 201, 211 (1870); Jeremiah Smith, *Legal Cause In Actions of Tort*, 25 HARV. L. REV. 103, 104 (1911).

133. *See* Green, *Proximate and Remote Cause*, at 215 .

some intermediate agent."[134] Lawyers conceived of causes as embedded in a chain of events, each necessitating the next. When an injury followed unlawful conduct "directly," causation was clear, but intervening causes diminished causal responsibility.

A wrongdoer might nevertheless become liable for remote injuries if certain criteria were met. First, his act would have to be necessary to the ultimate result. Thus, a subsequent event sufficient to cause the injury could supersede his causal responsibility, unless his act were also necessary to that sufficient condition. By the early twentieth century legal scholars identified this requirement of necessity to the injury as factual causation.[135] Yet an act necessary to a result was only a legal cause if sufficiently proximate to the result, and there was disagreement as to the proper criteria of proximity.[136] An important axis of disagreement was whether human acts should be distinguished from natural events. It was increasingly accepted that a subsequent natural event necessary to a result would not supersede the causal responsibility of the original act unless the intervening event was unforeseeable.[137] Yet some courts put subsequent human acts in a different category. Thus, intervening acts could be superseding causes, if sufficiently independent of the original act of wrongdoing.[138]

Why differentiate natural events from human acts in this way? From a libertarian perspective, causation of voluntary human action is impossible, by definition. According to Paul Ryu, "the doctrine that a voluntary human agent interrupts causation was influenced by . . . Kant's view that man's voluntary action always starts a new chain of causation and can never be the effect" of another person's earlier act.[139] The power of the individual to create legal entitlement and liability by choice was central to classical legal thought. James McLaughlin's 1925 account of proximate cause assured readers that "it is clear from all legal tradition . . . that voluntary action must not be regarded as perfectly mechanical. The new element of

134. Ward v. Weekes, 7 Bing. 211, 212 (1830); *see also* SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE, 258 (1848).

135. James Angell McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149, 153–55 (1925).

136. *See generally* Joseph H. Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633 (1920) (discussing the role of proximate cause in establishing legal liability); Henry W. Edgerton, *Legal Cause*, 72 U. PA. L. REV. 211 (1924) (arguing that because proximate cause requires balancing competing interests it cannot be reduced to logical formulas); James Angell McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149 (1925) (assessing the merits and demerits of the conceptions of proximate cause advanced by Professors Beale and Edgerton).

137. *See* People v. Rockwell, 39 Mich. 503, 504 (1878)("[i]t is impossible to maintain such a charge without making every one liable not only for natural and probable consequences, but for all *possible* consequences and circumstances which immediately follow a wrongful act.")(emphasis added); Bush v. Commonwealth, 78 Ky. 268, 272 (1880)("If the death was not connected with the wound in the regular chain of causes and consequences, there ought not to be any responsibility.").

138. *See* Smith, *supra* note 132 at 118–20 (discussing this view in tort critically); Mclaughlin, *supra* note 135 at 168–70, 176.

139. Paul Ryu, *Causation in Criminal Law*, 106 U. PA. L. REV. 773, 782 (1958).

conscious choice . . . prevents the causation from being direct."[140] To classical liberals, a rule assigning causal responsibility to the last voluntary actor made the judicial assignment of causal responsibility desirably predictable and narrow. Francis Wharton saw Mill's view that all antecedents were equally causal and Green's view that causal responsibility was merely a normative judgment as "practical communism."[141] Wharton reasoned that proliferating causal responsibility simply invited litigants to find the deepest pocket in the vicinity of an injury to sue.[142]

Even in the mid-twentieth century, Hart and Honoré's review of causation doctrine observed that "a human action is never regarded as itself *caused*."[143] Thus, "[a] deliberate human act is . . . something *through* which we do not trace the cause of a later event and something *to* which we do trace the cause through intervening causes of other kinds."[144] In the late twentieth century Sanford Kadish still saw this libertarian view of human action as a fundamental ideological premise of the criminal law:

> [B]lame imports the notion of choice. We perceive human actions as differing from other events in the world. Things happen and events occur . . . in sequences and associations that have a necessary quality about them. We express this quality in terms of causation. . . . Human actions stand on an entirely different footing. While man is total subject under the laws of the natural world, he is total sovereign over his own actions.[145]

It followed that no person could ever cause another competent agent's choice (unless by coercion or deception).

On these libertarian premises, if one person was to be held responsible for the voluntary action of another person, it could only be on the basis of complicity rather than causation.[146] Indeed, Kadish argued, accomplice liability is only necessary in so far as criminal law presumes that offenders cannot cause another's crime.[147] Yet complicity requires that the principal's act is criminal, and suicide itself is not a crime. On the libertarian premises Kadish ascribed to the criminal law, an inciter could not be liable for a voluntary suicide.

Yet we have seen that our criminal law does not rest on exclusively libertarian premises. Against the view of human action as presumptively autonomous, utilitarians saw choice as dictated by pleasure and pain. There was nothing special about

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140. James Angell McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149, 168 (1925).

141. FRANCIS WHARTON, A SUGGESTION AS TO CAUSATION 10 (1874).

142. *See id.*; *see also* Morton J. Horwitz, *The Doctrine of Objective Causation*, *in* THE POLITICS OF LAW 201, 205 (David Kairys, ed., 1982).

143. H. L. A. Hart & A. M. Honoré, *Causation in the Law*, 72 L.Q. REV. 58, 80 (1956).

144. H. L. A. HART & A. M. HONORE, CAUSATION IN THE LAW 41 (1959).

145. Sanford Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 330 (1985).

146. *See id.* at 333.

147. *See id.* at 346.

human action that made it less predictable than any other kind of event. Over time, this utilitarian perspective gained ascendancy over the libertarian perspective in the law of causation. Courts increasingly saw both natural events and human acts as intervening only in so far as unforeseeable.[148] This invited utilitarians to argue that it would be simpler to ignore intervening acts or events and rest causal responsibility on the foreseeability of the result itself. In a 1914 article, drawing on Holmes and Green, Henry T. Terry argued that standards of proximate causation should correlate with standards of culpability.[149] Thus, a defendant accused of culpably causing injury should be held causally responsible for all injuries of the kind culpably risked no matter how occurring. Intervening events should block causal responsibility only for injuries for which the defendant would be held strictly liable.[150] In their article, "*A Rationale of the Law of Homicide: I*," Herbert Wechsler and Jerome Michael concluded that causation required not only that the act was a necessary condition to the result, but also that it was of a kind that generally makes such a result more probable.[151] At mid-century, Jerome Hall and Paul Ryu each agreed that legal causation should be reconceptualized as the attribution of injury to the defendant's culpability.[152]

Drawing on these ideas, Wechsler and the other drafters of the MODEL PENAL CODE AND COMMENTARIES redefined legal causation in terms of culpable mental states. Their official commentary explained that:

> When the requirement of 'proximate causation' dissociates the actor's conduct from a result of which it is a but-for cause, the reason is always a judgment that the actor's culpability with respect to the result, i.e. his purpose, knowledge, recklessness, or negligence, is such that it would be unjust to to permit the result to influence his liability or the gravity of his offense. Consequently, the Code proceeds on the assumption that issues of this sort ought to be dealt with as problems of the culpability required for conviction and not as problems of "causation."[153]

The defendant was liable for causing any result for which his conduct was necessary, and for which he had the requisite culpable mental state.[154] If the defendant's conduct was necessary to an expected result, it would cause that result, regardless of whether the causal pathway involved the conduct of another. If a similar result was produced in an unexpected way, the defendant would be responsible if the causal pathway was "not too accidental to have a just bearing on the actor's

148. *See id*. at 403.

149. Henry T. Terry, *Proximate Consequences in the Law of Torts*, 28 HARV. L. REV. 10, 15 (1914).

150. *Id*. at 20.

151. Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide: I*, 37 COLUM L. REV. 701, 746–47 (1937).

152. JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 247–95 (1960); Paul Ryu, *Causation in Criminal Law*, 106 U. PENNSYLVANIA L. REV. 773, 805 (1958).

153. MODEL PENAL CODE AND COMMENTARIES § 2.03 cmt. at 258 (AM. L. INST. 1985).

154. *See id*.

liability or the gravity of his offense."[155] Since Roy's death occurred in exactly the way Carter intended, this Model Penal Code standard would hold her causally responsible (assuming factual causation). Roy's agency in bringing it about would not affect Carter's liability at all.

In sum we have inherited two understandings of causation, one founded on libertarian premises and one founded on utilitarian premises. The first deploys a direct causation standard, precluding causal responsibility for results depending on an independent voluntary intervening act. The second deploys a foreseeability standard under which causal responsibility extends to all consequences within a culpably perceived risk.

B. Contemporary Causation Standards

1. Factual Causation

The necessary condition test is by far the prevailing test of factual causation. At least thirty-three states require that a cause be a necessary condition.[156] The standard is notoriously tricky to apply to concurrent causes. Where two attacks are necessary to death, both are factual causes. But where neither is necessary because both are sufficient, the necessary condition test seems to require acquittal of both assailants, even though both seem morally guilty.[157] A few authors and courts have seen these problems as grounds to impose causal responsibility for any conduct that was a substantial factor in the result.[158] Four states use the substantial factor

155. *See id.*

156. *See* ALA. CODE 1975 § 13A-2-5 (2018); ARIZ. REV. STAT. ANN. § 13-203 (2018); ARK. CODE. ANN. § 5-2-205 (West 2018); DEL. CODE ANN. tit. 11, §§ 261–64 (West 2018); HAW. REV. STAT. ANN. §§ 702-217 (West 2018); KY. REV. STAT. ANN. § 501.060 (2018); ME. REV. STAT. ANN. tit. 17-a § 33 (2018); MONT. CODE. ANN. § 45-2-201 (West 2018); N.J. STAT. ANN. § 2C:2-3 (West 2018); N.D. CENT. CODE ANN. § 12.1-02-05 (West 2018); tit. 18 PA. STAT. AND CONST. STAT. ANN. § 303 (West 2018); TEX. PENAL CODE ANN. § 6.04 (West 2018); ALASKA STAT. ANN. § 1.25.1 (West 2013); CAL. CRIM CODE § 240 (West 2012); GA. CODE ANN. § 40-6-270(b) (West 2018); MASS. GEN. LAWS ANN. ch. 2, § 2.8.1 (West 2013); NMRA, CRIM. UJI 14-251; S.C. CODE ANN. § 2-8 (2012); VA. CODE ANN. § 2-25-051 (West (2007). *See* State v. Spates, 176 Conn. 227, 233 (1978); Eversley v. State, 748 So. 2d 963, 967 (Fla. 1999); State v. Lampien, 148 Idaho 367 (2009); People v. Hall, 273. Ill. App. 3d 838, 841 (1995); State v. Adams, 810 N.W.2d 365, 371 (Iowa 2012); State v. Kalathakis, 563 So. 2d 228, 232-33 (La. 1990); State v. Lytle, 194 Neb. 353, 358 (1975); Williams v. State, 118 Nev. 536, 550 (2002); People v. Matos, 83 N.Y.2d 509, 511 (1994); State v. Pierce, 216 N.C. App. 377, 383 (2011); State v. Lovelace, 137 Ohio App. 3d 206, 216 (1999); Letner v. State, 156 Tenn. 68 (1927); State v. Gonzales, 56 P.3d 969, 974 (Utah Ct. App. 2002); State v. McDonald, 90 Wash. App. 604 (1998).

157. *See* James Angell McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149, 153 (1925).

158. *See, e.g.*, Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 109 (1911); *see also* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 283 (1960); ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 72–78 (3d. ed. 1982).

test alone,[159] and another six combine the two tests.[160] Most courts and commentators, however, simply treat simultaneous sufficient conditions as an exception to the otherwise general requirement of necessity.[161]

Factual causation is further complicated by timing issues. Since death is inevitable, homicide is the causation of death at a particular time. If only one of two attacks is sufficient to cause death when it occurs, the other is not a factual cause, even if sufficient to cause death later. Thus, if A stabbed B, inflicting a mortal wound, but C then beheaded the still languishing B, the beheading alone would be necessary and the stabbing superfluous.[162] The stabbing would only count as necessary to death occurring when it did if it was necessary to the beheading. If B expires from the stabbing before the beheading, however, the stabbing is the only factual cause and the beheading is superfluous. Finally, if A inflicts a mortal wound, and C inflicts a wound not ordinarily mortal, but which accelerates the fatal effect of A's assault, both A and C are factual causes of death.[163]

How might these rules apply to Carter's case? Carter's advocacy clearly wasn't a sufficient condition for death: Roy's physical conduct was necessary. Was Carter's encouragement also necessary? Roy's stated resolve to kill himself casts doubt on that. Yet, Roy's hesitation supported the prosecutor's argument that Carter's increasingly imperative encouragement made a difference to the timing of his death. After all, he had hesitated for two years, and acted only after Carter urged him to do so. And we have Carter's statements that she believed her influence made a difference.[164]

However, both Roy's new resolve to kill himself in the last week of his life and Carter's self-condemnation are ambiguous evidence. Recall that prior to that week, Carter had been *discouraging* suicide, and had expressed the belief that this

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159. State v. Soucy, 139 N.H. 349, 353–54 (1995); MINN. STAT. ANN. § 3.31 (West 2017); OKLAHOMA UNIFORM JURY INSTRUCTION NO. 4-60 OUJI-CR(2d) (Supp. 2000) ("A death is caused by the conduct if the conduct is a substantial factor in bringing about the death and the conduct is dangerous and threatens or destroys life."); State v. Oimen, 184 Wis. 2d 423, 435-36 (1994).

160. *See* State v. Leroy 232 Conn. 1, 13 (1995) (using both terms interchangeably); *Kalathakis*, 563 So. 2d (using both terms interchangeably); ALASKA STAT. ANN. § 1.25.1 (West 2013) (adding substantial factor for multiple causes); People v. Jennings, 50 Cal. 4th 616, 644 (2010) (adding substantial factor for concurrent causes); People v. Tims, 449 Mich. 83, 95 (1995) (adding substantial factor for concurrent causes); *McDonald*, 90 Wash. App. 604 (adding substantial factor for concurrent causes).

161. *See* Jones v. Commonwealth, 281 S.W.2d 920, 923 (Ky. 1955); *see also* Joseph H. Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633 (1920). GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW, 379–80 (1983); MARKUS D. DUBBER, CRIMINAL LAW: MODEL PENAL CODE, 130 (2002); MODEL PENAL CODE AND COMMENTARIES § 2.03 cmt. at 259 (AM. L. INST. 1985).

162. State v. Scates, 50 N.C. 420, 423–24 (1858); *see also* People v. Ah Fat, 48 Cal. 61, 62 (1874); State v. Wood, 53 Vt. 558, 560–61 (1881); People v. Elder, 100 Mich. 515, 517 (1894); Walker v. State, 42 S.E. 787, 789 (Ga. 1902); State v. Angelina, 80 S.E. 141, 156 (W. Va. 1913).

163. *See, e.g.*, Commonwealth. v. Costley, 118 Mass. 1, 27 (1875) ("The law is well settled that if a wound is feloniously inflicted . . . in such a manner as to put life in jeopardy. . . the fact that . . . improper and unskillful treatment of surgeons, hastens, or cooperates in producing, the fatal result, does not palliate or excuse the felonious act.").

164. *See* supra text accompanying notes 49 and 50.

discouragement was "the only thing keeping him alive." And in attributing responsibility to herself for his death, she said she could have dissuaded him on the night of his death or reported his plans to others. If so, we have two possible causes of Roy's suicide: Carter's encouragement and Carter's desistance from discouragement. If her desistance from discouragement was sufficient to bring about his suicide when it occurred, then her encouragement would have been superfluous and not causal. Unless she had a duty to continue dissuading him, her ceasing to do so would not be an omission that could count as criminal conduct. The Massachusetts Supreme Judicial Court suggested that her encouragement earlier in the week did indeed create a duty to discourage by endangering him, but that itself presumes the danger arose from encouraging suicide rather than ceasing to discourage it. The trial court then concluded that her urging him to return to the truck further endangered him, creating a duty to dissuade him.[165] This argument requires confidence beyond reasonable doubt that urging him to exit the truck again would have succeeded, or that anyone she called would in fact have reached him in time to save him. Another possible source of duty to discourage could be her having previously undertaken to do so,[166] but that would effectively require a depressed teen to continue in a harrowing role as a counselor for which she was not professionally qualified.

Such difficulties proving factual causation probably inhere in mere encouragement. Where a defendant supplies means or information about method actually used in completing suicide, it is easier to conclude that such aid was necessary to the timing of death. Thus the requirement of factual causation may be an important filter, discouraging homicide prosecution for inciting suicide, unaccompanied by concrete aid.

2. Legal Causation

We have seen that legal causation has been defined in terms of two competing standards: a direct causation test premised on libertarian assumptions, precluding responsibility for the conduct of an independent voluntary intervening actor, and a foreseeability test premised on utilitarian assumptions. These two standards may assess the inciter of a voluntary suicide differently. Which prevails in current law?

Only twelve jurisdictions define legal causation by statute. Nine have enacted the Model Penal Code definition of causation.[167] Five, including two Model Penal

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165. *See* Erin Moriarty, *Death by Text: The Case Against Michelle Carter*, CBS NEWS (June 16, 2017), https://www.cbsnews.com/news/death-by-text-the-case-against-michelle-carter/.

166. *See, e.g.*, Jones v. United States, 308 F.2d 307, 310 (D.C. 1962) ("There are at least four situations in which the failure to act may constitute breach of legal duty . . . fourth, where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid.").

167. ALA. CODE 1975 § 13A-2-5(a) (2018); ARIZ. REV. STAT. ANN. § 13-203 (2018); 11 DEL. CODE ANN. tit. 11, §§ 261–264 (West 2018); HAW. REV. STAT. ANN. §§ 702-217 (West 2018); KY. REV. STAT. ANN. § 501.060 (2018); MONT. CODE. ANN. § 45-2-201 (West 2018); N.J. STAT. ANN. § 2C:2-3 (West 2018); tit. 18 PA. STAT. AND CONST. STAT. ANN. § 303 (West 2018); TEX. PENAL CODE ANN. § 6.04 (West 2018).

Code states, provide by statute that where conduct is one of two concurrent necessary conditions, it is not causally responsible if *"the concurrent cause was sufficient to produce the result and the conduct of the actor clearly insufficient*."[168] Arguably a voluntary suicide or a self-administered drug overdose would be a sufficient cause, while encouragement or aid of voluntary self-destructive acts would be insufficient. Yet it might be argued that if the self-destructive act would not have occurred without aid or encouragement, it was not sufficient. Alternatively, it could be argued that concurrent causes must be independent and that if aid or encouragement was necessary to the self-destructive act, the two causes were not concurrent.

In Texas, which combines the Model Penal Code formula with an exception for sufficient concurrent causes, one court concluded that "if an 'intervening cause' is reasonably foreseeable, it does not negate an actor's conduct as the 'cause' of a result."[169] In Alabama, the other such state, a court reversed a negligent homicide conviction for a defendant who played Russian Roulette with a victim who fatally shot himself playing the game by himself later in the day.[170] However, the Court emphasized not the causal insufficiency of the defendant's act, but the unforeseeability of the victim's, implying that the defendant would have been causally responsible had the victim killed himself in the defendant's presence.[171]

Several other Model Penal Code jurisdictions have cases holding that the defendant is responsible for foreseeable intervening actions.[172] One such Model Penal Code jurisdiction is Pennsylvania. In 1961, the Pennsylvania Supreme Court decided the influential *Commonwealth v. Root* denying that a drag racer could be liable for his competitor's death because he did not cause it "directly."[173] In 1999, however, a lower court decision imposed liability on a drag racer for his competitor's killing of another motorist on the ground that death was "entirely foreseeable,"[174] and suggested that the penal code revision had superseded *Root*.[175] A recent Pennsylvania decision imposed homicide liability on a supplier of drugs for the victim's self-administered overdose on the same foreseeability rationale.[176]

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168. ALA. CODE 1975 § 13A-2-5(a) (2018); ARK. CODE. ANN. § 5-2-205 (West 2018); ME. REV. STAT. ANN. tit. 17-a § 33 (2018); N.D. CENT. CODE ANN. § 12.1-02-05 (West 2018); TEX. PENAL CODE ANN. § 6.04 (West 2018) (emphasis added).

169. Harris v. State, No. 03-10-00174-CR, WL 1149337, at *3 (Tex. App. Apr. 6, 2012).

170. *See* Lewis v. State, 474 So. 2d 766, 771 (Ala. Crim. App. 1985).

171. *Id.*

172. *See* State v. Vandever, 211 Ariz. 206, 208 (2005) (finding that thevictim driving above the speed limit did not exculpate defendant because the collision was a foreseeable risk of defendant's illegal turn); State v. Kang , WL 1587852, at *7 (Del. Super. Ct. July 15 2002.) (finding victim running red light not within foreseeable risk of drunk driving); Lofthouse v. Commonwealth, 13 S.W.3d 236, 241 (Ky. 2000) (finding overdose within foreseeable risk of supplying drugs); State v. Thomas, 288 A.2d 32, 34 (N.J. Super. Ct. App. Div. 1972) (finding drug overdose within foreseeable risk of supplying drugs).

172. Commonwealth v. Root, 170 A.2d 571, 580 (Pa. 1961).

174. Commonwealth v. Jackson, 744 A.2d 271, 274 (Pa. Super. Ct. 1999).

175. *Id.* at 273 (pointing strangely to the provision defining complicity rather than causation).

176. *See* Commonwealth v. Kakhankham, 132 A.3d 986, 996 (Pa. Super. Ct. 2015).

In states without statutory definitions of causation, foreseeability standards also predominate.[177] To be sure, rules barring causal responsibility for the results of independent intervening actions persist in many states.[178] Yet in most such states, foreseeable actions are not deemed sufficiently independent to count as intervening.[179] In addition to the nine Model Penal Code states imposing foreseeability

177. *See* Johnson v. State, 224 P.3d 105, 111 (Alaska 2010) (articulating a scope of the foreseeable risk test with express consideration for remoteness); *see also* CALCRIM No. 240 (2017) ("[A] natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes."); People v. Calvaresi, 534 P.2d 319 (Colo. 1975) ("[D]eath must be the natural and probable consequence of the unlawful act."); People v. Hudson, 856 N.E.2d 1078, 1083 (Ill. 2006) ("Legal cause is essentially a question of foreseeability."); R.S. v. State, 796 N.E.2d 360, 364 (Ind. Ct. App. 2003) (holding that foreseeability test excludes liability for hastening heart attack in progress as a result of minor beating); State v. McFadden, 320 N.W.2d 608, 618 (Iowa 1982) (imposing liability on drag racer for injuries inflicted by competitor under foreseeability standard); Palmer v. State, 164 A.2d 467, 474 (Md. 1960) ("[S]ufficient that the ultimate harm is one which a reasonable man would foresee."); Goldring v. State, 654 A.2d 939, 944 (Md. Ct. Spec. App. 1994) (citing Palmer v. State, 223 Md. 341, 353 (Md. 1960)) (holding drag racer responsible for opponent's death); People v. Tims, 534 N.W.2d 675, 681 (Mich. 1995) (holding that causation is not interrupted by negligence of the victim); NEW MEXICO UNIFORM JURY INSRUCTIONS UJI 14-251 NMRA (stating that proximate causation requires foreseeability); N.Y. PENAL LAW § 125 (McKinney through L.2018, chs. 1 to 201) (stating that conduct is sufficiently direct cause of death when the death was a reasonably foreseeable result of the conduct); State v. Baksi, No. 98-T-0123, 1999 WL 1299297, at *13 (Ohio Ct. App. Dec. 23, 1999) ("[D]efendant. . . responsible for the natural and foreseeable consequences that follow . . . from the act or failure to act."); OKLAHOMA UNIFORM JURY INSTRUCTION NO. 4-60 OUJI-CR(2d) (Supp. 2000); Cole v. State, 512 S.W.2d 598, 601 (Tenn. Crim. App. 1974) (holding that death of drag racing opponent was "natural or probable consequence" of reckless and unlawful conduct); State v. Farmer, 66 S.W. 3d 188, 203 (Tenn. 2001) (holding the same as Cole v. State, 512 S. W.2d 598 (Tenn. Crim. App. 1974)); Bloomquist v. State, 914 P.2d 812, 820 (Wyo. 1996) (stating that proximate cause stems from the "natural and probable consequence" of the act of negligence).

178. *See* N.M. STAT. ANN. § 14-251 (2000) (requiring proximate causation to have a "continuous chain of events, uninterrupted by outside event"); State v. Leroy, 653 A.2d 161, 167 (Conn. 1995) (holding action cannot be "superseded by an efficient, intervening cause"); J.A.C. v. State, 374 So. 2d 606, 607 (Fla. Dist. Ct. App. 1979) (finding deceased passenger's shifting gears intervening action breaking drag racer's causal responsibility); People v. Velazquez, 561 So. 2d 347, 352 (Fla. Dist. Ct. App. 1990) (citing State v. Petersen, 522 P.2d 912, 920 (Or. Ct. App. 1974)) (finding drag racer not liable when victim "kills himself" by speeding immediately after drag race); Thacker v. State, 117 S.E.2d 913, 915 (Ga. Ct. App. 1961) (finding drag racer does not cause opponent's collision); State v. Mauldin, 529 P. 2d 124, 127 (Kan. 1974) (finding drug supplier not responsible for self-administered overdose); State v. Garner, 115 So. 2d 855, 864 (La. 1959) (finding assailant not causally responsible for fatal defensive gunfire); People v. Campbell, 335 N.W.2d 27, 30 (Mich. Ct. App. 1994) (finding assisting suicide not "killing"); People v. Kevorkian, 527 N.W.2d 714, 735–36 (Mich. 1994) (assisting suicide not direct causation); State v. Hudson, , 680 N.W.2d 603, 611 (Neb. 2004) (holding independent intervening cause breaks causal connection); Williams v. State, 118 Nev. 536 (2002)(intervening cause supersedes); State v. Lamprey, 821 A.2d 1080, 1084 (N.H. 2003) (disfavoring foreseeability test; cause must be direct and immediate,); State v. Petersen, 522 P.2d 912, 1009 (Or. Ct. App. 1974) (finding drag racer does not cause opponent's participation); State v. Lamont, 631 N.W.2d 603, 608 (S.D. 2001) (holding new independent cause can supersede defendant's negligence); State v. Yudichak, 561 A.2d 4077, 409 (Vt. 1989) (holding subsequent act of another necessary to death bars causation); MINN. PRAC. JURY INSTRUCTIONS, CRIM. GUIDE § 3.31 (6th ed.) (defining superseding cause); VERMONT MODEL CRIMINAL JURY INSTRUCTIONS § 2-24-051 (VT BAR ASS'N Mar. 26, 2007), http://www.vtbar.org/UserFiles/Files/WebPages/Attorney%20Resources/juryinstructions/criminaljuryinstructions/2title13/ms24-051.htm (instructing that efficient intervening cause breaks causal link).

179. *See* JUD. COUNCIL OF CAL. CRIM. JURY INSTRUCTIONS § 240 (stating "likely to happen if nothing unusual intervenes"); People v. Armitasge 194 Cal. Rptr. 515 (Cal. Ct. App. 1987) (holding independent intervening cause must be "unforeseeable"); People v. Calvaresi, 534 P.2d 316, 319 (Colo. 1975) (en banc) (quoting 1

rules by statute, another twenty-nine have common law rules imposing causal responsibility for foreseeable results, or excluding foreseeable intervening actions as superseding causes.[180]

In short, some form of foreseeability standard defines causal responsibility in thirty-eight of the states. Yet twenty-six of these foreseeability jurisdictions also provide that an independent voluntary intervening act[181] or a sufficient concurrent

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Wharton's Criminal Law & Procedure, § 200, at 448 (12th ed. 1957)) ("[N]ot the result of an independent intervening cause . . . which he could not foresee"); People v. Garner, 781 P. 2d 87, 90 (Colo. 1989) (en banc) (quoting People v. Gentry, 738 P.2d 1188, 1190 (Colo. 1987)) ("[I]ntervening cause . . . must be unforeseeable"); State v. Spates 405 A.2d 656, 660 (Conn. 1995) (finding causation "unbroken" when "death or injury is a foreseeable and natural result"); State v. Wassil, 658 A.2d 548, 551, 555–56 (Conn. 1995) (finding drug overdose within foreseeable risk of supplying); State v. Rushing, 532 So. 2d 1338, 1340 (Fla. Dist. Ct. App. 1988) (finding provision of gun foreseeably leads to suicide); State v. Lampien, 223 P.3d 750, 758 (Idaho 2009) ("To relieve . . . of criminal liability . . . intervening cause must be . . . unforeseeable"); Green v. State, 650 N.E. 2d 307, 310 (Ind. Ct. App. 1995) (reasoning that failure of victim to wear seatbelt foreseeable); State v. Marti, 290 N.W. 2d 570, 585–86 (Iowa 1980) (holding victim's suicide not an intervening cause after defendant supplied loaded gun; approvingly cites Iowa tort case and criminal cases from other jurisdictions requiring unforeseeable intervening actions); State v. Beach, 67 P. 3d 121, 129 (Kan. 2003) (finding robbery by third party during drug transaction with victim foreseeable); State v. Kalathakis, 563 So. 2d 228, 232–33 (La. 1990) (fiding no causation of death of accomplice because his intervening conduct unforeseeable); Commonwealth v. Catalina, 556 N.E.2d 973, 980 (Mass. 1990) ("heroin consumption . . . a reasonably foreseeable consequence of selling . . . drug to . . . known addict"); State v. Hofer, 614 N.W. 2d 734, 737 (Minn. Ct. App. 2000) (quoting Canada By and Through Landy v. McCarthy, 567 N.W.2d 496, 507 (Minn. 1997)) (holding intervening cause "must not have been reasonably foreseeable by the original wrongdoer"); State v. Houpt, No. A-0306577, 2004 WL 1191035, at *10 (Neb. Ct. App. June 1, 2004) (holding efficient intervening cause must be unforeseeable); Bostic v. State, 760 P.2d 1241, 1243 (Nev. 1988) (holding intervening cause must be independent and unforeseeable); State v. Munoz, 970 P.2d 143, 147 (N.M. 1998) (finding foreseeability to be a component of intervening causation); People v. Duffy, 7595 N.E.2d 814, 816 (N.Y. 1992) (finding suicide not intervening act where defendant "should . . . have foreseen" it could result from providing gun to and encouraging victim); State v. Pierce, 718 S.E.2d 648, 652 (N.C. Ct. App. 2011) (quoting State v. Hall, 299 S.E.2d 680, 683 (N.C. Ct. App. 1983)) (holding proximate cause requires continuous sequence unbroken by intervening act, leading to reasonably foreseeable result); State v. Watkins, 448 A. 2d 1260, 1265 (R.I. 1982) ("If the independent or intervening cause is reasonably foreseeable, the causal connection remains unbroken."); State v. Des Champs, 120 S.E. 491, 493 (S.C. 1923) (finding reasonably foreseeable intervening cause does not preclude proximate causation"); State v. Randolph, 676 S.W. 2d 943, 948 (Tenn. 1984) ("[A]lthough an issue of causation will be presented . . . customer [ ] injecting himself . . . not so . . . unforeseeable . . . as to insulate the seller"); State v. Hallett, 619 P. 2d 335, 339 (Utah 1980) (finding dangerous act is proximate cause if later negligent acts contributing to result are "reasonably expected to follow"); Levenson v. Commonwealth, 808 S.E.2d 196, 199 (Va. Ct. App. 2017) (quoting Brown v. Commonwealth, 685 S.E.2d 43, 46 (Va. 2009)) (intervening cause not superseding if a probable consequence of defendant's own conduct); Bailey v. Commonwealth, 329 S.E.2d 37, 40 (Va. 1985) (quoting Delawder v. Commonwealth, 196 S. E.2d 913, 915 (Va. 1973)) (intervening event breaks causation only if unforeseeable); State v. Perez-Cervantes, 6 P.3d 1160, 1163 (Wash. 2000) (en banc) (finding later intervening act that "defendant, in the exercise of ordinary care, could not reasonably have anticipated" supersedes); Bloomquist v. State, 914 P. 2d 812, 821 (Wyo. 1996) (finding accident victim wandering into traffic foreseeable so not superseding cause).

180. *See* sources cited *supra* notes 154–156 (Alaska, California, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Maryland, Michigan, Minnesota, Nebraska, Nevada, New Mexiso, New York, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Utah, Virginia, Washington, West Virginia, Wyoming).

181. California, Colorado, Connecticut, Florida, Idaho, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Mexico, New York, North Carolina, Rhode Island, South Carolina, Tennessee, Utah, Virginia, Washington, West Virginia.

cause[182] is a superseding cause. What may courts do in the great many states, where foreseeability rules and intervening actor exceptions coexist? It seems that by equating causation with culpability, a foreseeability rule logically preempts the intervening action from having any significance. If the intervening action is within the scope of the foreseeable risk, it is culpably caused and so not independent.

The prevalence of foreseeability standards and their logical primacy over intervening actor rules poses a puzzle. Because suicide is frequently committed, attempted, considered, and discussed, we should expect to see lots of homicide liability for causing suicide. But as the next subsection will show, we don't.

C. The Problem of the Victim as Intervening Actor

Courts applying an intervening actor rule divide intervening acts into those independent of the defendant's act, which break the chain of causation, and acts dependent on the defendant's act, which do not.[183] They have often treated intervening fatal acts as causally dependent on the defendant's act if they are "normal" responses.[184] This may mean a foreseeable response, or it may mean a lawful response. One assailant was liable when he left his helpless victim lying wounded in a road to be foreseeably (and perhaps blamelessly) struck by traffic.[185] By contrast, another assailant was not liable where an unrelated attacker appeared unexpectedly and killed his prostrate victim.[186]

Many decisions considering the independence of an intervening actor involve victim self-endangerment.[187] Both libertarian and utilitarian justifications are available for holding a defendant liable for another's self-inflicted harm. Thus we might analyze the defendant's conduct as culpably endangering the victim, and classify victim self-injury as within the foreseeable risk. Alternatively, we may view the defendant's violation of a victim's right as having so impaired the victim's autonomy that the resulting self-injury is neither voluntary nor independent. Accordingly, opinions attributing causal responsibility for a victim-mediated injury might be compatible with the persistence of an intervening actor rule that would acquit a defendant who did nothing to impair his victim's autonomy.

In assessing causal responsibility for victim self-endangerment, courts have considered victims who refused medical treatment for violent injuries, endangered themselves in flight from assault, entered fires started by arsonists, injured themselves while competing with others in dangerous contests, overdosed on illegal drugs supplied by others, as well as those encouraged or assisted to commit suicide.

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182. Alabama, Texas.

183. *See generally* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW, 364–65 (5th ed. 2010) (distinguishing intervening acts that are "coincidences" from those that are "responses").

184. *Id*. at 364–67; *see also* Rollin Perkins & Ronald Boyce, CRIMINAL LAW 813 (1982).

185. People v. Fowler, 178 Cal. 657, 670 (1918).

186. *See* People v. Elder, 100 Mich. 515 (1894).

187. The other major issue is inadequate medical treatment of a wound.

Victim refusal of medical treatment does not generally supersede a violently inflicted wound or injury.[188] Yet these results can be explained on four different rationales: (1) that the unavailability of adequate medical treatment is foreseeable; (2) that the victim has a right to refuse treatment; (3) that the refusal of treatment is not an intervening action, but an omission (unaccompanied by a duty); and (4) that the refusal was the result of incapacity caused by the wrongful injury.[189]

Defendants have generally been held responsible for deaths in dangerous flight from a violent assault.[190] Here too, causal responsibility can be explained on the basis of either foreseeability or coercion. Yet decisions have sometimes absolved defendants when fleeing victims took unnecessary risks. A captain who negligently crashed a ship was held blameless for the deaths of passengers who tried to swim ashore rather than await rescue.[191] One court concluded that leaping from a car was not a normal response to simple assault.[192] Two infamous nineteenth century cases absolved abusive husbands of homicide when their severely battered wives fled their rural homes at night in winter and died of exposure. In both cases, courts faulted the victims for not seeking shelter in nearby homes.[193]

Assailants have also been held responsible for subsequent suicides. In *People v. Lewis*,[194] the defendant shot his brother-in-law in the abdomen, inflicting a wound that would have caused death in an hour. The victim, in pain and expecting to die, cut his own throat and died within minutes. The court saw the gunshot as necessary to the self-inflicted wound, but *not* its cause, because a shooting does not lead to a suicide "in the natural course of events."[195] Instead, the court treated the gunshot as a concurrent cause, hastening death slightly.[196]

In the famous case of *Stephenson v. State*, a Ku Klux Klan leader abducted, beat, bit, and attempted to rape the victim.[197] The victim, while under the control of the defendant's henchmen, purchased and ingested poison. She died after being returned home, apparently from the combined effects of the poison and an infected bite-wound. The court offered two different accounts of Stephenson's causal responsibility for the victim's ingestion of poison, each ambiguous between a utilitarian and a libertarian conception of causation. First, the court reasoned – rather implausibly – that the victim's suicide was, like dangerous flight, the "natural and

188. *See* Stanton's Case, 2 City Hall Rec. 164 (N.Y. 1817); United States v. Hamilton, 182 F. Supp. 548 (D.D. C. 1960); Franklin v. State, 51 S.W. 961 (Tex. Crim. App. 1899).

189. *See Hamilton*, 182 F. Supp. at 549 (1960) (hinting at each of these rationales).

190. *See* Whaley v. State, 26 So. 2d 656 (Fla. 1946); Patterson v. State, 183 S.E. 309 (Ga. 1936); Thornton v. State, 33 S.E. 683 (Ga. 1899); Adams v. People, 109 Ill. 444, 451 (1884); Sanders v. Commonwealth, 244 Ky. 77 (1932); Keaton v. State, 57 S.W. 1125 (Tex. Crim. App. 1900); Letner v. State, 299 S.W. 1049 (Tenn. 1927).

191. United States v. Warner, 28 F. Cas. 404, 411 (C.C.D. Ohio 1848).

192. *Patterson*, 184 S.E. at 314.

193. State v. Preslar, 48 N.C. 421 (1856); Hendrickson v. Commonwealth, 85 Ky. 281 (1887).

194. 124 Cal. 551 (1899).

195. *Id*. at 556.

196. *Id*. at 559.

197. Stephenson v. State, 179 N.E. 633 (Ind. 1932); see also CROSS OF FIRE, (Leonard Hill Films 1989) (television miniseries depicting the events surrounding this case).

probable consequence" of his threat to harm her.[198] Second, the court reasoned that if Stephenson's "conduct rendered the deceased . . . mentally irresponsible, and that such was the natural and probable consequence of such unlawful and criminal treatment" he was causally responsible for a resulting suicide.[199] Thus causation could be ascribed on the basis of the wrongful impairment of the intervening actor's volition by means of either coercion or incapacitation, or on the basis of the defendant's culpability for a foreseeable death. The latter standard would impose liability for encouraging a voluntary suicide, but the former would not.

Courts have held arsonists causally responsible for the deaths of those entering burning buildings.[200] Here too, the cases are unclear as to whether causal responsibility inheres in the foreseeable danger of fire or the coercive effect of threatening property. One court viewed entering a blaze to save property as sufficiently "natural and ordinary course of conduct" to make an arsonist responsible for the fatal result.[201]

Next we turn to the question of remote causal responsibility as a result of crimes enabling or encouraging – but not coercing – victims to endanger themselves. These crimes include drag-racing, drug distribution, and Russian Roulette. Nothing inherent in these crimes impairs the self-endangering victim's volition, although of course a drug user may be addicted, and foolish self-endangerment is often associated with intoxication. Absent incapacity, remote causal responsibility arising from such offenses is harder to justify on libertarian premises. Accordingly, we may expect attribution of causal responsibility for another's voluntary risk-taking only on the basis of a foreseeability rule.

Courts have divided on whether to hold illegal drag racers liable for the deaths of their racing rivals. The Pennsylvania decision of *Commonwealth v. Root*[202] ruled that defendant could not be liable for death of the driver of other car in a drag race because although "the deceased was aware of the dangerous condition created by the defendant's reckless conduct. . . he recklessly chose to swerve his car to the left and into the path of an oncoming truck, thereby bringing about the head-on collision which caused his own death."[203] The court rejected a foreseeability standard of proximate cause drawn from tort law and required a "more direct causal connection" for criminal liability.[204] In a similar case, a Georgia court simply viewed the actions of the two drivers as completely independent.[205]

198. *Stephenson*, 179 N.E. at 649.
199. *Id.*
200. *See, e.g.*, State v. Glover, 330 Mo. 709 (1932).
201. State v. Leopold, 147 A. 118, 121 (Conn. 1929).
202. 170 A.2d 310 (Pa. 1961).
203. *Id.* at 314.
204. *Id.*
205. Thacker v. State, 117 S.E. 2d 913 (Ga. 1961).

More revealing of the libertarian values implicit in these results is the decision in the Oregon case of *State v. Petersen*, approving this reasoning:[206]

> In unusual cases like this one, whether certain conduct is deemed to be the legal cause of a certain result is ultimately a policy question . . . Or, stated differently, the issue is not causation, it is responsibility. In [m]y opinion, policy considerations are against imposing responsibility for the death of a participant in a race on the surviving racer when his sole contribution to the death is the participation on the activity mutually agreed upon . . . people frequently join together in reckless conduct. As long as all participants do so knowingly and voluntarily, I see no point in holding the survivor(s) guilty of manslaughter if the reckless conduct results in death . . . Extending the concept of legal causation beyond that point . . . can only be justified to deter people from jointly engaging in hazardous activity, knowing what the risks are and being willing to take them. I would have that a matter of choice for each individual.[207]

A Florida decision approvingly cited *Petersen* in a similar case where the victim continued speeding after the race ended, and crashed fatally.[208] A later Oregon decision imposed liability on a driver testing a race car at high speeds, for injuries to a fellow worker who was a voluntary passenger.[209] The court distinguished *Petersen* by reasoning that the driver had caused death directly, with no intervening action on the part of the passenger.

These decisions may be contrasted with the Iowa case of *State v. McFadden*[210] that explicitly rejected the reasoning of both *Petersen* and *Root* and embraced a foreseeability standard. It relied on an earlier Iowa case,[211] imposing liability for the death of a third-party struck by the defendant's rival. That decision emphasized that both racers imposed the same risk on the third-party victim. Both decisions extend causal responsibility to results within the risk culpably imposed, without regard to any interaction between the defendant and the victim. Decisions also imposed liability on racing partners in Arizona, California, and Mississippi.[212]

An influential decision on joint risk taking is the Massachusetts Russian Roulette case, *Commonwealth v. Atencio*,[213] relied upon in *Commonwealth v. Carter*. Defendants Marshall and Atencio each took their turns before handing the revolver to the victim, who spun the chamber and shot himself fatally. The court

206. State v. Peterson, 526 P.2d 1008, 1009 (Or. 1974) (adopting dissent's language from State v. Peterson, 522 P.2d 912, 921–22 (Or. Ct. App. 1974)).

207. State v. Peterson, 522 P. 2d 912, 921–22 (Or. Ct. App. 1974).

208. People v. Velasquez, 561 So. 2d 347 (Fla. 1990).

209. State v. Murray, 162 P.3d 255 (Or. 2007).

210. 320 N.W. 2d 608 (Iowa 1982).

211. State v. Youngblut, 257 Iowa 343 (1965).

212. State v. Melcher, 487 P. 2d 3 (Ariz. 1971); People v. Kemp, 310 P. 2d 680 (Cal. 1957); Campbell v. State, 285 So. 2d 891 (Miss. 1973).

213. 189 N.E.2d 223 (Mass. 1963).

assigned no significance to their provision of the gun to the victim, instead emphasizing the encouraging effect of their participation in a joint venture:

> It is an oversimplification to contend that each participated in something that only one could do at a time. There could be found to be a mutual encouragement in a joint enterprise. In the abstract, there may have been no duty on the defendants to prevent the deceased from playing. But there was a duty on their part not to cooperate or join with him in the 'game.'[214]

The court distinguished *Root*, arguing that each driver's opportunity to diminish his own risk by employing skill and care makes each drag racer less responsible for his rivals' injuries. The public interest in the welfare of the deceased, and the valuelessness of the contest justified imposing liability on all participants: "[h]ere the Commonwealth had an interest that the deceased should not be killed by the wanton or reckless conduct of himself and others."[215] Causal responsibility was imposed to deter this antisocial conduct.

Attribution to drug distributors of causal responsibility for drug overdoses may seem more appealing in that distributors may profit without sharing in the risk. Yet there are countervailing considerations in that much illegal drug use is far less dangerous than Russian roulette or even drag racing – regular cocaine use, for example, is associated with an annual death rate of 0.05%.[216] Thus, causal responsibility for overdoses is often no better justified under a foreseeability standard than under a direct causation standard. Some courts have avoided the causation question by finding insufficient evidence of culpability towards death in the sale of a narcotic for personal use.[217] The Kansas Supreme Court cited *Root* in rejecting a foreseeability test in favor of a direct causation test for felony murder where the underlying felony was narcotics distribution.[218] A Minnesota court cited the Kansas case in concluding that:

> Because the sale of cocaine alone does not justify the assumption that the purchaser is incurring a substantial and unjustified risk of death, we hold that sale alone is not a proper felony upon which to predicate a charge of felony murder . . . Furthermore, the State has failed to show a direct causal relationship between the sale of cocaine and the subsequent death of the buyer.[219]

Nevertheless, most courts have disagreed. A Connecticut court reasoned:

> [W]e reject the defendant's claim that Groleau's conduct in administering the drugs to himself, as a matter of law, was an efficient intervening cause of

214. *Id*. at 225.
215. *Id*. at 224.
216. *See* GUYORA BINDER, FELONY MURDER 198 (Stanford University Press 2012).
217. *See* State v. Miller, 874 N.W.2d 659 (Iowa 2015); Lofthouse v. Commonwealth, 13 S.W. 3d 236 (Ky. 2000).
218. State v. Mauldin, 529 P.2d 124, 126 (Kan. 1974).
219. State v. Aarsvold, 376 N.W.2d 518, 522–23 (Minn. Ct. App. 1985).

> Groleau's death. In so holding, we adopt the position . . . of courts in the majority, if not the entirety, of the jurisdictions that have considered the question. . . . [T]he jury reasonably could have found that the defendant's acts were the proximate cause of Groleau's death.[220]

Similarly, a Virginia court held that "an intervening event, even if a cause of the harm, does not operate to exempt liability if the intervening event was put into operation by the defendant's negligent acts."[221] And—unsurprisingly—a Massachusetts court concluded that "[i]ntervening conduct that is reasonably foreseeable will not relieve the defendant of criminal responsibility" and "heroin consumption is . . . a reasonably foreseeable consequence of selling that drug to a known addict."[222] Of course emphasizing addiction also honors the intervening actor rule in the breach, by denying the independence and voluntariness of the intervening action.

Our survey of cases on causing victim self-endangerment reveals the libertarian values expressed by the rule that an intervening voluntary action is a superseding cause, but suggests a trend towards imposing responsibility for harming the public welfare by enabling foreseeable self-harm. Finally, let us turn to cases considering causal responsibility for another person's suicide, where the defendant has committed no other crime. The culpability of these defendants is great: they expect and want the victim to die. Yet their conduct is slight. They commit no trespass against the liberty of their victims. Accordingly, they force a choice between utilitarian and libertarian models of causal responsibility.

In the nineteenth century, causal responsibility for death was not always a necessary element of liability for another's suicide, because some jurisdictions criminalized suicide, enabling prosecution of a supporter as an accomplice. In the 1816 Massachusetts case of *Commonwealth v. Bowen* and the 1904 Kentucky case of *Commonwealth v. Hicks*, courts imposed liability on this basis of complicity in suicide.[223] On the other hand, the 1908 Texas decision in *Sanders v. State* reasoned that one who assisted suicide could not be an accomplice because "[s]o far as our law is concerned, the suicide is innocent of any criminality. Therefore the party who furnishes the means to the suicide is also innocent of violating the law."[224] Dismissing a murder charge, the court found causal responsibility equally impossible without proof of coercion or deception: "However wicked or malicious may have been the purposes or intent of the accused in administering the poison as charged, yet if the deceased took the poison voluntarily, knowing what the result might be, her death would not constitute culpable homicide."[225]

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219. State v. Wassil, 658 A.2d 548, 555-56 (Conn. 1995) (citing additional cases from California, Massachusetts, New Jersey, and Tennessee).

221. Coyle v. Commonwealth, 653 S.E.2d 291, 295 (Va. Ct. App. 2007).

222. Commonwealth v. Catalina, 556 N.E.2d 973, 980 (Mass. 1990).

223. Commonwealth v. Bowen, 13 Mass. 356 (1816); Commonwealth v. Hicks, 82 S.W. 265 (Ky. 1904).

224. Sanders v. State, 112 S.W. 68, 70 (Tex. Crim. App. 1908).

225. *Id.* at 69.

A few decisions from this era did hold that murder liability could be imposed for aiding or encouraging suicide. An 1872 Ohio decision, *Blackburn v. State*, upheld murder liability for intentionally killing by administering poison.[226] It directly confronted the problem posed by the victim's choice to die and adopted a frankly paternalistic response:

> [I]t is immaterial whether the party taking the poison took it willingly . . . or was overcome by force, or overreached by fraud. True, the atrocity of the crime, in a moral sense, would be greatly diminished by the fact that suicide was intended; yet the. . . life of those to whom life has become a burden-of those who are hopelessly diseased or fatally wounded-nay, even the lives of criminals condemned to death, are under the protection of the law, equally as the lives of those who are in the full tide of life's enjoyment, and anxious to continue to live. If discriminations are to be made in such cases . . . they must be made by the exercise of executive clemency or legislative provision. [227]

The 1910 South Carolina decision in *State v. Jones* upheld a murder conviction for administering strychnine on the theory that the victim's suicide was no more independent than an accomplice's act and therefore could not break the chain of causation.[228] The court approved this instruction:

> In order for one who incites to suicide to be guilty of murder, a causal connection must exist between the incitement and the suicide . . . . Provided this connection is established, I charge you that it is the law that the inciter is as truly responsible for the act, and therefore as truly a murderer, as though he had prevailed upon a third person to commit the homicide. A human being is dead as the consequence of his deliberate act, and it would be a reproach to the law if he could escape punishment by electing to bring about the death by the victim's own hand rather than by the hand of a third party. If he employs a third person, the interposition of the will of the third person will not render him less guilty. Why, then, should the intervention of the victim's will?[229]

The instruction described only two ways that an inciter could cause death—"by putting the deceased in such fear as to persuade and induce her to take the poison"[230] —or "by furnishing the means, or putting the means within reach."[231]

Two other decisions went further, treating the victims and aiders as co-conspirators and not even requiring that the aider cause the victim's suicide. The 1904 decision of the Illinois Supreme Court in *Burnett v. People* held that murder could be charged on the theory that Burnett had persuaded the victim to kill herself by

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226. Blackburn v. State, 23 Ohio St. 146 (1872).

227. *Id*. at 162-63.

228. State v. Jones, 67 S.E. 160 (S.C. 1910).

229. *Id*. at 162.

230. *Id*.

231. *Id*. Evidence of a history of domestic violence was introduced at trial, *Id*. at 165, and we cannot infer that the jury convicter or was permitted to convict on the basis of encouragement alone.

agreeing to a suicide pact, and had thereby become liable as the principal.[232] Yet Burnett neither supplied the fatal morphine, nor was present when the deceased took it.[233] There was little proof of agreement and the court reversed on evidentiary issues.[234] In the 1920 Michigan case of *People v. Roberts*, the defendant supplied poison to his terminally ill wife at her direction and was convicted of first degree murder. The court rejected the analysis that he was merely an accomplice to his wife's noncriminal act, instead treating him as a principal.[235]

The next decision to impose homicide liability for suicide was the 1961 Massachusetts case of *Commonwealth v. Persampieri*,[236] cited in *Commonwealth v. Carter*.[237] Persampieri announced to his wife that he planned to divorce her. She threatened to commit suicide. The court explained:

> The petitioner's wife was emotionally disturbed, she had been drinking, and she had threatened to kill herself. The petitioner, instead of trying to bring her to her senses, taunted her, told her where the gun was, loaded it for her, saw the safety off, and told her the means by which she could pull the trigger. He thus showed a reckless disregard of his wife's safety and the possible consequences of his conduct.[238]

This certainly suggests that the conduct was necessary to the fatal result and foreseeably so. And it hints at an alternative ground for causal responsibility, in his omission to perform a marital duty to prevent suicide. The above discussion, however, was offered only to show the requisite culpability for involuntary manslaughter, and the court never addressed causation. The defendant pled to manslaughter, but then appealed on the ground that the indictment had charged him only with being aiding and abetting his wife's murder of herself, which was not a crime. The court determined that the indictment adequately stated a murder charge and saw no need to explain how the defendant caused death.[239] In contrast to *Commonwealth v. Carter*, the indictment charged murder, alleging Persampieri's "intent to murder her."[240]

Since the promulgation of the Model Penal Code, four decisions have imposed homicide liability for aiding suicide. All four based causation on foreseeability. In the 1979 Montana case of *State v. Bier*, defendant threatened to leave his wife, she

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232. Burnett v. People, 68 N.E. 505 (Ill. 1904).

233. *Id.* at 507.

234. *Id.* at 210 (directing a suppression hearing for the statement and reconsideration of probable cause).

235. People v. Roberts, 178 N.W. 690, 693 (1920); *see also* State v. Ludwig, 70 Mo. 412 (1879), People v. Kent, 83 N.Y.S. 948 (1903) (upholding manslaughter convictions for aiding and encouraging under assisting suicide statutes); State v. Webb, 216 Mo. 378 (1909) (overturning manslaughter conviction under assisting suicide statute for failure to instruct on abandonment).

236. 175 N.E. 2d 387, 389 (Mass. 1961).

237. 52 N.E.3d 1054, 1061-62 (Mass. 2016).

238. *Persampieri*, 175 N.E. 2d at 390.

239. *See id.*

240. *Id. at 388*

blocked his way, and he then threw a gun on the bed, saying she would have to shoot him to keep him from leaving, whereupon she shot herself fatally. In affirming his conviction for negligent homicide, the court wrote that:

> [W]here a crime is based on some form of negligence, the State must show not only that defendant's negligent conduct was the "cause in fact" of the victim's death, but also that the victim was foreseeably endangered, in a manner which was foreseeable and to a degree of harm that was foreseeable.[241]

In the 1980 Iowa case of *State v. Marti*, the court, citing *Persampieri* and *Bier*, concluded that "preparing and providing a weapon for one who is unable to do so and is known to be intoxicated and probably suicidal are acts 'likely to cause death or serious injury,' within the definition of involuntary manslaughter."[242] The court endorsed a definition of proximate cause from a decision holding that "for an intervening act or force to relieve an individual from liability, it must not have been . . .reasonably foreseeable."[243] In the 1988 Florida case of *State v. Rushing*, the court reinstated a charge of negligent manslaughter, rejecting the trial court's view that the victim's suicide was an intervening act.[244] Citing *Persampieri*, *Bier* and *Marti*, the court explained:

> If an intervening cause is foreseeable, it cannot insulate a defendant from all liability . . . . In the case at bar, we are of the firm opinion that it cannot be said as a matter of law that the deceased victim's actions were not foreseeable . . . The victim had said she wanted to blow her brains out. . . The defendant immediately furnished her with a loaded pistol and stood and watched her do just that.[245]

Finally, in the New York case of *People v. Duffy*,[246] the accused was convicted of reckless manslaughter[247] for providing a rifle to a drunk and despondent seventeen-year-old and baiting him to "blow his head off."[248] The court found the causation "sufficiently direct" because the risk the defendant would kill himself "was something which defendant should have, under the circumstances, plainly foreseen."[249]

The *Duffy* case posed an interesting problem of statutory interpretation. As in *Persampieri* and *Carter*, the defendant's culpability with respect to death was arguably intentional, not merely reckless. In fact, Duffy was also charged with "intentionally aid[ing] or caus[ing] another person to commit suicide," a distinct

241. State v. Bier, 591 P. 2d 1115, 1118 (Mont. 1979).
242. State v. Marti, 290 N.W. 2d 570, 583 (Iowa 1980).
243. *Id*. at 584 (citing Haumersen v. Ford Motor Co., 257 N.W.2d 7, 15 (Iowa 1977)).
244. State v. Rushing 532 So. 2d 1338 (Fla. Dist. Ct. App. 1988).
245. *Id*. at 1339– 40.
246. 79 N.Y.2d 611 (1992).
247. N.Y. PENAL LAW § 125.15(1) (1965).
248. *Duffy*, 79 N.Y.2d at 613.
249. *Id*. at 616.

form of second degree manslaughter.[250] He could have been convicted of this form of manslaughter without any finding of causation. The jury, however, picked the theory of manslaughter with the lower standard of culpability, reckless manslaughter, and acquitted Duffy of intentionally aiding suicide.[251] An intermediate appellate court read the intentionally-causing-suicide-provision as barring second degree manslaughter liability for aiding or causing suicide without intent to kill. The New York Court of Appeals, however, ruled that the statute did indeed permit manslaughter liability for recklessly causing suicide.[252]

Conflict of homicide liability with assisted suicide offenses was also a theme in two Michigan decisions rejecting homicide liability for suicide assisters. In the 1983 case of *People v Campbell*,[253] an intermediate appellate court quashed an indictment for murder where the defendant provided a gun and encouraged the victim to kill himself. The court found *Roberts* superseded by decisions identifying killing as an element of murder and observed that that the defendant did not kill anyone.[254] Because Michigan leaves the definition of murder to the common law, the court examined law in other jurisdictions.[255] The court noted the prevalence of statutes punishing assisting or encouraging suicide as a distinct and lesser offense,[256] and the paucity of murder convictions for assisting or encouraging suicide. It observed that no state statute had defined inciting suicide as murder and expressed doubt that inciting suicide had ever been criminalized at common law.[257] The court concluded that the defendant's conduct was not homicide and, absent an assisted suicide statute, was legal.[258]

In 1993, Michigan indeed passed a statute criminalizing assisted suicide.[259] In 1991, in Oakland County, however, Dr. Jack Kevorkian provided two patients suffering from painful, debilitating conditions, with machines to use in committing suicide, and remained present while they employed them to that end.[260] In 1994, the Michigan Supreme Court quashed murder indictments for these deaths and overruled *Roberts*.[261] The court noted the prevalence of assisted suicide statutes[262] and used cases applying these statutes for assistance in defining causation.[263] The

250. *See* N.Y. PENAL LAW § 125.15(1) (1965).
251. *Duffy*, 79 N.Y.2d at 613–14.
252. *Id*. at 615.
253. People v. Campbell, 335 N.W.2d 27 (Mich. 1983).
254. *Id*. at 29–30.
255. *See id*. at 30.
256. In 1983, 9 states punished assisted suicide as a form of manslaughter and 20 states punished it as a distinct offense. *See* In re Joseph G., 667 P.2d 1176, 1179 (Cal. 1983). The Campbell court used the narrower term "incitement" without clarifying whether this included assistance. *See Campbell*, 335 N.W.2d at 31.
257. *Campbell*, 335 N.W.2d at 30.
258. *Id*. at 30–31.
259. MICH. COMP. LAWS ANN. § 752.1027 (1993).
260. *See* People v. Kevorkian, 527 N.W.2d 714, 735–36 (Mich. 1994).
261. *Id*. at 738.
262. *Id*. at 731, 735–36.
263. *Id*. at 736–39.

court concluded that homicide liability requires "that death occurred as a direct and natural result of the defendant's act"[264] and is appropriate only when the accused "participates in the final overt act that causes death, such as firing a gun or pushing the plunger on a hypodermic needle."[265] The court held:

> Only 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 providing the means, the proper charge is assisting in a suicide.[266]

In short, the court presumed that assisted suicide and causation of death are mutually exclusive categories and that punishing assisted suicide by statute—as most states now do—implies a legislative judgment that assisting a voluntary suicide cannot be punished as homicide because it does not cause death.

Although standards of legal causation have become increasingly utilitarian, the law of causing suicide remains a stubbornly libertarian island.[267] As we have seen, the prevailing causation standard makes culpable actors responsible for foreseeable harms, including those mediated by the foreseeable action of others. Logically, this standard should impose homicide liability on those whose assistance or incitement is necessary to suicide, and murder liability on those who intend that result. After promulgation of the Model Penal Code, four courts did indeed apply foreseeability standards to convict suicide assisters of homicide between 1979 and 1992. But then the highly publicized Kevorkian case—arguing that liability should be confined to assisting suicide rather than homicide offenses—seemed to arrest this trend. No court has imposed *murder* liability for assisting a voluntary suicide in a century, even though the mental element of murder has often been satisfied. Even the states imposing lesser grades of homicide on suicide assisters are surprisingly few. While few courts have joined the Michigan Supreme Court in proclaiming that assistance cannot cause suicide, it appears that courts and prosecutors in most states have deferred to the legislative characterization of assisting suicide as an offense distinct from homicide.

When we turn from assisting suicide to inciting suicide, the pattern is even more striking. Only one American decision[268] has ever said that encouragement alone—without aid or threats—could be murder, and none has actually imposed murder

264. *Id*. at 735–36.

265. *Id*. at 738.

266. *Id*. at 739.

267. Contradictory principles often persist in legal doctrine and retain persuasiveness even after they have been defeated in a prior case. *See generally* KARL LLEWELLYN, THE COMMON LAW TRADITION, DECIDING APPEALS 521–35 (1960); Jack Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS U. L. REV. 1 (1986); Duncan Kennedy, A SEMIOTICS OF LEGAL ARGUMENT, 42 SYRACUSE L. REV. 75 (1991).

268. *See* Burnett v. People, 68 N.E. 505 (1904) (stating that the defendant cannot be guilty of the charge of murder "unless the evidence shows beyond a reasonable doubt, that he did or said something which aided, encouraged, or induced [the] deceased to kill herself").

liability. Indeed, the same is true for lower grades of homicide. To our knowledge, every American defendant found liable for causing voluntary suicide enabled the crime by providing the fatal weapon. It appears that no American has ever been convicted of homicide for encouraging suicide alone—*except Michelle Carter*.

III. ASSISTING SUICIDE AND COMPLICITY

Our discussion of causing suicide in part II revealed a paradox. Legal causation doctrine has moved towards a utilitarian standard that permits liability for foreseeably causing voluntary suicide. Yet we saw few homicide convictions based on assisting suicide and only Carter's for inciting suicide. We identified an explanatory factor in the prevalence of statutes punishing assistance or encouragement as a lesser offense. We also identified accomplice liability as a kind of polite-work-around of libertarian limits on causal responsibility. It advances the utilitarian goal of extending criminal responsibility for the acts of others, on largely subjective criteria of liability, while accepting the libertarian premise that one actor cannot cause the voluntary conduct of another. *Complicity is the compliment utility pays to liberty*.

In this section, we bring these points together by identifying assisting suicide offenses as a form of accomplice liability. While suicide is not criminalized, we argue that this treatment is best explained on two distinct grounds: that it is partially justified by the liberty interests of those who commit it and partially excused (or immunized) by the undeterrability of those who commit it. Aiding suicide is punished, albeit less than aiding or encouraging homicide, because the aider benefits from the libertarian partial justification but not from the utilitarian partial excuse (or immunity).

We also reveal that assisting suicide liability is, in an important respect, more deferential to libertarian limits on criminal responsibility than is conventional complicity. While American complicity law equally punishes those who aid or encourage offenses, encouragement alone almost never suffices for assisting suicide liability. This certainly reflects the autonomy value of speech advocating suicide, for both speakers and hearers. Yet the liberty value of encouraging suicide transcends speech: suicide itself is partially justified as an expression of autonomy. This is reflected in a reluctance to punish not only those who verbally encourage suicide, but also those whose aid is not substantial enough to make a difference to the decision to die. In differentiating substantial from insubstantial assistance, assisting suicide statutes diverge from American complicity law, which—unlike foreign complicity law—is all-or-nothing. The resulting offense, punishing substantial assistance of suicide, transgresses familiar categories by imposing liability for partial causation of a partially wrong death.

In what follows, we survey state statutes criminalizing aiding or inciting suicide and their application in the courts. We then introduce the general doctrine of complicity and interpret assisted suicide liability as complicity in someone else's

partially justified and partially excused suicide. Finally, we contrast modern assisting suicide statutes with general complicity doctrine in the United States and abroad.

A. Kinds of Assistance Punished By Assisting Suicide Statutes

A dozen states punish causing or aiding suicide as a form of homicide. Three of these punish only causing suicide.[269] Hawaii provides that intentionally causing suicide is manslaughter.[270] North Dakota provides that willfully doing so by means of coercion, duress or deception is a distinct crime, but graded as severely as murder.[271] Pennsylvania treats causing suicide only by force, duress, or deception as homicide, with the grading depending on the mental state—doing so intentionally could be murder and doing so recklessly would be manslaughter.[272]

These causing-suicide offenses arguably add little to the liability already imposed by their general homicide statutes. As the following discussion demonstrates, it seems that the doctrine of "perpetration by means" would generate homicide liability for causing someone else to commit suicide even in the absence of a statute specifically criminalizing such conduct. Pursuant to this doctrine, a person who uses another as an instrument or as a means to commit a crime is liable for the resulting harm as if he had brought it about by his own conduct.[273] The doctrine is typically applied when someone induces an innocent or irresponsible agent to commit a crime against someone else through deception, coercion, or exploitation of incapacity. In *Johnson v. State*, for example, an Alabama court held that a person who caused an insane individual to kill another is guilty as a perpetrator in much the same way as if he had committed the homicide himself.[274] The decision in *Rouse v. Commonwealth*, imposed liability for forcing a child to operate a vehicle recklessly.[275] Similarly, in *United States v. Kenofskey*, a person was held liable for mail fraud for causing another to mail a letter that unbeknownst to him contained a fraudulent life insurance death claim.[276]

In the context of assisting suicide, a person who causes someone else to commit suicide could be found guilty of homicide as if he had killed the person himself. A paradigmatic example would be that of an actor who threatens to kill a parent's child unless the parent commits suicide. If the parent commits suicide in order save her child, the person who threatened the child's life is guilty of homicide as if

269. Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Missouri, Hawaii, New York, North Dakota, Oregon, Pennsylvania.

270. HAW. REV. STAT § 707-702(1)(b0 (1972).

271. N.D. CENT. CODE ANN. § 12.1-16-04(2) (1991).

272. 18 PA. STAT. AND CONS. STAT. § 2505(a) (1972).

273. GUYORA BINDER, CRIMINAL LAW, THE OXFORD INTRODUCTIONS TO U.S. LAW: CRIMINAL LAW 322–24 (2016).

274. Johnson v. State, 38 So. 182, 183 (Ala. 1904).

275. Rouse v. Commonwealth, 303 S.W. 2d 265, 266 (Ky. 1957).

276. United States v. Kenofskey, 243 U.S. 440, 442–43 (1917).

she had killed the parent. While perpetration by means can plausibly generate homicide liability in causing-suicide cases without the need for a special statute criminalizing the offense, it seems that one of the purposes of these statutes is to reduce homicide liability from murder to manslaughter. An example is Hawaii's statute that punishes causing suicide as manslaughter, even though such cases could be punished as murder pursuant to the doctrine of perpetration by means. If we applied this statute to the Michelle Carter case, she would be liable only for manslaughter even if she intended to cause death.[277] This is exactly what Carter was punished for in Massachusetts.

Another purpose of these causing-suicide offenses seems to be to specify the causal mechanisms that can give rise to homicide liability in these cases. An example is the Pennsylvania statute, which restricts causation to means involving force, duress or deception.[278] In this sense, the Pennsylvania statute stipulates that voluntary suicide precludes causal responsibility. A similar outcome is likely in North Dakota, which treats a concurrent sufficient cause as breaking the chain of causation,[279] but perhaps would not treat a coerced or deceived suicide as an independent concurrent cause. Neither Carter nor Kevorkian would have been guilty of murder in Pennsylvania or North Dakota because of a lack of duress or deception. In contrast, Hawaii employs the foreseeability test of the Model Penal Code, which would allow causal responsibility for providing aid or encouragement indispensable to death with intent to cause it.[280] Provision of the means of suicide, as in the 1994 *Kevorkian* case, could be deemed a cause under Hawaii's foreseeability test, and so could give rise to manslaughter liability.

Four more states punish only aiding suicide as manslaughter. Alaska, Florida and Missouri define intentionally aiding suicide as manslaughter.[281] Arizona does, as well, but limits such intentional aid to provision of physical means.[282] Kevorkian would have been liable for providing his suicide machine under these statutes. But Carter obviously did not provide the physical means required in Arizona. If her encouragement and suggestions to research methods on the internet did not amount to aid, she would not be liable for manslaughter. However, non-causal aid—such as suggesting a method or providing a weapon that the victim did not ultimately use—could give rise to liability in Alaska, Florida, or Missouri. Homicide liability without causation of death poses a problem of congruence between the conduct committed and the conduct for which the defendant is denounced. *No* state statute imposes homicide liability on the basis of encouragement alone, without causation of death.

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277. Assuming, of course, that Carter's encouragement is found to have been a cause in fact of Roy's suicide.

278. 18 PA. CONS. STAT. § 2505(a) (1972).

279. N.D. CENT. CODE ANN. § 12.1-02-05 (West 2018).

280. HAW. REV. STAT. §§ 702-214 (1972), 702-215 (1984), 702-216 (1984), 702-217 (1972).

281. ALASKA STAT. ANN. § 11.41.120 (West 2018); FLA. STAT. § 782.08 (1971); MO. REV. STAT. § 565.023 (1)(2) (2014).

282. ARIZ. REV. STAT. ANN. § 13-1103(A)(3) (West 2018).

Five states provide that causing *or* aiding suicide is manslaughter. Arkansas, Colorado, Connecticut, and New York all include both intentionally causing and intentionally aiding suicide within manslaughter.[283] Oregon also provides that intentionally causing or aiding suicide is manslaughter,[284] and adds that doing so without duress or deception is a defense to murder, but not manslaughter.[285] Since murder requires criminal homicide, which in turn requires causation of death,[286] we cannot infer that aiding suicide alone can give rise to murder liability in Oregon. As just explained, the criminalization of causing suicide is unproblematic pursuant to the more general doctrine of perpetration by means. Nevertheless, by lowering liability for intentionally causing suicide from murder to manslaughter, these statutes create an incongruity between culpability and punishment. Another problematic feature of these statutes is that they extend liability for manslaughter to intentional assistance of suicide that does not cause death. As we have seen, this involves a disturbing incongruity between conduct and offense. So like the Carter verdict and sentence, these manslaughter statutes may denounce too harshly if causation is absent but punish too mildly if causation is present.

Most states punish participation in suicide as a distinct crime rather than a form of homicide. Because these offenses are not defined by causation of death, they often apply to attempted suicides as well as completed suicides. These offenses take three forms.

Eleven states define criminal participation in suicide narrowly in ways that keep it close to causation, such as by requiring certain physical acts or attacks on the victim's voluntariness. Idaho, Michigan, Rhode Island and Tennessee all condition liability on either intentionally providing the physical means or intentionally participating physically in a suicide or attempted suicide.[287] Ohio requires knowingly causing a suicide or attempt by such means.[288] Maryland and South Carolina also punish physically enabling or participating in suicide or its attempt, but add intentionally causing suicide or attempted suicide by force, duress or deception.[289] Kentucky, Kansas and Indiana also punish both physical assistance and causing suicide or its attempt by force, duress or deception, but they grade causing more severely than assisting.[290] Finally, Illinois punishes physically enabling or participating in a suicide or its attempt, but adds a more aggravated offense of coercing suicide or its attempt by "(i) control of the other person's physical location or

283. ARK. CODE ANN. § 5-10-104(a)(3) (West 2018); COLO. REV. STAT. ANN. § 18-3-104(1)(b) (West 2018); CONN. GEN. STAT. § 53a-56(a) (1971).

284. OR. REV. STAT. § 163.125(b) (1999).

285. *Id.* § 163.117 (1981).

286. *Id.* §§ 163.115 (2015), 163.005 (2007).

287. IDAHO CODE ANN. § 18-4017 (West 2018); MICH. COMP. LAWS § 752.1027 (1993); 11 R.I. GEN. LAWS § 11-60-3 (1996); TENN. CODE ANN. § 39-13-216 (West 2018).

288. OHIO REV. CODE ANN § 3795.04 (West 2018).

289. MD. CODE ANN., CRIM. LAW § 3-102 (West 2018); S.C. CODE ANN. § 16-3-1090 (1998).

290. KY. REV. STAT. ANN. § 216.302 (West 2018); KAN. STAT. ANN. § 21-5407 (2011); IND. CODE. § 35-42-1-2 (2014).

circumstances; (ii) use of psychological pressure; or (iii) use of actual or ostensible religious, political, social, philosophical or other principles."[291]

Physical means and physical participation can both cause suicide if they are indispensable to its completion at a particular time, and if we adopt a foreseeability rather than an intervening voluntary act test for legal causation. Yet the provision of means or physical participation, can also be causally superfluous. The physical act requirements in these statutes would preclude liability for Carter or anyone else whose participation was confined to verbal encouragement. That is also true of the provisions conditioning causation on physical force.

Verbal encouragers could be punished under provisions punishing causation by deception. While Carter's encouragement of suicide did not seem purposely deceptive, deception was an element in the other best-known case of inciting suicide, *State v. Melchert-Dinkel*.[292] William Melchert-Dinkel posed in online chatrooms as a suicidal young woman and proposed fraudulent suicide pacts in an apparent effort to induce victims to display their suicides to him on a webcam.[293] In contrast with the narrow approach to liability for verbal encouragement adopted in *Melchert-Dinkel*, the Illinois coerced suicide provision seems to broadly criminalize verbal encouragement. Curiously, it does not even mention physical force, but instead seems to envision terrorist cells and religious cults. Nevertheless, the Illinois provision defining coercion as including psychological pressure is disturbingly vague and could condemn not only Melchert-Dinkel, but also Carter. The provision on "actual or ostensible . . . philosophical or other principles" is also dangerously vague and could be used against right to die advocacy groups.[294]

A second type of statute imposes liability for intentionally causing or aiding a suicide attempt, without specifically requiring any of the physical means or violations of autonomy specified in the first type of assisting suicide statutes. Delaware, New York and Washington punish both intentionally causing and intentionally aiding an attempt.[295] Courts could interpret causing suicide as requiring interference with autonomy. It seems unlikely, but not impossible, that verbal encouragement alone could be punished as causing a suicide attempt. Another ten states simply punish intentional aid of suicide,[296] attempted suicide,[297] or both.[298] Here, too, it seems possible, but by no means necessary, that courts would read a requirement of physical contribution into the element of aid. Conceivably, Carter's advising

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291. 720 ILL. COMP. STAT. 5/12-34.5 (2011).

292. 844 N.W.2d 13, 21 (Minn. 2014).

293. *See id*.

294. 720 ILL. COMP. STAT. ANN. 5/12-34.5 (2011).

295. *See* DEL. CODE ANN. tit. 11, § 645 (1953); N.Y. PENAL LAW § 120.30 (1965); WASH REV. CODE ANN. § 9A.36.060 (2011).

296. ALA. CODE § 22-8B-4 (1975); DEL. CODE ANN. tit. 11 § 645 (1953) ; GA. CODE ANN. § 16-5-5 (2012); N.M. STAT. ANN. § 30-2-4 (1963); WIS. STAT. § 940.12 (1977).

297. OKLA. STAT. tit. 21, § 818 (1910).

298. *See* MINN. STAT. § 609.215 (1963); NEB. REV. STAT. § 28-307 (1977); N.J. STAT. ANN. § 2C:11-6 (West 2018); TEX. PENAL CODE ANN. § 22.08 (West 2018).

Roy that a generator seemed more reliable than the water pump he chose to use, could be seen as aid, even though intangible and inconsequential.

Finally, a third group of states—California, Iowa, Louisiana, Maine, Mississippi, Montana, New Hampshire, North Dakota, Pennsylvania, and South Dakota—punishes intentionally assisting *or encouraging* suicide or its attempt.[299] The Mississippi case of *Williams v. State* is perhaps the best illustration of the potential breadth of such statutes. In concluding that Mississippi's statute could punish verbal encouragement, the court reasoned that "the assisted-suicide statute does not require that the contemplated assistance or encouragement be persuasive, direct, or significant,"[300] while "[a]ssistance or encouragement 'in any manner' is sufficient to constitute the crime."[301] Other statutes are similarly broad. California punishes anyone who "deliberately aids, or advises, or encourages another to commit suicide."[302] Similarly, Louisiana punishes "[t]he intentional advising, encouraging, or assisting of another person to commit suicide, or the participation in any physical act which causes, aids, abets, or assists another person in committing or attempting to commit suicide."[303] North Dakota punishes "[a]ny person who intentionally or knowingly aids, abets, facilitates, solicits, or incites another person to commit suicide."[304] On paper, at least, these provisions certainly would cover Carter.

Read literally, these statutes seem to criminalize both substantial and non-substantial acts of assistance, along with all kinds of verbal encouragement, even if quite minimal. Yet courts have proved reluctant to apply these statutes against verbal encouragement. *We have not found any case in which a defendant was convicted for verbal encouragement alone*. While the Mississippi Supreme Court made some broad statements in *Williams v. State* regarding verbal encouragement of suicide as a punishable offense, the defendant's conduct in the case went far beyond mere verbal encouragement.[305] Williams made a suicide pact with the victim, provided a private place for both of them to commit suicide, and furnished the victim with the knives that she eventually used to kill herself.[306]

The disconnect between the broad text and narrow application of these assisted suicide offenses is particularly apparent in California. In the case of *In re Joseph G*,[307] the California Supreme Court discussed the conduct required for assisting

299. CAL. PENAL CODE § 401 (West 2018); IOWA CODE § 707A.2 (1996); LA. STAT. ANN. § 14:32.12 (1995); ME. REV. STAT. tit. 17-a, § 204 (1975); MISS. CODE ANN. § 97-3-49 (1848); MONT. CODE. ANN. § 45-5-105 (1973); N.H. REV. STAT. ANN. § 630:4 (1971); N.D. CENT. CODE § 12.1-16-04 (1991); 18 PA. CONS. STAT. § 2505(b) (1972); S.D. CODIFIED LAWS § 22-16-37 (1939).

300. Williams v. State, 53 So. 3d 734, 745 (Miss. 2010).

301. *Id*. at 746.

302. CAL. PENAL CODE § 401 (West 2018).

303. LA. STAT. ANN. § 14:32.12 (1995).

304. N.D. CENT. CODE § 12.1-16-04 (1991).

305. *Williams*, 53 So. 3d at 745– 46.

306. *Id*. at 735–37.

307. 34 Cal. 3d 429 (1983).

suicide in distinguishing the offense from murder. In spite of the broad conduct the California statute seemed to prohibit – aiding, advising or encouraging—the court equated the offense with provision of the fatal weapon. Assisting suicide "contemplates some participation in the events leading up to the commission of the final overt act, such as furnishing the means for bringing about death—the gun, the knife, the poison, or providing the water, for the use of the person who himself commits the act of self-murder."[308] In contrast, the court held that an actor's conduct is punishable as murder if instead of furnishing the means he engages in conduct that amounts to "active participation" in the death of the suicide victim, as when the "person actually performs, or actively assists in performing, the overt act resulting in death, such as shooting or stabbing the victim, administering the poison, or holding one under water until death takes place by drowning."[309]

A 1992 California decision reiterated that the assisted suicide statute requires "affirmative and direct conduct such as furnishing a weapon or other means by which another could physically and immediately inflict a death-producing injury upon himself."[310] Finally, in the 2001 case of *In Re Ryan N.*, a panel of the California Court of Appeals addressed the sufficiency of mere encouragement.[311] The court conceded that that "[t]he language of [the state assisted suicide statute] closely resembles that used in other parts of the Penal Code to define or describe the principal criminal liability of persons who "aid and abet" the commission of a crime. . . ."[312] Thus the court admitted that "on its face the [assisted suicide] statute may appear to criminalize simply giving advice or encouragement to a potential suicide."[313] The court nevertheless concluded that the *actus reus* of the offense "required something more than mere verbal solicitation of another person to commit a hypothetical act of suicide."[314] Instead it required "[s]ome *active and intentional participation* in the events leading to the suicide," such as providing the means to be used.[315] In sum, moral support and verbal encouragement are not enough to generate criminal liability.

Minnesota's similar statute also seemed to impose liability for mere verbal encouragement of a suicide. However, the Minnesota Supreme Court struck down these provisions as unconstitutional infringements of free speech in *State v. Melchert-Dinkel*.[316] The court rejected the state's contentions that such encouragement was unprotected by virtue of being integral to criminal conduct or incitement to criminal conduct because suicide is not a crime.[317] It also rejected the contention

308. *Id.* at 436.
309. *Id.*
310. Donaldson v. Lungren, 4 Cal. Rptr. 2d 59, 65 (Cal. Ct. App. 1992).
311. *In re* Ryan N., 112 Cal. Rptr. 2d 620, 632 (Cal. Ct. App. 2001).
312. *Id.*
313. *Id.*
314. *Id.*
315. *Id.*
316. State v. Melchert-Dinkel, 844 N.W.2d 13 (Minn. 2014).
317. *Id.* at 19–21.

that it was covered by the fraud exception, on the ground that Melchert-Dinkel's deceptions were not aimed at gaining any material advantage.[318] The court concluded that speech advocating suicide is protected.[319] It added that no compelling public interest necessitated its proscription and punishment because a prohibition on assisting suicide was adequate to discourage or punish any speech that made a concrete difference by making suicide easier to accomplish.[320] More specifically, the court held that the assistance proscribed had to amount to conduct that "provides another person with what is needed for the person to commit suicide."[321] That is, the conduct must be such that it "enable[es] the person to commit suicide."[322]

This standard "signifies a level of involvement in the suicide beyond merely expressing a moral viewpoint or providing general comfort or support."[323] While "enablement perhaps most obviously occurs in the context of physical assistance", the court observed that "speech alone may also enable a person to commit suicide"[324] by "instructing another on suicide methods."[325] By requiring that the conduct play an enabling role in the suicide, the court excluded from the scope of the statute both non-substantial acts of assistance and acts that merely provide moral support or encouragement. These, as we will see in Subsection C, are more stringent conduct standards than the ones required by standard complicity doctrine. Although the court overturned Melchert-Dinkel's convictions, he was convicted on remand of one count of assisting suicide for suggesting the method used by the male victim, and one count of attempted assisted suicide for suggesting a method that the female victim declined to use.[326] The Minnesota Supreme Court later upheld an appealleate court's conviction of "Final Exit," a non-profit right to die advocacy and service organization for providing instructions on methods used in a suicide.[327]

In sum, while most jurisdictions criminalize assisting suicide, only a few jurisdictions criminalize inciting suicide. Inciting suicide provisions have seldom been applied; and in those few cases, they have been abrogated by judicial interpretation or invalidation.

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318. *Id*. at 21.
319. *Id*. at 24.
320. *Id*. at 23–24.
321. *Melchert-Dinkel*, 844 N.W.2d at 23.
322. *Id*.
323. *Id*.
324. *Id*.
325. *Id*.
326. *See* State v. Melchert-Dinkel, No. A15-0073, 2015 WL 9437531, at *1 (Minn. Ct. App. Dec. 28, 2015). The conviction of attempted assisted suicide was overturned on appeal. *Id*.
327. State v. Final Exit Network, Inc., 889 N.W. 2d 296 (Minn. Ct. App 2015) (The Minnesota Supreme Court initially granted review of this appeallete court case, but, after issuing it's decision in *State v. Melchert-Dinkel*, it denied to review the case, thus upholding the conviction).

B. Assisting Suicide as Complicity in Partially Justified and Partially Excused Suicide

As demonstrated in the previous subsection, the prevailing modern approach to participation in another's suicide is to criminalize assisting suicide as a freestanding criminal offense. Consequently, there is now no necessary connection between the general doctrine of complicity and the scope of modern assisting suicide offenses. This was not always the case.

At common law, suicide was a kind of murder for which the deceased was punished with forfeiture of property and ignominious burial.[328] The rationale for criminalizing suicide was that human life belonged not to the individual, but to God. As Blackstone put it "no man hath a power to destroy life, but by commission from God, the author of it."[329] The wrongfulness of assisting suicide was therefore parasitic on the wrongfulness of suicide. Inciting or assisting suicide was not an autonomous offense, but instead was a form of complicity in someone else's (self) homicide.[330] As one commentator explained it, "[s]uicide is murder at common law, . . . [consequently] one who counsels another to commit suicide, and is present when the act is committed, is guilty of murder as a principal in the second degree."[331] If, on the contrary "the adviser is absent at the time of the suicide, he cannot be punished at common law, as he is an accessory before the fact, and cannot be punished until the conviction of the principal."[332]

Eventually, criminalizing suicide fell into disfavor in most American jurisdictions. Multiple reasons were offered. Some argued that suicide was primarily a mental health issue, and should therefore not be dealt with by the criminal justice system.[333] Others suggested that respect for the right to self-determination entails deference to an individual's right to end his life.[334] An important consequence of decriminalization was that assistance or encouragement of suicide was no longer automatically criminal. Most states responded by enacting offenses that expressly criminalized assisting and encouraging another's suicide.[335] These statutes appear to punish assisting suicide as an intrinsic rather than a derivative wrong.

But now that suicide has been decriminalized and that assisting suicide appears to have become unmoored from the more general doctrine of accessorial liability,

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328. *See* JOEL PRENTISS BISHOP, NEW COMMENTARIES ON THE CRIMINAL LAW 682 (8th ed. 1892) ("self–murder, or suicide, like any other murder, is a common–law felony") (1892); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: OF OFFENSES AGAINST GOD AND RELIGION 190 (1769); *In re* Joseph G, 667 P.2d 1176, 1178 (Cal. 1983).

329. BLACKSTONE, *supra* note 328, at 189.

330. *See* People v. Kevorkian, 527 N.W.2d 714, 735–36 (Mich. 1994).

331. WILLIAM LAWRENCE CLARK, HANDBOOK OF CRIMINAL LAW 215, 217 (3d ed. 1915).

332. *Id.*

333. *See, e.g.*, David S. Markson, Comment, *The Punishment of Suicide—A Need for Change*, 14 VILL. L. REV. 463, 469 (1969).

334. *See generally* Glenn C. Graber, *The Rationality of Suicide*, *in* SUICIDE AND EUTHANASIA: THE RIGHTS OF PERSONHOOD 51, 60-65 (S. Wallace & A. Eser eds., 1981).

335. *See supra*, Part III.A.

it is unclear why assisting suicide is wrongful. What accounts for the emergence of the autonomous offense of assisting suicide when the underlying offense of suicide has largely disappeared from the criminal law?

Some argue that contemporary assisting suicide statutes "attempt . . . to discourage the actions of those who might encourage a suicide in order to advance personal motives."[336] Others focus on the differential responsibility of the aider and the victim: "although the evidence indicates that one who attempts suicide is suffering from mental disease, there is not a hint of such evidence with respect to the aider and abettor."[337] Both of these views presuppose that an important part of what is wrong with assisting suicide is the potential for abuse when someone advises another person to take his own life. The first formulation worries primarily about actors who may encourage suicide in order to benefit, for example from an inheritance. The second formulation seems inspired by the more generic worry that those who attempt suicide are often mentally unstable and, therefore, vulnerable to being manipulated into killing themselves by mentally stable third-parties. At bottom, both views seem concerned about the possible exploitation of the person contemplating suicide at the hands of the aider or abettor. These views imply that there is nothing inherently wrongful about suicide if autonomously chosen, but that an agency problem inheres in allowing another person to influence the decision. This approach to assisting suicide is at odds with a view of assisting suicide as complicity in the victim's wrongful conduct. As Englehardt and Malloy have noted, this "reflects a fundamental shift in the understanding of the law." [338] Given that "public morals are no longer" acceptable grounds for punishing suicide, "the traditional rationale that would support the proscription of assisting suicide as the assistance of a crime is accordingly eroded."[339]

While it is plausible to understand modern assisting suicide offenses as Englehardt and Malloy do, we doubt that the enactment of these statutes implied acceptance of the legitimacy of uncounseled suicide. To the contrary, it seems that the drafters of the Model Penal Code believed that assisting suicide ought to be criminalized precisely because actors who engage in such conduct are complicit in ending someone else's life. More specifically, they suggest that "the interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of another, even though the act may be accomplished with the consent, or at the request, of the suicide victim."[340] Rather than focusing on the potential for abuse inherent in encouraging suicide cases, the Model Penal Code drafters emphasized that assisting suicide undermines the inviolability of human life even when the suicide is

336. Donald M. Wright, *Criminal Aspects of Suicide in the United States*, 7 N.C. Cent. L.J. 156, 162 (1975).

337. *See* Markson, *supra* note 333, at 476.

338. H Tristram Englehardt Jr. & Michele Malloy, *Suicide and Assisting Suicide: A Critique of Legal Sanctions* 36 Sw. L.J. 1003, 1019-1020 (1982).

339. *Id.*

340. MODEL PENAL CODE, § 210.5 cmt. 5 (Am. Law. Inst. 1962).

consensual. On this view, the harm of suicide is death, not the flawed process by which it is chosen. If participation in consensual suicide should be punished for undermining the sanctity of life by expressing that suicide is acceptable, it follows that suicide is not acceptable. If so, assisting suicide is wrong in the same way that assisting homicide is wrong: because assisting someone else to commit a wrong makes on complicit in that wrong.

One hint that, like the Model Penal Code, some modern assisting suicide statutes seek to prevent complicity in someone else's self-homicide is that many such statutes are often worded in ways that track the kinds of assistance typically punished by general complicity doctrine. In Nebraska, for example, a person is guilty of assisting suicide if "with intent to assist another person in committing suicide, he aids and abets him in committing or attempting to commit suicide."[341] Similarly, in Mississippi, assisting suicide is defined as "wilfully, or in any manner, advis[ing], encourag [ing], abet[ting], or assist[ing] another person to take, or in taking, the latter's life."[342] Unsurprisingly, the kinds of assistance criminalized pursuant to these statute are the types of aid that typically give rise to accessorial liability under general complicity provisions. The parallels are to be expected, given that assisting suicide was originally punished as complicity in self-homicide rather than as a freestanding offense.

The similarity between assisting suicide statutes and complicity is often invoked by courts when construing laws criminalizing inciting and assisting suicide. In *State v. Bauer*, for example, the Court of Appeals of Minnesota explained that although "[s]uicide was a common law crime in England" it is "as a policy matter and for practical reasons . . . not criminalized in most states."[343] Nevertheless, the court went on to say, "the absence of [a] deterrent effect against the suicide . . . has not prevented the criminalization of assisting suicide."[344] For the court, assisting suicide remains punishable because the public policy and practical reasons that explain the decriminalization of suicide itself do not "extend[] to the suicide's accomplice."[345] On this view, suicide itself remains wrongful, but the state abstains from punishing it because—among other reasons—doing so would not have appreciable deterrent effect. It is as if the state granted a blanket excuse defense to every person who attempts suicide. While an excuse would shield the person, who commits or attempts suicide from criminal liability, this exculpatory effect would not automatically transfer to those who incite or aid the suicide. This approach to assisting suicide statutes trades on the divergent exculpatory effect of two different types of defense to criminal liability: justifications and excuses.

341. NEB. REV. STAT. §28-307 (1977).
342. MISS. CODE ANN. § 97-3-49 (1848).
343. State v. Bauer, 471 N.W.2d 363, 367 (Minn. Ct. App. 1991).
344. *Id.*
345. *Id.*

Justifications are defenses that negate the wrongfulness of the act.[346] Since justified conduct is not wrongful, assisting justified conduct cannot be wrongful either.[347] If Maria breaks a car window to save a child suffocating inside the vehicle, her conduct is justified pursuant to the lesser evils defense. But so too would any assistance given to Maria be automatically justified. If, for example, John were to give a hammer to Maria so that she could break the window and save the child, Maria's lesser evils defense automatically transfers to John so that his conduct is also justified.

Excuses, on the other hand, do not alter the wrongfulness of the act.[348] Instead, they defeat criminal liability by negating the actor's blameworthiness for having engaged in the admittedly wrongful act.[349] If Harry, a mentally ill individual, breaks the window of another's car believing that doing so is necessary to save the world from an imminent alien invasion, the act remains wrongful in spite of the individual's mental illness. Nevertheless, the perceptual distortions caused by the mental illness may generate an excuse that defeats liability for criminal damage without negating the wrongfulness of the conduct.[350] The diminished voluntariness of Harry's decisions may also mean that he, and others with the same condition, may be difficult to deter. This is an additional reason to excuse Harry from liability. An important feature of excuses is that they are personal, and so do not transfer to third-parties. If John gave Harry a hammer so that he could break the window of the vehicle, John would be held liable for criminal damages, for Harry's insanity excuse is personal and does not transfer to John.[351]

How does the distinction between justification and excuse help us—and the Minnesota Court of Appeals—make sense of contemporary assisting suicide statutes? One way they do is by allowing us to continue to think of the offense of assisting suicide as a form of accessorial liability in spite of the contemporary decriminalization of suicide. For the reasons we just discussed, the accessorial liability rationale for punishing assisting suicide is problematic once suicide is no longer considered a form of punishable self-homicide. If suicide is not a punishable offense, how can aiding and abetting a suicide generate punishment as a form of accessorial liability? The answer, as the Minnesota Court suggests, could be that

346. *See, e.g.*, Joshua Dressler, *New Thoughts about the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 U.C.L.A. L. REV. 61, 66 (1984).

347. Fletcher, *supra* note 111, at 760–762.

348. *Id.* at 458–59.

349. *Id.*

350. That the conduct remains wrongful (i.e. unlawful) is confirmed by the fact that the mentally ill individual is typically liable in tort for the damages caused by the vehicle. *See, e.g.*, *Delahanty v. Hinckley, Jr.*, 799 F. Supp. 184, 187 (1992) (stating that "while the Court acknowledges that commentators have criticized the common law rule, the fact remains that "courts in this country almost invariably say in the broadest terms that an insane person is liable for his torts.").

351. A third type of defenses, non-exculpatory defenses, defeat criminal liability without negating either the wrongfulness of the act or the blameworthiness of the actor.. They can be—like excuses—personal to the actor. A pertinent example would be the extension of immunity to those drug offenders—or suicide attempters—who accept mental health treatment. *See* 2 PAUL ROBINSON, CRIMINAL LAW DEFENSES § 201 (1984).

although suicide remains wrongful, it is not punishable because of the application of an excuse. Since excuses are personal to the actor, only the person who commits or attempts to commit suicide can avail herself of them. Those who aid or abet the suicide, on the other hand, would not benefit from the excuse or non-exculpatory defense, as they would not automatically transfer to third-parties.

While it would be somewhat odd to exempt all perpetrators of a given crime from liability *ex ante* on the basis of an excuse, the decision to do so is arguably defensible in light of the special features of suicide. Many people who attempt suicide, although certainly not all, suffer from mental illness. Even when not the obvious product of mental illness, suicide is most often seen as an issue that is most adequately dealt with outside of the criminal justice system. This would mirror the way in which the law deals with insane offenders. We treat insanity as a public health problem. It is easy to think of suicide in a similar way. It could also be argued that anyone who is willing to take their own life is beyond the deterrent influence of the criminal law. In sum, punishing these actors would appear to be useless at best and cruel at worst. As a result, a prophylactic rule excusing all actors who attempt suicide may be defensible. In recognition of the impossibility of deterring this whole class of actors, it is defensible to furnish them with an excuse.

Another way of analyzing assisting suicide statutes is by thinking of suicide as unpunished because justified or partially justified. The most obvious reason for thinking that suicide is justified is that it can be an exercise of autonomy. After all, as we pointed out in the introduction, it is difficult to think of a more momentous choice than the decision to live or die. To the extent that this decision is made without coercion and by a sufficiently competent actor both in terms of maturity and mental clarity, allowing the actor to make the choice would seem to respect and even enhance her autonomy. Contrarily, prohibiting suicide even when the actor's decision to end his life is uncoerced and fully competent would seem to interfere with the actor's autonomy. Assuming that enhancing autonomy is desirable, committing suicide under these kinds of circumstances would seem to be justified and, therefore, not wrongful.

If suicide is viewed as a fully justified exercise of autonomy, then assisting suicide should not be punished. One of the distinctive features of justification defenses is that they automatically transfer to third-parties.[352] If what the actor is doing is not wrongful, it follows that helping the actor engage in such conduct also ought not be considered wrongful. If suicide is justified as an exercise of autonomy, then helping or encouraging someone else to commit suicide should similarly be regarded as justified. On this view, assisting suicide should not be punished, at least not as broadly as it is punished today. To be sure, this view would be compatible with punishing assisting or encouraging suicide when the actor that is contemplating suicide is coerced into doing so or lacks sufficient competency or mental clarity to make such a momentous choice. It would, however, be

352. Fletcher, *supra* note 111, at 760–62.

incompatible with criminalizing assistance or encouragement of suicide when the actor who is thinking about killing himself is uncoerced and fully competent to make this choice.

This approach to assisting suicide is aligned with what we have called the libertarian strand in criminal law theory and doctrine. The libertarian view seeks to define spheres of permissible and impermissible conduct in a way that maximizes personal autonomy. The refusal to punish uncoerced and competent suicide is exactly what one would expect in a criminal law that is committed to enabling rather than hindering self-determination. If such suicide is an exercise of autonomy, any act assisting it should be justified as autonomy enhancing. Any advice helping the actor to reach an autonomous decision should be justified as autonomy-enhancing as well. While this approach is certainly coherent and perhaps even attractive, existing assisting suicide statutes do not reflect full commitment to libertarian principles. By punishing assisting suicide even when the decision to commit suicide is uncoerced and competent, contemporary statutes fail to enhance autonomy as much as the libertarian view would call for.

Although the current degree of criminalization of assisting and encouraging suicide is not fully compatible with a libertarian approach to criminal law, it does respond to some of the concerns motivating the libertarian view. More specifically, modern assisting suicide statutes can be viewed as criminalizing complicity in a partially, albeit not fully, justified suicide. The basic idea is that although suicide remains wrongful, the fact that the actor voluntarily chose to end her own life reduces, without fully negating, the wrongfulness of the act. The wrongfulness of uncoerced and competent suicide is diminished because it has some value as an exercise of autonomy. Nevertheless, the act remains wrongful because the utilitarian model still pervades most of contemporary criminal law, including the doctrine of causation. As we pointed out before, from a utilitarian viewpoint, conduct ought to be punished if doing so will deter future harmful conduct, regardless of whether the conduct is autonomy maximizing or not. Assisting and encouraging voluntary suicide remain wrongful in the utilitarian view because suicide poses a serious and costly public health problem. By outlawing complicity in suicide, the utilitarian inspired assisting suicide statutes seek to diminish the number of suicides.

While assisting suicide offenses reflect the utilitarian view of criminal law in so far as they impose punishment, they do not fully embody that view because they do not punish assisting suicide in parity with the punishment imposed for assisting homicide. Yet suicide is no less a public health problem than homicide. According to Center for Disease Control statistics for 2014, there were 42,825 deaths attributed to suicide compared to 15,872 deaths attributed to homicide.[353] Why then, is assisting suicide punished less than assisting homicide? Why is encouraging suicide rarely punished at all, while encouraging homicide can be punished as

353. CENTER FOR DISEASE CONTROL, NATIONAL VITAL STATISTICS REPORTS, DEATHS: FINAL DATA FOR 2014 (2016), available online at https://www.cdc.gov/nchs/data/nvsr/nvsr65/nvsr65_04.pdf.

murder? One possibility is that we punish assisting suicide less than assisting homicide because the libertarian approach to criminal law still exerts some pull in this particular context. While respect for the autonomy of the actor who commits suicide is not enough to fully defeat the utilitarian argument for punishing assistance to suicide, it suffices to mitigate that punishment when compared to that imposed for assisting intentional homicide.

It seems that modern assisting suicide statutes are best interpreted as laws that criminalize complicity in an only partially justified suicide. From a descriptive perspective, this interpretation is more accurate than one that views the suicide as fully justified. Viewing suicide as fully justified would warrant legalizing assistance to suicide entirely, which is not what we see today. Viewing assistance to complicity in someone else's partially justified suicide is also more descriptively accurate than an approach that views suicide as completely unjustified. If suicide were completely unjustified, there would be little distinction between complicity in someone else's intentional suicide and complicity in someone else's intentional homicide. But that is also not what we see. What we find are statutes punishing assisting intentional suicide considerably less than assisting intentional homicide. The best way of explaining this disparity is by viewing these statutes as laws that punish complicity in a suicide that is partially justified because suicidal conduct can sometimes advance important autonomy interests; and partially excused because suicide cannot be deterred by threatening its perpetrator with punishment and may not be fully autonomous.

C. Disparities Between Assisting Suicide Statutes and General Complicity Doctrine

If assisting suicide is analogized to complicity in a crime, then mere encouragement and all forms of assistance, however trivial, ought to generate liability. This is so because—at least in Anglo-American jurisdictions—any amount of aid or encouragement suffices for accessorial liability. The case of *Wilcox v Jeffery*[354] is representative. The defendant in *Wilcox* bought a ticket to attend an illegal jazz concert. He attended the concert and seemed to enjoy the performance very much.[355] The court found him liable for aiding and abetting the illegal performance, holding that "his presence and his payment to go there" was sufficient conduct to amount to "encouragement" for the purposes of imposing accessorial liability.[356] Relatedly, it is settled law that an accomplice's aid or encouragement does not need to be a cause of the perpetrator's crime. As one court noted in an oft-cited case, "[t]he assistance given [to establish complicity] need not contribute to the criminal result in the sense that but for it the result would not have ensued."[357]

354. Wilcox v. Jeffery [1951] 1 All ER 464 at 466.
355. *Id.*
356. *Id.*
357. State v. Tally, 15 So. 722, 738 (Ala. 1894).

What is required, then, is that "the accomplice's aid and encouragement facilitat[e] the result, even if the result would have transpired without the accomplice's assistance."[358] Similarly, when the accessory is charged with encouraging, the prosecution need not prove that the accessory's support need influenced the perpetrator. In *State v. Monroe*, for example, the defendant was convicted as an accomplice to the crime of assault for standing by while a friend assaulted the victim and yelling out "c'mon" and "kick her butt."[359] The court held that these words sufficed even though they were uttered after the assault had begun and so could not have exerted causal influence on the perpetrator's decision to commit the crime.[360] Similarly, when an actor is charged with providing physical assistance, any degree of aid suffices, even if quite minor.[361] Thus, as the Supreme Court of Pennsylvania recently stated, "[t]here is no minimum amount of assistance or contribution requirement" in the law of complicity.[362] Consequently, "even non-substantial assistance, if rendered with the intent of promoting or facilitating the crime, is sufficient to establish complicity."[363]

Yet as we explained in Subsection A, modern assisted suicide statutes do not appear to proscribe minor contributions to suicide or to prohibit verbally encouraging a suicide. There is, therefore, an important discontinuity between the kinds of assistance prohibited pursuant to general complicity law and the kinds of aid punished under assisted suicide statutes. Whereas any assistance, including verbal encouragement, suffices for complicity liability, only causal assistance that goes beyond verbal encouragement is punishable pursuant to assisted suicide statutes. Assisted suicide liability requires more objective wrongdoing than accomplice liability and in that respect it is more deferential to libertarian limits on the criminal law. In what follows, we explore this discontinuity in more detail.

1. Verbal Encouragement, Moral Support, and Free Speech

The difference between freestanding assisting suicide statutes and the general doctrine of accessorial liability is most evident in the context of verbal encouragement. While courts have little problem punishing as accessories those who provide moral support or otherwise verbally encourage the criminal act of another, most forms of verbal encouragement are not criminalized pursuant to the vast majority of contemporary assisting suicide statutes.

This reluctance to punish verbal encouragement or moral support as assisted suicide reflects, at least in part, a concern over whether criminalizing speech that encourages another's suicide violates the free speech rights of the encourager. This

358. State v. Etzweiler, 480 A.2d 870, 882 (N.H. 1984) (King, C.J., dissenting) (superseded by statute on other grounds).

359. State v. Monroe, 612 N.E. 2d 367, 368 (Ohio Ct. App. 1992).

360. *Id.*

361. *Id.*

362. Commonwealth v. Gross, 101 A.3d 28, 35 (Pa. 2014).

363. *Id.*

is not usually a problem in the context of general complicity doctrine, as the Supreme Court has long held that speech essential to criminal conduct may be lawfully criminalized without violating the First Amendment. In *Giboney v. Empire Storage and Ice Co*., for example, the Court rejected the contention that "speech or writing used as an integral part of conduct in violation of a valid criminal statute" enjoys constitutional protection.[364] This doctrine permits punishment for encouraging any validly enacted criminal offense.

Given the similarities between general complicity law and assisted suicide statutes, it could plausibly be argued that verbally inciting another's suicide could be punished without running afoul of the First Amendment because such speech is "an integral part of conduct in violation of" the criminal statute that punishes assisting suicide.[365] This was precisely the prosecution's argument in the *Melchert-Dinkel* case in response to the defendant's claim that in punishing encouragement, the Minnesota statute infringed free speech. The problem with this argument is that verbally encouraging someone else to commit suicide is not an essential part of some other conduct violating a criminal law. As the court stated in *Melchert-Dinkel*, "the major challenge with applying the 'speech integral to criminal conduct' exception is that suicide is not illegal in [America]."[366]

Of course, it may be argued that such verbal encouragement is conduct that is essential to a criminal law violation not because suicide is a crime, but rather because assisting suicide has been criminalized as a free standing offense. But this smacks of circularity, given that the only reason that verbally encouraging suicide was integral to the crime of assisting suicide in Minnesota was precisely because the state elected to include it within the definition of the crime. It would seem that the state should not be able to immunize speech from First Amendment protection by simply enacting a statute criminalizing such speech. This was the view adopted by the court in *Melchert-Dinkel*. According to the court, arguing that verbally encouraging a suicide is speech that is integral to establishing a criminal violation "is circular because it effectively upholds the statute on the ground that the speech prohibited by [the assisted suicide statute] is an integral part of a violation of [the assisted suicide statute]."[367] As a result, the Minnesota high court struck down the portion of the assisted suicide statute that appeared to broadly criminalize verbal encouragement or moral support.

Nevertheless, as we mentioned in Subsection A, the court held that speech that played an "enabling role" in bringing about the suicide could be punished without running afoul of the First Amendment. In *State v. Final Exit Network, Inc*, for example, the Minnesota Court of Appeals upheld a conviction under the state assisted suicide statute for conduct that included providing a particular individual

364. Giboney v. Empire Storage and Ice Co., 336 U.S. 490, 498 (1949).
365. *Id*.
366. State v. Melchert-Dinkel, 844 N.W.2d 13, 19 (Minn. 2014).
367. *Id*. at 20.

with oral and written instructions on a relatively effective, painless and private method for committing suicide.[368] In upholding the conviction, the appellate court observed that there is a distinction between prohibiting detailed instructions on how to commit suicide and prohibiting "advocacy for the right to die" or speech that provides "emotional support" to those seeking to end their life.[369] Such verbal acts are considered "tangential to the act of suicide" and, as such, may not be criminalized without violating the First Amendment.[370] In contrast, speech that amounts to "instructing another on suicide methods" is deemed essential to the act of suicide rather than tangential.[371] Such speech may properly be criminalized because it goes beyond "expressing ideas" and instead amounts to providing material assistance to suicide.[372]

The line drawn in *Melchert-Dinkel* and *Final Exit* is between mere moral support or encouragement and speech concretely facilitating the commission of the suicide. This distinction maps rather nicely onto the distinction between substantial and insubstantial assistance. Morally supporting someone who has already decided to commit suicide is rarely a factual cause of the suicide in the sense of a necessary condition. As we saw in the Carter case, it might hasten an already imminent death, but this is (a) very hard to prove and (b) a much smaller harm than the drastic shortening of life typically punished as homicide. In contrast, providing specific instructions regarding how to commit suicide may be an actual cause of the suicide. This kind of conduct tends to take place when a person is unsure of whether to commit suicide because they are afraid that the methods they intend to use will be ineffective or painful. In such circumstances, providing the person with instructions regarding an effective method of committing suicide may bring about a suicide that would not have happened otherwise. Of course there is still the possibility that incitement alone will persuade someone to commit suicide who would never otherwise have considered it, but where that happens we might expect to find indicia of coercion, deception or exploitation of incapacity.

There is another perhaps more fundamental reason that may explain the contemporary reluctance to punish verbal encouragement of suicide. The punishment of assisting suicide is perplexing in part because of the ambivalence with which we evaluate suicide. On the one hand, suicide is often viewed as a pressing public health problem that costs years of productive and potentially satisfying life for thousands of people, harrowing grief for survivors, and considerable public expensed to try to prevent. On the other hand, suicide is sometimes viewed as an exercise of autonomy that can be justified and ought to be tolerated. This is most obviously the case in the context of physician-assisted suicide, which is now legal

368. State v. Final Exit Network, 889 N.W.2d 296, 299–301 (Minn. Ct. App. 2016).
369. *Id*. at 307.
370. *Id*.
371. *Id*.
372. *Id*.

in a handful of states.[373] To a lesser extent, it is also true of assistance of any uncoerced and competent suicide. While such assistance is generally unlawful, it is punished considerably less than it was at common law, given that assisting suicide is no longer viewed as complicity in (self) murder. This view, as we argued in the previous subsection, reflects at least a partial commitment to the idea that autonomy should be valued in criminal law.

When viewed as a serious public health issue, suicide appears as conduct that is of no, or perhaps negative, value. It is seen as a problem to be tackled rather than as an opportunity for enhancing personal autonomy. From this perspective, speech that encourages suicide appears to have little value as well. In contrast, if viewed as an act of self-determination, suicide appears as conduct that is of significant value. As such, suicide should not be proscribed, and perhaps should even be praised. Viewed through this lens, speech that encourages suicide could have positive valence, as it could augment someone else's autonomy.

Given these conflicting views about the value of suicide, it is unsurprising that courts are generally unwilling to criminalize verbal encouragement of suicide. It is precisely when there are competing views about values that the need to protect speech is at its most pressing. Since society is ambivalent regarding the value of suicide, courts are understandably inclined to tread lightly when it comes to punishing speech that encourages such conduct. In contrast, there are no similar controversies over the value of standard instances of criminal conduct, such as homicide, sexual assault, or theft. Consequently, verbal encouragement of such conduct – and criminal conduct more generally – does not amount to protected free speech.

2. Substantial and Non-Substantial Physical Assistance

While First Amendment concerns can explain the reluctance to punish verbal encouragement under contemporary assisting suicide statutes, these concerns cannot explain why the majority of American jurisdictions punish only substantial physical assistance to suicide. What explains the disconnect between the kinds of assistance punished under general complicity law and the types of aid criminalized pursuant to assisted suicide statutes? Why is any kind of assistance, however trivial or insubstantial, punishable as complicity, whereas only substantial, often causal, aid is punished as assisted suicide?

While there is no obvious explanation for this disconnect, the narrower approach to criminalizing physical assistance embodied in modern assisted suicide statutes responds to the basic intuition that substantial contributions to bringing about harm are more blameworthy than insubstantial contributions to harm. Contributing to counterfeiting by supplying an expensive and hard to find counterfeiting machine

373. Physician-assisted suicide is authorized by legislation in California, Oregon, Washington, Vermont. In Montana, physician-assisted suicide was judicially authorized in Baxter v. State, 224 P.3d 1211 (Mont. 2009).

(substantial contribution) is more blameworthy than contributing to the forgery by supplying a $100 bill to copy (insubstantial contribution). The counterfeiting equipment far more substantially increases the perpetrator's chances of succeeding in the crime and so its provision is more blameworthy. For that reason, its possession or distribution might itself be proscribed as a special crime of criminal facilitation.

A similar logic seems to underlie many contemporary assisting suicide statutes. A survey of these statutes reveals a fairly sophisticated scale of punishment for different kinds of acts that contribute to someone else's suicide. On the harshest end of the scale, murder liability is imposed when the assistance consists in performing or assisting in the performance of the final overt act that causes the death. On the other hand, manslaughter liability is imposed when the defendant causes someone else to commit suicide by force, duress, or deception. Finally, on the most lenient end of the scale of liability, the defendant is punished for the freestanding offense of assisting suicide when the aid amounts to providing the means for committing the suicide. Beyond the range of liability lies insubstantial assistance—perhaps accompanying the victim to the store to shop for equipment, or accepting responsibility for a pet—and finally, verbal encouragement.

The sliding scale that undergirds the punishment of assisting suicide in many American jurisdictions stands in stark contrast with the one size fits all approach of American complicity law. Rather than having a sliding scale of punishment of accomplices that ramps up as the blameworthiness of the accomplice's participation increases, complicity law authorizes imposing the same amount of punishment on all accomplices regardless of their degree of contribution to the harm. Indeed, Joshua Dressler has criticized this feature of American law and recommended punishing "non-substantial assistance" less than "substantial" assistance to the perpetrator and punishing both less than actual perpetration.[374] This is, in fact, what occurs in many European and Latin American countries, where it is common to distinguish between "essential" and "non-essential" (i.e. trivial) complicity. Essential accomplices provide assistance to the perpetrator that considerably increases the perpetrator's chances of consummating the offense.[375] In contrast, non-essential or trivial accomplices are those that contribute to the commission of the offense by assisting the perpetrator with acts that do not substantially increase the chances of perpetrating the offense.[376] In many civil law jurisdictions trivial accomplices are punished less severely than perpetrators and substantial accomplices.[377]

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374. *See* Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427, 433, 448 (2008).

375. *See* ENRIQUE GIMBERNAT ORDEIG, AUTOR Y CÓMPLICE EN DERECHO PENAL 127–28 (2006).

376. *See id.*

377. *See generally*, Luis E. Chiesa, *Reassessing Professor Dressler's Plea for Complicity Reform: Lessons from Civil Law Jurisdictions*, 40 NEW ENG. J. ON CRIM. & CIV. CONFIN. 1 (2014) (evaluating how European Continental codes distinguish between substantial and insubstantial complicity).

It is common in Europe and Latin America for assisted suicide statutes to track distinctions in degrees of assistance that their criminal laws already make in the context of complicity doctrine. Spain's assisted suicide statute, for example, punishes only "essential" assistance to suicide.[378] As a result, Spain's statute—like most American assisting suicide statutes—does not punish insubstantial acts of assistance. Spain's statute also criminalizes "instigating" someone else to commit suicide.[379] Instigation is a legal term of art in civil law systems of criminal justice. An instigator is someone who convinces another person to commit an offense.[380] Thus, an instigator in the context of suicide is someone who convinces another person to commit suicide. If the person is already inclined to commit suicide, there can be no instigation. This creates a distinction between instigation and encouragement. Instigation requires convincing someone of doing something they were not inclined to do. As such, instigation is what Americans would call a factual cause of the harm brought about by the perpetrator, since the offense would not have taken place but for the instigation. In contrast, as we have observed, providing verbal encouragement or moral support to someone already inclined to commit an offense is not generally a factual cause of the resulting harm. Outside of the context of assisted suicide, instigation is punished as severely as perpetration in Spain.[381] On the other hand, moral encouragement that falls short of instigation is punished considerably less than perpetration.[382] Given that Spanish complicity law views instigation and essential assistance as particularly blameworthy forms of complicity, it is unsurprising that these are precisely the forms of assistance that are criminalized pursuant to the Spanish assisted suicide statute.

By contrast, American assisted suicide statutes draw distinctions between degrees of participation that American complicity doctrine fails to recognize. The most likely reason for this divergence is our ambivalence about whether voluntary suicide is a wrong or a right. Yet this ambivalence exposes a deeper problem in American criminal law. Both causation and complicity impose all-or-nothing responsibility, and both forms of responsibility are increasingly attributed on the basis of the highly subjective standards favored by utilitarian legal thought. Yet, as the problem of inciting suicide reveals, libertarian intuitions persist within American criminal law. An all-or-nothing approach to criminal responsibility makes it difficult to accommodate these competing values. To be sure, the utilitarian-inspired Model Penal Code does leave culpability as the single dimension along which it is possible to grade guilt. Yet that one-dimensional conception of guilt is not responsive to the libertarian intuition that, however, guilty one's thoughts, objective

378. C. P., Art. 143, 2.

379. C. P., Art. 143, 1.

380. Miguel Diaz & Garcia Conlledo, *Autoria y Participacion*, 10 REVISTA DE ESTUDIOS DE LA JUSTICIA, 45 n.10 (2007).

381. C. P., Art. 28, 2.

382. C. P., Art. 29.

conduct matters. The paradoxical resolution of the Carter case—attributing full causal responsibility but partial culpability— exposes this continuing conflict of values.

CONCLUSION

The Carter case posed a dilemma. Her culpability with respect to death was very great. She expressed a clear purpose that Conrad Roy die. This went beyond the recklessness of a foreseeable risk of death required for manslaughter, and fulfilled the intent usually required for murder. Indeed, her persistence in urging suicide over the course of a week, her participation with Roy in planning his suicide, and her offering of persuasive arguments all bespoke the premeditation and deliberation required for first degree murder. In Massachusetts, murder of either degree requires a life sentence (with parole for second degree murder or first degree murder by a juvenile).[383]

Why, then, was Carter charged only with manslaughter rather than murder? Even manslaughter is punishable by up to twenty years.[384] Why would a killer with far more culpability than is required for manslaughter be sentenced to only fifteen months? Perhaps her youth and emotional instability played some role in limiting her punishment, but it seems obvious that Carter's liability was limited not by her culpability, but by her conduct. She did not shoot, stab, or bludgeon. She inflicted no wound or injury. She did not administer the fatal poison. Neither did she supply it. She did not even supply any indispensable information beyond reminding the victim that information is available on the internet. The victim researched methods, purchased equipment, secluded himself, and slowly killed himself, as he had tried to do before and as he had professed his commitment to do, for two years, despite Carter's efforts to talk him out of it.[385] Perhaps Carter's ultimate support for this course of action made a critical difference in Roy's decision. Could any court deny there was probable cause to believe Carter's encouragement made a difference? If her support was decisive to Roy's suicide, then Carter's conduct would satisfy the criminal law's causal requirements. But perhaps Roy's increasing resolution precipitated Carter's acceptance of a decision that was Roy's own. If so, her conduct would not amount to a factual cause of Roy's death. Could any factfinder exclude the latter possibility beyond a reasonable doubt?

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383. MASS. GEN. LAWS ch. 265, § 2 (2017).

384. MASS. GEN. LAWS ch. 265, § 13 (2017).

385. "Both witnesses appeared to back assertions by Carter's attorney, Joseph Cataldo, that Roy had long contemplated suicide and was depressed partly because of physical and verbal abuse from family members. Cataldo previously said Roy was on a 'path to take his own life for years' after he was seriously depressed by his parents' divorce and a victim of of physical abuse by a relative." Jessica Chia, *Defense lawyers for girl who is accused of encouraging her boyfriend to kill himself say he researched 'easy and painless' suicide YEARS earlier*, DAILY MAIL, (June 10, 2017), http://www.dailymail.co.uk/news/article-4589122/Judge-denies-defense-request-texting-suicide-case.html#ixzz54K0xxdcz.

In spite of these challenges, the trial court found that Carter's conduct was a factual cause of Roy's death under the assumption that her encouragement accelerated Roy's decision to kill himself even if only by a day or an hour. The court also embraced the utilitarian foreseeability standard that now prevails in most American jurisdictions. In doing so, it rejected the more libertarian standard of causation that imposes responsibility for results of a wrongful act not followed by intervening voluntary action. But, as we saw in Part II, while most jurisdictions profess to impose causal responsibility for foreseeable results, very few jurisdictions have actually imposed homicide liability for assisting another person's suicide, and none have previously imposed such liability on the basis of encouragement alone. This reluctance to impose causal responsibility for assisting or encouraging a suicide may explain why the district attorney decided to charge Carter with a lesser homicide offense and why most states have enacted laws defining assistance and sometimes encouragement of suicide as a freestanding and lesser crime.

It is tempting to believe that dilemma posed by the Carter case would disappear had the case been tried in one of the many state that punishes inciting or assisting suicide as a distinct criminal offense. On their face, these statutes would seem to authorize punishing Carter even if her encouragement was not a factual cause of Roy's death. They also would punish Carter less than if she were convicted of intentional homicide. Upon closer inspection, however, most contemporary assisting suicide statutes criminalize only substantial acts of verbal or physical assistance. As we saw in Part III, the majority of assisting suicide statutes in America criminalize acts of substantial physical assistance, such as providing the means for committing suicide. Furthermore, it seems that the few states that criminalize verbal assistance only do so when the speech enables the suicide by, for example, providing detailed instructions regarding how to effectively commit suicide. As a practical matter, mere verbal encouragement is not punished under assisting suicide statutes. Thus not only would Carter have not likely been convicted of homicide in any other state, she would not likely have been convicted of assisting suicide either.

Assisting suicide laws are best interpreted as ascribing responsibility for another's suicide on the basis of complicity rather than causation. They view voluntary suicide as partially justified by the victim's choice, and partially excused because of the undeterrability of that choice. As such, they reflect a libertarian view of suicide as an autonomous act that is uncaused by the encouragement of the accomplice. Yet in refusing to completely justify suicide, these laws embody the utilitarian aim of reducing the social costs of such conduct. This combination of libertarian and utilitarian commitments explains why these laws continue to criminalize assisting suicide while simultaneously punishing it less than assisting murder.

The puzzle of inciting suicide confronts American criminal law with a conflict between the liberty interests of individuals to deliberate and decide their own fate,

and the public welfare interest in preventing the tragic waste of life. These competing interests align with deeper conflicts of value in the liberal tradition that also express themselves in criminal law. American criminal law's all-or-nothing attribution of causal responsibility and complicity reflect the ascendancy of a utilitarian program that aspires to measure all human conduct along a single metric of subjective culpability. Yet the anomalous treatment of inciting suicide reflects the stubborn persistence of the libertarian intuition that objective conduct matters, too.