



1969

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Recommended Citation

David S. Markson, *The Punishment of Suicide - A Need for Change*, 14 Vill. L. Rev. 463 (1969).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol14/iss3/5>

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THE PUNISHMENT OF SUICIDE — A NEED FOR CHANGE

I. INTRODUCTION

Suicide represents a major medical and legal problem.¹ Each year in the United States more than 19,000 deaths are reported as suicides,² and this alarming figure does not even take into account the many "accidental" deaths which are, in reality, suicides. The reported number of deaths by suicide in 1960 represented more than twice the number of deaths by homicide, almost half the number of deaths by automobile accidents, and almost 15 times the number of deaths by aircraft accidents.³ The number of attempted suicides is unknown but is estimated to be as high as 200,000 per year.⁴

The basic purpose of this Comment is to analyze the relationship of the criminal law to a person who has decided to end his life. The problem has been divided into five categories: suicide; attempted suicide; aiding, abetting, and advising suicide; suicide pacts; and the accidental death of another during a suicide attempt. In each area, there is an examination of the existing law in the United States, reference to relevant sociological and psychiatric knowledge, an analysis of the proper relationship of the law to each act, and a few suggested changes.

Central to the ensuing discussion is the question of why any given act should be made criminal and its perpetrator punished. H.L.A. Hart's answer "[t]o announce to society that these actions are not to be done and to secure that fewer of them are done,"⁵ and Herbert L. Packer's analysis of the justifications for criminal punishment⁶ are applied to what is presently known about one who commits or attempts to commit suicide in order to determine whether the goals of the criminal law are being met. It is submitted that, in many instances, these goals are not being met and, in fact, are often being thwarted. The law respecting suicide has long been encrusted with medieval notions and legalistic formalism and the problem which exists is too pressing to be ignored and left unchanged.

1. See, e.g., R. Felix, *Foreword to N. FARBEROW & E. SHNEIDMAN, THE CRY FOR HELP* (1961).

2. Schulman, *Suicide and Suicide Prevention: A Legal Analysis*, 54 A.B.A.J. 855 (1968). See generally L. DUBLIN, *SUICIDE* (1963).

3. Calculated from DEPT OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 57, 59 (1968).

4. Schulman, *supra* note 2.

5. H. HART, *PUNISHMENT AND RESPONSIBILITY* 6 (1968).

6. H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 35-61 (1968). Mr. Packer divides the justifications for criminal punishment into five groups: (1) *Retribution* — because man is responsible for his actions, he should receive his just deserts. (2) *Utilitarian Prevention: Deterrence* — more good is likely to result from inflicting punishment (prevention of crime) than from withholding it. (3) *Special Deterrence: Intimidation* — future crimes by the person being punished are eliminated. (4) *Behavioral Prevention: Incapacitation* — physical restraint results in the loss of the ability to commit future crimes. (5) *Behavioral Prevention: Rehabilitation* — the personality of the offender will be changed so that he will conform to the dictates of the law.

II. SUICIDE

Suicide is the intentional,⁷ voluntary,⁸ unaccidental⁹ act of a sane¹⁰ man which results in his own death. Although there are several cultures in which suicide is viewed indifferently or even admirably,¹¹ Western Civilization has always considered it as an horrendous deed.¹²

While lauding the noble suicide of Socrates, Plato reflected a general attitude against suicide. Athenean law required that the hand committing the suicidal act be severed from the body and buried separately. Josephus, an early Jewish commentator, felt that suicide was criminal because it is absent from the nature of other animals and is a rejection of the Divine Soul from the body. St. Augustine, in *City of God*, condemned suicide as a "detestible and damnable wickedness" in that it violates the Sixth Commandment, is a deprivation of the opportunity for penitence and is an act of cowardice. St. Thomas Aquinas reasoned that suicide was unlawful since it is against man's natural inclination to love one's self, does injury to the community, and impinges upon the province of God.

Similar reasoning forms the basis of Blackstone's common law view of suicide:

And also the law of England wisely and religiously considers that no man hath a power to destroy life but by commission from God, the author of it; and, as the suicide is guilty of a double offence; one spiritual, in invading the prerogative of the Almighty and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects; the law has therefore ranked this among the highest crimes, making it a peculiar species of felony, a felony committed on one's self.¹³

7. *Stiles v. Clifton Springs Sanitarium Co.*, 74 F. Supp. 907 (W.D.N.Y. 1947); *Metropolitan Life Ins. Co. v. Brock*, 87 Ga. App. 919, 75 S.E.2d 663 (1953); *Aetna Life Ins. Co. v. McLaughlin*, 370 S.W.2d 229 (Tex. Civ. App. 1963).

8. *Fleetwood v. Pacific Mut. Life Ins. Co.*, 246 Ala. 571, 21 So. 2d 696 (1945); *S. Life & Health Ins. Co. v. Wynn*, 29 Ala. App. 207, 194 So. 421 (1940); *Muzenich v. Grand Carniolian Slovenian Catholic Union*, 154 Kan. 537, 119 P.2d 504 (1941).

9. *Edwards v. Traveler's Life Ins. Co.*, 20 F. 661 (N.D.N.Y. 1884); *Liberty Nat'l Life Ins. Co. v. Cox*, 98 Ga. App. 582, 106 S.E.2d 182 (1958); *Edwards v. Business Men's Assurance Co.*, 350 Mo. 666, 168 S.W.2d 82 (1942).

10. *Stiles v. Clifton Springs Sanitarium Co.*, 74 F. Supp. 907 (W.D.N.Y. 1947); *Edwards v. Business Men's Assurance Co.*, 350 Mo. 666, 168 S.W.2d 82 (1942); *Franklin v. John Hancock Mut. Life Ins. Co.*, 298 N.Y. 81, 80 N.E.2d 746 (1948); *Shipman v. Protected Home Circle*, 174 N.Y. 398, 67 N.E. 83 (1903); *Jones v. Traders Gen. Ins. Co.*, 144 S.W.2d 689 (Tex. Civ. App. 1940).

11. B. MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* 94-98 (1947); J. MASON, *THE MEANING OF SHINTO* 127 (1935).

12. For a general historical discussion, see G. WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* (1957).

13. 4 BLACKSTONE, *COMMENTARIES* 189; accord, e.g., *Hales v. Petit*, 75 Eng. Rep. 387, 400 (K.B. 1816).

The early common law purported to punish a person for suicide by ignominious burial on the highway with a stake impaling the body¹⁴ and by forfeiture of the suicide's goods and chattels to the king.¹⁵ The last such unholy interment practiced in England was in 1823.¹⁶ A month later it was formally abolished by statute.¹⁷ The Forfeiture Act of 1870 ended the practice of escheat to the king of the suicide's property.¹⁸ The final step in England was taken in 1961 when legislation was passed which abolished suicide as a crime.¹⁹

Generally, there has never been punishment for suicide in the United States²⁰ and the early English attitude has been expressly rejected.²¹ The sole exception was a Massachusetts statute enacted in 1660 providing for unholy interment in the common highway.²² However, this practice was abandoned and finally repealed by the Statute of 1823,²³ presumably in consideration of the suicide's innocent survivors.²⁴

Although there has generally been no punishment for suicide in the United States, there is, nevertheless, a split of authority as to whether suicide is criminal or unlawful, albeit unpunishable.²⁵ Although this distinction is of no consequence with respect to suicide itself, it will be seen that it is often determinative of the criminality of attempted suicide and of suicidal acts involving another party.

14. G. WILLIAMS, *supra* note 12, at 259, gives the explanation for this practice. Blackstone records that burial was "in the highway, with a stake driven through the body;" in practice it was at the cross-roads, and a stone was placed over the face of the suicide. Stake and stone were intended to prevent the body from rising as a ghost or vampire.

A remarkably similar custom and reason is found among the Ob Ugrian tribe of the Ob' River area of northwestern Siberia. Chernetsov, *Ob Ugrian Concepts of the Soul*, in H. MICHAEL, *STUDIES IN SIBERIAN SHAMANISM* 30 (1963), reports:

[T]hey put a stone [over his heart] and in those cases where there are grounds especially to fear the dead man, they put a stone over his mouth too. These measures serve the [purpose] not to give the deceased opportunity to wander and thereby disturb the living.

15. 4 BLACKSTONE, *COMMENTARIES* 190; J. KERR, *THE LAW OF HOMICIDE* 61 (1891); T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 420 (1948); N. ST. JOHN-STEVAS, *THE RIGHT TO LIFE* 66 (1963); Mikell, *Is Suicide Murder?*, 3 *COLUM. L. REV.* 379 (1903); Withers, *Status of Suicide as a Crime*, 19 *VA. L. REV.* 641 (1914).

16. G. WILLIAMS, *supra* note 12, at 259.

17. 4 *Geo. 4*, c. 52, § 1 (1823).

18. 33 & 34 *Vict.*, c. 23, § 1: "No . . . felo de se shall cause any attainder or corruption of blood, or any forfeiture or escheat . . ."

19. The Suicide Act of 1961, 9 & 10 *Eliz. 2*, c. 60, § 1, provides: "The rule of law whereby it is a crime for a person to commit suicide is hereby abrogated."

20. J. KERR, *supra* note 15, at 62.

21. "[W]e have never regarded the English law as to suicide as applicable to the spirit of our institutions." *Burnett v. People*, 204 *Ill. 208*, 222, 68 *N.E.* 505, 510 (1903).

22. [T]he Legislature "judgeth that God calls them to bear testimony against such wicked and unnatural practices, that others may be deterred therefrom," and therefore enacted that every self-murderer "shall be denied the privilege of being buried in the common burying-place of Christians, but shall be buried in some common highway where the selectmen of the town where such person did inhabit shall appoint, and a cartload of stones laid upon the grave, as a brand of infamy, and as a warning to others to beware of the like damnable practices."

Commonwealth v. Mink, 123 *Mass. 422*, 428-29 (1877), quoting 4 *Mass. Col. Rec.* pt.i 432; *Mass. Col. Law* 137 (ed. 1672); *Anc. Chart.* 187.

23. This is the colonial counterpart of 4 *Geo. 4*, c. 52 (1823).

24. *Commonwealth v. Mink*, 123 *Mass. 422*, 428-29 (1877).

25. See pp. 446-48 *infra*.

III. ATTEMPTED SUICIDE

Consistent with the reasoning that suicide was a felony, the common law treated an attempt to commit suicide as a misdemeanor.²⁶ However, the English Suicide Act of 1961 abolished the crime of attempted suicide, as well as the crime of suicide.²⁷ In fact, attempted suicide is no longer a crime in most countries.²⁸ However, such is not the uniform rule in the United States where vestiges of the common law remain.

The states have approached the issue of the criminality of attempted suicide in several different ways. One view is that the common law is still in effect except where repealed by statute; therefore, in the absence of a statute to the contrary, suicide remains a felony and attempted suicide a misdemeanor.²⁹ New Jersey adopted this approach in *State v. Carney*,³⁰ where the supreme court affirmed a conviction for attempted suicide, relying on a statute which provided that all offenses indictable at common law and not provided for by statutes are treated as misdemeanors.³¹ Similarly, the North Carolina supreme court, while acknowledging that suicide may not be punished in that state due to constitutional prohibitions, nevertheless recognized its criminal character and reversed the lower court's quashing of an indictment of attempted suicide.³²

However, the Indiana supreme court, in an insurance case,³³ declared that Indiana has no common law crimes and no statute making attempted suicide an offense and, therefore, attempted suicide was not a bar to recovery under disability insurance. Yet, in a criminal case, the same court ruled that although attempted suicide is not criminal, it is nevertheless unlawful as contrary to the law of God and man.³⁴

A third view has been adopted by several states, also without the benefit of controlling legislation. For example, a Pennsylvania court³⁵ said that the pivotal question in attempted suicide is whether suicide is criminal, for it cannot be a crime to attempt an act which is not a crime if accomplished.³⁶ The court reasoned that since suicide is not punishable, it is not criminal and, thus, attempted suicide is not criminal. It also

26. See, e.g., *Rex v. Mann*, [1914] 2 K.B. 107; *Regina v. Burgess*, 169 Eng. Rep. 1387 (Crim. App. 1862); *Regina v. Moore*, 175 Eng. Rep. 571 (1852). See also R. PERKINS, *CASES AND MATERIALS IN CRIMINAL LAW AND PROCEDURE* 799 (1952).

27. 9 & 10 Eliz. 2, c. 60, § 1. See Samuels, *Two Recent Acts*, 1961 CRIM. L. REV. 582, 591.

28. G. WILLIAMS, *THE REFORM OF THE LAW* 166 (1951).

29. Comment, *Criminal Law — Attempted Suicide*, 40 N.C.L. REV. 323, 324 (1962).

30. 69 N.J.L. 478, 55 A. 44 (L. Div. 1903).

31. A later New Jersey case, *State v. La Fayette*, 188 A. 918 (C.P. Camden County 1937), cited *Carney* with approval but voided the conviction on jurisdictional grounds.

32. *State v. Willis*, 255 N.C. 473, 121 S.E.2d 854 (1961).

33. *Prudential Life Ins. Co. v. Rice*, 222 Ind. 231, 238-39, 52 N.E.2d 624, 626-27 (1944).

34. *Wallace v. State*, 232 Ind. 700, 116 N.E.2d 100 (1953).

35. *Commonwealth v. Wright*, 26 Pa. County Ct. 666 (1902).

36. *Id.* at 666-67; 1 WHARTON, *CRIMINAL LAW AND PROCEDURE* § 72, at 155 (1957) states that "[t]o constitute a criminal attempt, it is necessary that the act which is attempted be a crime."

noted the strong public opinion against treating attempted suicide as a crime, rather than as the manifestation of mental illness.³⁷

In contrast to the above approaches to the issue of the criminality of attempted suicide, some states have either adopted specific legislation regarding it or their courts have reached conclusions based on some relevant statutory language. For example, in Massachusetts,³⁸ the court in *Commonwealth v. Dennis*³⁹ held that attempted suicide was not a crime on the basis that the entire subject of criminal attempt had been revised by a statute⁴⁰ which provided that the punishment for an attempted crime be calculated by reference to the length of imprisonment for the completed crime.⁴¹ Since there obviously could be no imprisonment for the completed act of suicide, there could be no punishment for an attempt.⁴² In basing its decision on statutory construction, the court reasoned that attempted suicide, a crime at common law, had been repealed by implication.⁴³

The second statutory approach to the criminality of attempted suicide is evidenced by those states which have passed legislation expressly

37. Calling suicide self-murder is a curt way of justifying an indictment and trial of an unfortunate person who has not the fortitude to bear any more of the ills of this life. His act may be a sin, but it is not a crime; it is the result of disease. He should be taken to a hospital and not sent to a prison.

Commonwealth v. Wright, 26 Pa. County Ct. 666, 669 (1902).

Other states have reached similar conclusions in refusing to attach criminality to attempted suicide. *See, e.g.*, *State v. Campbell*, 217 Iowa 848, 853, 251 N.W. 717, 719 (1933), *noted in*, 19 IOWA L. REV. 445 (1934); *Blackburn v. Ohio*, 23 Ohio St. 146, 163 (1872) (dictum); *Grace v. State*, 44 Tex. Crim. 193, 69 S.W. 529 (1902).

38. It has already been noted that Massachusetts considered suicide a felony and was the only colony to enact unholy interment legislation. *See Commonwealth v. Bowen*, 13 Mass. 354, 356 (1816).

39. 105 Mass. 162 (1870). *Accord*, *May v. Pennell*, 101 Me. 516, 64 A. 885 (1906).

40. MASS. ANN. LAWS ch. 274, § 6 (1968).

41. Other states have similar statutes. *See* CAL. PENAL CODE § 664 (West 1955); FLA. STAT. ANN. § 776.04 (1965); KAN. STAT. ANN. § 21-101 (1964); MASS. ANN. LAWS ch. 274, § 6 (1968); MINN. STAT. ANN. § 609.17 (1964); MO. ANN. STAT. § 556.150 (1953); MONT. REV. CODES ANN. § 94-4711 (1949); N.H. REV. STAT. ANN. §§ 590:5, 590:6 (1955); ORE. REV. STAT. ANN. § 161.090 (1968); UTAH CODE ANN. § 76-1-31 (1953); VT. STAT. ANN. tit. 13, § 9 (1958); W. VA. CODE ANN. § 61-11-8 (Supp. 1968).

42. At first blush the court's decision may seem surprising in light of *Commonwealth v. Bowen*, 13 Mass. 354 (1816), which held that suicide was unlawful. Moreover, the court in *Commonwealth v. Mink*, 123 Mass. 422 (1877), interpreted *Dennis* to mean only that attempted suicide is neither punishable nor indictable. The court in *Mink* went on to hold that attempted suicide was, nevertheless, unlawful and criminal as *malum in se*. Perhaps the distinction in reasoning was actually due to the different factual situations involved in the three cases. In *Dennis*, the defendant had injured no one in his attempt, and the court felt that it was improper to punish such an act. On the other hand, *Bowen* involved an adviser to a successful suicide and, in *Mink*, the person who attempted suicide had accidentally killed another. Apparently, the court felt that a higher degree of moral turpitude and danger to society were involved in the latter two situations, which merited different results. The only way the early Massachusetts courts could accomplish this goal under common law reasoning and strict criminal law categories was to define suicide as unpunishable and not felonious but, at the same time, unlawful and *malum in se*.

43. Although California's statute is similar to that of Massachusetts, a California torts case held, independently and without reference to the statute, that suicide and attempted suicide are not crimes in California. *See Tate v. Canonica*, 180 Cal. App. 2d 898, 903, 5 Cal. Rptr. 28, 33 (1960).

rejecting common law crimes.⁴⁴ In these jurisdictions attempted suicide is not a crime since no statute provides for its criminality.

A number of states have enacted statutes affixing criminal liability for attempted suicide.⁴⁵ Such statutes typically provide that attempted suicide is punishable by imprisonment in the state penitentiary for a period of up to 2 years, a fine of up to \$1000, or both.⁴⁶

Obviously, the strict common law reasoning which made suicide a felony, and thereby attached criminal liability to attempted suicide leaves much to be desired. The proper formulation of a law regarding attempted suicide necessitates an analysis of who attempts suicide, what kind of person he is, and what drives him to self-destruction. In light of this analysis and the goals of the criminal law, it is submitted that suicide and attempted suicide are not proper subjects of the criminal law and should not be punished.

A substantial amount of research has been conducted in this area.⁴⁷ Although suicide and attempted suicide cut across sex lines, ethnic and racial groups, socioeconomic classes and methods employed, a typical picture has emerged.⁴⁸ One who attempts suicide is most likely to be a white housewife in her twenties, living in an apartment house. She utilizes an overdose of barbiturates and offers marital difficulties or depression as reasons for her attempt. The person who actually succeeds in his attempt presents, at least statistically, quite a different picture. He is a white male, 50 years of age or older, married, and lives in an apartment house. He kills himself by means of gunshot wounds, hanging, or carbon monoxide poisoning and had previously given mental health, depression, or marital difficulties as the reason for his act. In other words, the statistics present a picture of an average but unfortunate individual more than of the perpetrator of the most vile and heinous of felonies.

The central question is, of course, not who is this individual, but rather, what drove him to his last act. There are two somewhat diverse

44. See, e.g., HAWAII REV. LAWS § 1-1 (1955); WIS. STAT. ANN. § 939.10 (1958).

45. NEV. REV. STAT. § 202.495 (1957), Law of March 4, 1957, ch. 35 [1957] Stat. of Nev. 59 [repealed 1961]; N.J. STAT. ANN. § 2A: 170-25.6 (Supp. 1968); N.D. CENT. CODE ANN. § 12-33-02 (1960), Law of Feb. 17, 1877, ch. 16, § 230 [1877] Dakota Territory 724 [repealed 1967]; OKLA. STAT. ANN. tit. 21, § 812 (1958); S.D. CODE § 13.1903 (1939); WASH. REV. CODE § 9.80.020 (1961).

46. New Jersey defines one who attempts suicide as a disorderly person, which is punishable by imprisonment for up to 1 year in the county workhouse, penitentiary, or jail, or a fine of \$1000, or both. N.J. STAT. ANN. § 2A: 170-25.6 (Supp. 1968). The New York Penal Code Law of July 26, 1881, ch. 680, §§ 174, 178, [1881] Laws of N.Y. 42-43 (repealed 1919), had labeled one who attempted suicide as a felon and provided for punishment of up to 2 years in the state prison, a fine of \$1000, or both. This provision was repealed, in 1919, because of severe criticism. See Larremore, *Suicide and the Law*, 17 HARV. L. REV. 331, 340 (1904).

47. For an exhaustive bibliography of suicide in the last century, which is divided into psychological, sociological, medical-legal, and religious-philosophical groupings, see N. FARBEROW & E. SCHNEIDMAN, *THE CRY FOR HELP* 325-88 (1961).

48. *Id.* at 45-46. See also Schulman, *Suicide and Suicide Prevention: A Legal Analysis*, 54 A.B.A.J. 855, 857 (1968).

approaches to this question: the sociological and the psychoanalytic.⁴⁹ The classical sociological investigation was made by Durkheim⁵⁰ in the late 19th century. In postulating a social basis for suicide, he suggested that there were three basic types. The first, egoistic suicide, occurs in individuals who are poorly integrated into society and are forced to depend largely on themselves.⁵¹ Altruistic suicide occurs in individuals who are highly integrated into a society which strongly dictates habits and customs.⁵² The third type, anomic suicide, occurs in individuals whose needs are governed by society but who fail to adapt when society changes.⁵³

Freud, the pioneer of the psychoanalytic school, suggested that the cause of suicide is an inherent death instinct.⁵⁴ His further explanation that suicide was based on harbored guilt feelings and inwardly directed violence in an emotionally arrested or immature individual has been reflected by many contemporary psychiatrists.⁵⁵

The current psychiatric view is that attempted suicide is a symptom of mental illness and, as such, it makes no more sense to affix criminal liability to it than to any other symptom of any other illness,⁵⁶ unless

49. N. ST. JOHN-STEVAS, *LAW AND MORALS* 46 (1964).

50. E. DURKHEIM, *SUICIDE* (1951).

51. Lalli & Turner, *Suicide and Homicide: A Comparative Analysis by Race and Occupational Levels*, 59 *J. CRIM. L.C. & P.S.* 191, 193 (1968). See also J. GIBBS & W. MARTIN, *STATUS INTEGRATION AND SUICIDE* 7 (1964).

52. See also P. BOHANNAN, *AFRICAN HOMICIDE AND SUICIDE* 3-29, 230-66 (1960); B. MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* (1947); J. MASON, *THE MEANING OF SHINTO* (1935).

53. See also D. RIESMAN, *THE LONELY CROWD* (1961); J. SHORT & A. HENRY, *SUICIDE AND HOMICIDE* (1954).

54. S. FREUD, *BEYOND THE PLEASURE PRINCIPLE* (1959). K. Menninger, in his classic work, *MAN AGAINST HIMSELF* 81 (1938) comments:

[T]he best theory to account for all the presently known facts is Freud's hypothesis of a death instinct, or primary impulses of destructiveness opposed by a life instinct or primary impulses of creativeness and constructiveness; it is various phases of interaction between these two which constitute the psychological and biological phenomena of life.

55. K. MENNINGER, *MAN AGAINST HIMSELF* 82 (1938) states:

[T]he close scrutiny of the deeper motives for suicide would confirm this hypothesis [that self-destructive impulses proceed beyond the neutralizing constructive impulses and results in suicide] in that there appear regularly to be elements from at least two and possibly three sources. These are, (1) impulses derived from the primary aggressiveness crystallized as a wish to kill, (2) impulses derived from a modification of the primitive aggressiveness, the conscience, crystallized as the wish to be killed, and (3) I believe there is evidence that some of the original primary self-directed aggressiveness, the wish to die, joins hands with the more sophisticated motives and adds to the total vectorial force which impels the precipitate self-destruction.

G. ZILBOORG, *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* 50 (1954) comments:

It would seem then that if too great an amount of aggression is turned inward, as the saying goes, we may have to do with a suicide; if it is turned outward, we may deal with a murder. Many sociological writers were wont to point out in pre-Freudian days that in certain parts of the world, or even in certain provinces of the same country, the average number of suicides and homicides stands in some inverse relationship. This observation would bear out the psychological views on the dynamics of aggression.

56. Bergler, *Suicide: Psychoanalytic and Medicolegal Aspects*, 8 *LA. L. REV.* 504, 533 (1948), citing East, *Suicide from the Medico-Legal Aspect*, *BRIT. MED. J.*, Aug. 8, 1931, for the proposition that "all suicides are under the pressure of unconscious forces and are, psychiatrically speaking, no more responsible for the act than is a person for having cancer."

there is some overriding justification to punish or incarcerate this particular type of symptom.⁵⁷ Dr. Brill's conclusion that all suicides are psychotic⁵⁸ is echoed by many contemporary writers. Drs. Ulett and Goodrich explain that "suicide occurs almost exclusively in persons clinically ill and that two-thirds of these suffer from either manic-depressive psychosis or alcoholism."⁵⁹ Although there is the need for psychiatric treatment before the one who attempts suicide is released in his own custody, Dr. Overholser concludes that "the idea of proceeding against him as a criminal is a medieval relic."⁶⁰ In his most recent work, *The Crime of Punishment*, Dr. Menninger believes there can be no doubt that suicide is often a flight from madness and an escape from the wish to commit violence on others.⁶¹

In summation, sociologists, psychoanalysts, and psychiatrists all generally agree that suicide and attempted suicide represent neither a willful invasion of "the prerogative of the Almighty" nor a "peculiar species of felony," but rather are the result of mental illness. Therefore, since suicide and attempted suicide are symptoms of illness and not criminal manifestations, it follows that the person involved should be treated rather than punished.⁶²

Another reason why attempted suicide should not be punished is that there is a complete failure of any justification for the application of punishment. The theory of retribution, based on man being responsible for his actions and thereby deserving of punishment, is inapplicable since the very fact of the attempt negates the idea of responsibility. The goal of utilitarian prevention through deterrence is not served since others desiring death would not be deterred by fear of loss of freedom. Special deterrence by means of intimidation is defeated for a similar reason: a man seeking death but thwarted in his attempt would not later be intimidated by fear of imprisonment if he failed again.⁶³ Furthermore, if any such intimidation would exist, it would serve to insure that the attempter would adopt a more certain method in a subsequent attempt in order to avoid failure and return to prison. Fear of punishment would

57. An example of such an overriding justification would be the psychopathic murderer who has no control over his anti-social tendencies. In such a case, protection of society is a justification sufficiently strong to permit incapacitation.

58. See note 71 *infra*.

59. G. ULETT & D. GOODRICH, *A SYNOPSIS OF CONTEMPORARY PSYCHIATRY* 278 (2d ed. 1960).

60. W. OVERHOLSER, *THE PSYCHIATRIST AND THE LAW* 47 (1953).

61. K. MENNINGER, *THE CRIME OF PUNISHMENT* 181 (1968).

62. See, e.g., Larremore, *Suicide and the Law*, 17 HARV. L. REV. 331, 340 (1904). For the contrary view that one who attempts suicide should be criminally punished, see Comment, *The Criminal Aspect of Suicide*, 39 DICK. L. REV. 42 (1934). Therein, the author presents the incredibly medieval view that there are two opposite motives for suicide: (1) the noble (e.g., protection of chastity) and (2) the base (e.g., financial disaster or unrequited love). He then espouses the unbelievable conclusion that "the better [view] is that attempt at suicide should be criminally punished, and it is immaterial what motive, whether good or bad, instigated the attempt to take a human life." *Id.* at 52 (emphasis added).

63. Dr. Szasz in testifying before a Senate Subcommittee remarked:

A certain proportion of people who want to kill themselves do so . . . [I]t

also deter the reporting of attempts and thereby reduce the chances of one receiving psychiatric attention. With respect to the goal of behavioral prevention by means of incapacitation, there is ample evidence to justify the intuitive feeling that one predisposed to suicide has ample opportunities within prison walls to make a successful suicide attempt.⁶⁴ Furthermore, the potential suicide represents a risk only to himself and, beyond that consideration, there is no need to isolate him from the community for protection of society from antisocial acts.⁶⁵ Even the most optimistic penologist would admit that prisons fail to achieve the justification of behavioral prevention through rehabilitation, yet the need for rehabilitation involving psychiatric therapy is particularly acute in the case of a suicide risk.⁶⁶ Until adequate psychiatric therapy is readily available in penal institutions, the need for rehabilitation cannot be a justification for imprisonment of a suicide rather than protective and rehabilitative confinement in a psychiatric hospital.

The final reason for abolishing the crimes of suicide and attempted suicide is found within the Model Penal Code, which rejects their criminality.

While attempted suicide is still viewed as [criminal] in a few states, we think it clear that this is not an area in which the penal law can be effective and that its intrusion on such tragedies is an abuse.⁶⁷

Professor Donald A. Giannella has pointed out in his discussion of abortion⁶⁸ that even though the Model Penal Code is largely founded on

seems to me that we must recognize that ability to kill oneself is one of the opportunities which one has in a free society and there is absolutely no way of eliminating it completely.

Hearings on S. 935 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 87th Cong., 1st Sess. 272 (1961).

Larremore, *Suicide and the Law*, 17 HARV. L. REV. 331, 340 (1904), states: The modern theory of penal legislation is prevention of future crime from which the factor of revenge is eliminated. It is quite plain that punishing an attempter would not deter others from making similar attempts; it would not even tend to discourage a second attempt by the same person. . . . [A] person really resolved on taking his own life would scarcely pause to consider his liability to fine or imprisonment if his plan should fail.

64. Immediate hospitalization of the acutely depressed or suspected suicidal patient on a closed ward may be a lifesaving measure. . . . Adequate suicidal precautions can be observed *only* on a psychiatric division. G. ULETT & D. GOODRICH, A SYNOPSIS OF CONTEMPORARY PSYCHIATRY 280 (2d ed. 1960) (emphasis added).

65. "The danger to the community from manic-depressive psychotics is secondary. Murder does occur in severe depressions but it is rare." M. GUTTMACHER & H. WEIHOFEN, *PSYCHIATRY AND THE LAW* 66 (1952).

66. Every depressed patient [suffering from manic-depressive disorders] is a suicidal risk and this must be kept in the forefront of our thinking and planning. . . . These [commitment plans] are basically medical decisions and call for the measured judgment of experienced psychiatrists. They alone have the skill and experience to gauge the present seriousness and future potential severity of the illness and its probable consequences.

Id.

67. MODEL PENAL CODE § 201.5, comment 1 (Tent. Draft No. 9, 1959).

68. Giannella, *The Difficult Quest for a Truly Humane Abortion Law*, 13 VILL. L. REV. 257, 272-73 (1968).

utilitarian principles, destruction of life, even on utilitarian grounds, will be forbidden as a general rule except in those circumstances where it would not undermine the public sense of security. Suicide and attempted suicide would fall within these special circumstances. Since the "decision" to end one's life rests solely in the hands of the potential suicide, there is no basis for society to feel that its security is challenged. Also, under utilitarian principles, society suffers from the suicidal act only to the extent that it is deprived of the good from the future acts of the suicide. Such a possibility represents far too little loss to tip the balance toward prohibition of suicide, particularly in view of the fact that the suicide is suffering from mental illness and this in itself greatly diminishes his potential productivity.

Given the psychiatric evidence that suicide and attempted suicide are a result of mental disease, one might argue that the preferable approach is to treat the acts as crimes and allow the psychiatric evidence to provide a defense of insanity. The above-mentioned psychiatric evidence would probably satisfy the Model Penal Code test of criminal responsibility. This test provides:

A person is not responsible for criminal conduct if at the time of such conduct as the result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.⁶⁹

It is well documented that suicide is a result of mental disease⁷⁰ and that the act is, itself, patent evidence of the inability of the individual to conform his conduct to the requirements of law.⁷¹ The comments to the Model Penal Code⁷² indicate that a balance is being struck between the McNaughton, Durham, and "irresistible impulse" rules. The proposed test does not require the complete impairment of cognitive capacity, as does the McNaughton rule, nor the complete impairment of the capacity of self-control, as does the irresistible impulse test, and it avoids the ambiguity of "product" in the Durham rule.⁷³

However, this alternative approach is not as sound as abolishing suicide and attempted suicide as crimes for two reasons. First, the person

69. MODEL PENAL CODE § 4.01(1) (Proposed Official Draft 1962).

70. W. OVERHOLSER, *THE PSYCHIATRIST AND THE LAW* 46-47 (1953) states: Fortunately in this country [United States], although the statutes still remain on the books of some states, a more enlightened attitude toward suicide has been in effect and it is pretty generally recognized by the law, as it is of course by psychiatrists and by the general public, that the presumption in the case of a suicide or attempted suicide is that the person is suffering from a serious mental disturbance.

71. The noted psychoanalyst, A. Brill, in *FUNDAMENTAL CONCEPTION OF PSYCHOANALYSIS* (1921), has stated categorically that all suicides are committed by psychotics, for only those afflicted with a mental disease lack attachment to an individual or object strong enough to negate the compulsive drive for self-destruction and embody the utter rejection of the basic law of self-preservation.

72. MODEL PENAL CODE § 4.01, comments 2-5 (Tent. Draft No. 4, 1955).

73. *Id.*

who attempted suicide could not avail himself of this defense in the approximately 30 jurisdictions which apply the right-wrong test and probably could not avail himself of this defense in the approximately 15 states which apply the irresistible impulse test.⁷⁴ Second, the more cogent argument, conceptually, is that attempted suicide, necessarily resulting from mental illness, should not provide its own built-in defense, but rather should not be termed a crime at all.

The results of all the various reasons for abolition of the crime of attempted suicide are best summarized by Norman St. John-Stevas. He says:

All modern research points to one conclusion about the problem of suicide — the irrelevance of the criminal law to its solution. Whether it is hoped to reduce the suicide rate by changing the social structure or providing psychiatric help for potential suicides, the criminal law can do nothing to help.⁷⁵

IV. AIDING, ABETTING, AND ADVISING SUICIDE

At common law one who advised another to commit a crime and who was actually present at the time and place of the crime was considered a principal in the second degree.⁷⁶ However, where the adviser was not present at the time of the crime, he was considered an accessory before the fact⁷⁷ and, under the artificial common law rule, an accessory could not be punished until the principal had been tried.⁷⁸

This distinction was critical in suicide cases. Since suicide was a punishable felony at common law, a principal in the second degree was guilty of murder, yet an accessory before the fact would completely escape punishment inasmuch as the person who committed suicide could never be brought to trial.

In many jurisdictions today, the distinction between a principal in the second degree and an accessory before the fact has been abolished; in other jurisdictions, it has been abolished at least insofar as it affects the time of trial and degree of punishment.⁷⁹

Although suicide was a felony at common law, this view has not been generally adopted in the United States.⁸⁰ Nevertheless, the majority of jurisdictions in this country affix criminal liability to aiding, abetting, or advising suicide. The criminality of the actual suicide is incidental in

74. MODEL PENAL CODE § 4.01, Appendix A, at 161 (Tent. Draft No. 4, 1955).

75. N. ST. JOHN-STEVAS, *THE RIGHT TO LIFE* 75 (1964).

76. *McMahan v. State*, 168 Ala. 70, 53 So. 89 (1910); *Hicks v. Commonwealth*, 118 Ky. 637, 642, 82 S.W. 265, 266 (1904); *State v. Webb*, 216 Mo. 378, 387, 115 S.W. 998, 1000 (1909). See also R. PERKINS, *CRIMINAL LAW* 585 (1957).

77. R. PERKINS, *supra* note 76; 13 A.L.R. 1259 (1921).

78. *McMahan v. State*, 168 Ala. 70, 53 So. 89 (1910); *Hicks v. Commonwealth*, 118 Ky. 637, 642, 82 S.W. 265, 266 (1904); *Regina v. Leddington*, 173 Eng. Rptr. 749 (1839); 13 A.L.R. 1259 (1921). See also R. PERKINS, *supra* note 76.

79. *Burnett v. People*, 204 Ill. 208, 68 N.E. 505 (1903); *People v. Wycoff*, 150 Mich. 449, 114 N.W. 242 (1907).

80. See p. 465 *supra*.

determining the liability of the aider, abettor, and adviser, as long as a causal connection can be established between the incitement and the death.⁸¹

The courts have generally approached this problem under different theories. Some jurisdictions punish the aider and abettor as a party to the suicide. For example, in *Commonwealth v. Hicks*,⁸² a Kentucky court held that an accessory before the fact of suicide was guilty of murder inasmuch as suicide was a felony and all accessories to felonies are subject to the same punishment as the principal. The court reasoned that although suicide is not punishable, the act involved the killing of another and, hence, the accessory should be treated as an accessory to murder.⁸³

Other courts hold that the aider and abettor is a murderer in his own right. The Michigan supreme court acknowledged that suicide was not a crime in that jurisdiction, but nevertheless affirmed a conviction for murder by poison against an individual who mixed the poison and placed it within the reach of the suicide.⁸⁴ The court reached this decision in spite of evidence that the victim was suffering from multiple sclerosis, requested the poison, and actually administered it by her own hand. An Ohio court, faced with a similar situation in *Blackburn v. State*,⁸⁵ although reversing the conviction on evidentiary grounds, reasoned that the phrase "murder by poison" included the mere furnishing of poison.⁸⁶ This court further stated that even if the defendant had not actually furnished the poison but was present at the time it was taken and urged the deceased to commit suicide, this would also constitute murder. *Blackburn* was cited with approval by the Supreme Court of Illinois in *Burnett v. People*,⁸⁷ although it reversed the conviction for lack of evidence. Massachusetts,⁸⁸ Tennessee,⁸⁹ and South Carolina⁹⁰ have also held that the aider and abettor is guilty of murder in his own right, reasoning, *inter alia*, that the consent of the victim is no excuse.

A unique minority view exists in Texas, where it has been held that suicide is not criminal, and if one merely advises or encourages suicide or indirectly aids by furnishing poison, he is guilty of no crime.⁹¹

81. Schulman, *Suicide and Suicide Prevention: A Legal Analysis*, 54 A.B.A.J. 855, 859 (1968); Comment, *Suicide — Criminal Aspects*, 1 VILL. L. REV. 316, 320 (1956).

82. 118 Ky. 637, 82 S.W. 265 (1904). In this case, a directed verdict of not guilty was affirmed for lack of evidence and the court's view was expressed as dicta. *Accord*, *McMahan v. State*, 168 Ala. 70, 53 So. 89 (1910).

83. For a detailed critique of this legal analysis, see Mikell, *Is Suicide Murder?*, 3 COLUM. L. REV. 379 (1903).

84. *People v. Roberts*, 211 Mich. 187, 178 N.W. 690 (1920).

85. 23 Ohio St. 146 (1872).

86. This view is criticized in G. WILLIAMS, *supra* note 12, at 300.

87. 204 Ill. 208, 68 N.E. 505 (1903).

88. *Commonwealth v. Bowen*, 13 Mass. 356 (1816).

89. *Turner v. State*, 119 Tenn. 663, 108 S.W. 1139 (1908).

90. *State v. Jones*, 86 S.C. 17, 67 S.E. 160 (1910).

91. *Sanders v. State*, 54 Tex. Crim. 101, 112 S.W. 68 (1908); *Grace v. State*, 44 Tex. Crim. 193, 69 S.W. 529 (1902).

However, if he actually administers the lethal dose, he is guilty of murder.⁹²

There are at least twelve states which have enacted legislation dealing with aiding, abetting, and advising suicide.⁹³ The typical statute reads: "Every person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony."⁹⁴ Such a provision is found in California and Mississippi. Florida, Kansas, Missouri, and Washington specify that the felony is manslaughter. Minnesota, North Dakota, Oklahoma, South Dakota, and Wisconsin do not label the aiding and abetting as either a felony or as manslaughter, but merely prescribe a prison term ranging from 7 to 15 years. New York classifies causing or aiding another to commit suicide as manslaughter in the second degree — a class C felony.⁹⁵ It also provides a lesser penalty if the suicide is not successful — a class E felony.⁹⁶ Five other states similarly provide for a lesser penalty if the suicide is unsuccessful.⁹⁷ Only North Dakota and Oklahoma specifically provide that furnishing the weapon or poison is aiding and abetting.

The Model Penal Code states that if a causal connection between the aiding and abetting and the act of suicide can be established, the aider and abettor may be convicted of a felony in the second degree whether or not the suicide is successful, and of a misdemeanor even if there is no attempt.⁹⁸ It further contains a provision, similar to New York's, that if force, deception, or duress is involved, the charge may be criminal homicide.

92. *Aven v. State*, 102 Tex. Crim. 478, 277 S.W. 1080 (1925).

93. The relevant statutes in these jurisdictions are: CAL. PENAL CODE § 401 (West 1955); FLA. STAT. § 782.08 (1965); KAN. ANN. STAT. § 21-408 (1964); MINN. STAT. ANN. § 609.215 (1964); MISS. CODE ANN. § 2375 (1957); MO. REV. STAT. § 559.080 (1953); N.Y. PENAL LAW §§ 120.30, 120.35, 125.15, 125.25(1) (b) (McKinney 1967); N.D. CENT. CODE §§ 12-33-03, 12-33-04, 12-33-05, 12-33-06 (1960); OKLA. STAT. ANN. tit. 21, §§ 813-17 (1958); S.D. CODE §§ 13.1902, 13.1903 (1939); WASH. REV. CODE ANN. §§ 9.80.030, 9.80.040 (1961); WIS. STAT. ANN. § 940.12 (1958).

94. CAL. PENAL CODE § 401 (West 1957).

95. N.Y. PENAL LAW § 125.15 (McKinney 1967).

96. N.Y. PENAL LAW § 120.30 (McKinney 1967). However, if duress or deception are involved and the attempt is successful, the aider is guilty of murder. N.Y. PENAL LAW § 125.25(1) (b) (McKinney 1967).

97. Minnesota, North Dakota, Oklahoma, South Dakota, and Washington. Mississippi specifically provides that aiding and abetting, whether successful or not, is a felony.

98. MODEL PENAL CODE § 210.5 (Proposed Official Draft 1962), states:

(1) *Causing Suicide as Criminal Homicide*. A person may be convicted of criminal homicide for causing another to commit suicide only if he purposely causes such suicide by force, duress, or deception.

(2) *Aiding or Soliciting Suicide as an Independent Offense*. A person who purposely aids or solicits another to commit suicide is guilty of a felony in the second degree if his conduct causes such suicide or an attempted suicide, and otherwise of a misdemeanor.

The comments explain that an ineffectual aiding and soliciting of suicide may be reduced to a misdemeanor since the instinct of self-preservation serves as a safeguard not found in cases of ineffectual solicitation of an ordinary criminal offense. MODEL PENAL CODE § 210.5, comment at 128 (Proposed Official Draft 1962). This position is questionable in view of the mental condition of a potential suicide, his lack of responsibility, and a state of mind which might be better described as an "instinct for self-destruction."

It is readily apparent that one who aids, abets, or advises suicide might well be criminally culpable, and yet one who attempts suicide would not. Although the evidence indicates that one who attempts suicide is suffering from mental disease,⁹⁹ there is not a hint of such evidence with respect to the aider and abettor.¹⁰⁰ In fact, it would appear that such a person is prompted by the same state of mind which motivates any other criminal. Moreover, the justifications for punishment apply to the aider and abettor, while they do not apply to the attempted suicide.¹⁰¹

However, certain problems do exist which are not adequately covered by case law or statutes. The statutes have a broad, general sweep and fail to take into account the varying degrees of culpability which different factual situations present. It is submitted that the gravity of the punishment should bear some relationship to the degree of culpability. The following hypothetical situations present a wide range of blameworthiness.

H, the husband, knows *W*, his wife, is suffering from some type of mental illness and that she is on the verge of a nervous breakdown. *H* wants to end his marriage in order to marry his secretary, but *W* has refused to give him a divorce. *H* realizes that he would profit by *W*'s suicide, and he encourages and urges suicide at every opportunity.

Situation 1. When *H* is on a business trip, *W* purchases a gun and kills herself.

Situation 2. While *H* is on a business trip, *W* learns of *H*'s infidelity and, because of that, purchases a gun and kills herself.

Situation 3. *H* purchases a gun and leaves it where he thinks *W* will find it and then departs. During his absence, *W* kills herself.

Situation 4. *H* purchases a gun, gives it to *W*, and leaves. During *H*'s absence, *W* kills herself.

Situation 5. *H* purchases a gun, gives it to *W*, and stands by as *W* kills herself.

Situation 6. *H* purchases a gun, gives it to *W*, and taunts her until she kills herself.

Situation 7. *H* purchases a gun and, with *W*'s acquiescence, puts it to her head and fires.

In the last situation, the crime is obviously murder since the victim's consent is no excuse. However, in situations 5 and 6, there is an actual suicide with the aider and abettor present and furnishing the instrumentality of death. In situation 6, the element of force or duress may exist

99. See pp. 469-73 *supra*.

100. This discussion does not involve one engaged in a suicide pact. He may, in fact, be an aider and abettor, as well as a potential victim, but, as such, represents a special case to be discussed pp. 479-82 *infra*.

101. See p. 463 n.6 *supra*.

to such an extent that under the New York statute or the Model Penal Code the act would be murder. In situation 5, such duress has taken place, if at all, at a point in time considerably removed from the act. To constitute murder under either formulation, it appears that the duress must occur at the time and place of the suicidal act. If such were not the case, *every* prior strong encouragement which induced the act could then be called duress. The distinction between situation 4 and situation 5 is the absence or presence of the advisor. Under the present statutes and cases, no distinction is made. However, at least one case has held that the aider and abettor, after procuring the fatal instrumentality, could escape criminal responsibility by renouncing his solicitation and fleeing the scene or at least attempting to do so.¹⁰² This would produce the anomaly, if no distinction is made between one present and one not present, that the abettor who is not present would not have the same opportunity as one who is present to escape culpability by renouncing his solicitation. Furthermore, the fact of presence evidences a far greater evil intent, or *mens rea*, than one who is not present. In addition, his presence would more strongly indicate a significant causal connection between the advising and the act.

The distinction between situations 3 and 4 merely involves the probative weight of *H*'s intent that *W* will find the gun and use it in her suicide.

The distinction between situations 2 and 3 is the procurement of the instrumentality. Two states, Oklahoma and North Dakota provide that the procurement of the fatal instrumentality constitutes assisting a suicide, but specify no greater penalty.¹⁰³ The statutes in other states make no mention of the instrumentality. Yet, one who produces a gun or poison and leaves it for a suicide presents a far greater danger to society than one who merely encourages suicide and should, therefore, receive greater punishment. Furthermore, the greater degree of moral turpitude involved reflects the seriousness of the aider's intent.

Situations 1 and 2 involve somewhat of an irony. One might intuitively feel that situation 2 involves greater moral turpitude since *H*'s immoral act was a contributing cause of *W*'s death. However, it in fact involves a lesser degree of criminal responsibility. In situation 1, *H*'s advising was clearly the inducing cause of *W*'s suicide and is thereby punishable under the law. However, in situation 2, *H*'s adultery is the inducing cause of the suicide and, as such, is not punishable by the criminal law, as it can no longer be said that *W*'s suicide was caused by *H*'s advising.

102. *State v. Webb*, 216 Mo. 378, 115 S.W. 998 (1909).

103. OKLA. STAT. ANN. tit. 21, § 814 (1958), provides:

Every person who *wilfully* furnishes another person with any deadly weapon or poisonous drug, *knowing* that such person intends to use such weapon or drug in taking his own life, is guilty of aiding suicide, if such person thereafter employs such instrument or drug in taking his own life (emphasis added).

N.D. CENT. CODE ANN. § 12-33-04 (1960), is similar to the Oklahoma statute.

The discussion of the preceding hypothetical situations leads to the following proposed changes in the Model Penal Code and the state statutes.

1. *The common law view that aiding suicide is murder under all circumstances is expressly abrogated.*
2. *One who deliberately or purposely aids, abets, advises, or solicits another to commit suicide is guilty of manslaughter in the second degree — a class C felony — if such conduct is the inducing cause of such suicide or attempt.*
3. *One who deliberately or purposely aids, abets, advises, or solicits another to commit suicide and is present when such suicide occurs or attempt is made is guilty of manslaughter in the first degree — a class B felony.*

This change reflects the view that simply by being present, the aider renders a greater assistance and increases the probability that the act will occur. A second basis for greater responsibility also exists. Normally there is no duty to prevent another's presently occurring suicide. However, when one induces that suicide, a duty is imposed by law to stop it. It is a breach of that duty by standing by passively which forms another basis for imposing greater punishment.

4. *One who uses force, duress, or deception in causing another's suicide is guilty of murder — a class A felony.*
5. *One who furnishes the instrumentality of a suicide with the intent that such be used, and such is used and causes the suicide, is guilty of murder — a class A felony.*

This change reflects not only the attitude that such behavior represents a greater risk to society, but also more adequately reflects the medical-psychiatric analysis of the potential suicide. If such a person is so lacking in responsibility, he is almost the passive tool of one who wishes to kill him. By furnishing the fatal instrumentality, intending that such a weak individual use it, the provider of the instrumentality has murdered the suicide as surely as if he had pulled the trigger or administered the poison himself. The criminal liability of such a murderer cannot be diminished by the actions of a non-responsible agent.

6. *Any criminal liability imposed by the above may be mitigated by factors which reduce culpability or moral turpitude.*

This reflects the view that the criminal law must separate the more heinous acts from the more sympathetic and punish them differently. The commentary to the New York statute distinguishes between the

act of euthanasia and one who is simply trying to "rid himself of an unwanted wife."¹⁰⁴ Another example of mitigation would involve people with a different cultural background, such as a practicing Shinto who advises a life-long friend, after hearing his tale of disgrace, that he believes suicide to be the honorable act for one in his position. Any absence of personal gain might be a mitigating factor. A final factor to consider is the mental condition of the victim. If he committed suicide in one of the rare instances of complete sanity, his rational choice could serve to mitigate the liability of one whose advice simply added in the deliberations of one making a sound decision.

7. *The above provisions do not apply to suicide pacts.*

In these cases, the aider and abettor is also a potential victim and, thus, different considerations must be weighed. These are discussed below.

The above changes are proposed because it would appear that they more accurately represent relative culpability and modern psychiatric advances, and more adequately reflect the goals of the criminal law.

V. THE SUICIDE PACT

The general view in the United States is that if two persons mutually agree to commit suicide and only one party dies, the surviving party is guilty of murder.¹⁰⁵ This view follows from the common law reasoning that each party is a principal in the first degree to his own suicide and a principal in the second degree to the suicide of the other party. Therefore, the survivor is guilty of attempted suicide and also guilty as an aider and abettor who is present at the suicide of another.¹⁰⁶ Again, Texas represents a unique minority view that the survivor is guilty of no crime unless he actually killed the victim or forced him to commit suicide.¹⁰⁷

Whether the common law rules have been modified by the various state statutes is not entirely clear. There are no statutes expressly referring to suicide pacts; however, the statutes dealing with aiding and abetting suicide are drawn broadly enough to conceivably include them.

104. N.Y. PENAL LAW § 125.15, commentary at 227 (1967), states:

Thus, a man who, upon the plea of his incurably ill wife, brings her a lethal drug in order to aid her end a tortured existence, is guilty at most of second degree manslaughter. On the other hand, a man who, in order to rid himself of an unwanted wife, deceitfully embarks upon an alleged suicide pact with her and then extricates himself according to plan leaving her to die, is guilty of murder as well as second degree manslaughter.

105. See, e.g., McMahan v. State, 168 Ala. 70, 53 So. 89 (1910); Burnett v. People, 204 Ill. 208, 68 N.E. 505 (1903); Commonwealth v. Mink, 123 Mass. 422 (1877); Turner v. State, 119 Tenn. 663, 108 S.W. 1139 (1908). See also F. WHARTON, CRIMINAL LAW § 575 (11th ed. 1912).

106. Rex v. Dyson, 168 Eng. Rep. 930 (1823); R. CROSS & P. JONES, AN INTRODUCTION TO CRIMINAL LAW 64 (2d ed. 1949).

107. Aven v. State, 102 Tex. Crim. 478, 277 S.W. 1080 (1925); Sanders v. State, 54 Tex. Crim. 101, 112 S.W. 68 (1908).

A Missouri court has in fact interpreted its aiding and abetting suicide statute to include a suicide pact.¹⁰⁸ This approach necessarily assumes that the survivor of the pact was the one who in actuality encouraged it (the active partner) and that the other (the passive partner) was thereby induced to commit suicide. However, it is equally likely that the survivor was actually the passive partner. It is even possible that both partners equally and independently decided to end their respective lives together so that neither was active or passive. In the last two situations, the survivor was not the dominant encouraging force, but merely is the one available for punishment.

Moreover, the suicide pact is substantively distinguishable from the aiding and abetting situation. Although there may have been aiding and abetting involved in the suicide pact, the survivor is distinguishable from a non-suicide pact aider and abettor in the sense that he was also a potential victim. Having wanted to end his own life, the survivor is more closely related to one who attempts suicide than to an aider and abettor.¹⁰⁹ As previously discussed,¹¹⁰ an aider and abettor should be punished, but one who attempts suicide should not because he possesses a disordered state of mind and the justifications for punishment are not fulfilled. All the reasons for not punishing one who attempts suicide would appear to apply with equal force to the survivor of a suicide pact.

However, the solution is not that simple. Before a meaningful law can be formulated with respect to survivors of suicide pacts, the problems of control of the instrumentality and intent of the actor must also be considered.

The first point to consider is who has control of the fatal instrumentality. Obviously, if the survivor does the shooting, he is not relieved of murderous culpability simply because he also intended to kill himself. However, a problem arises where the fatal instrumentality is not directly employed, as in carbon monoxide asphyxiation, or where both are in equal control, as in a poisoning case where one party purchased the poison and the other mixed it.

To take a specific example, where two lovers drive to a secluded location, seal the doors and windows, and leave the motor running, it makes no sense to inflict punishment upon the driver, if he survives, and not upon the passenger, if she survives, simply because the driver was the one more in control of the instrumentality. However, under present English law, the distinction is critical. If the survivor of a suicide pact was not in charge of the instrumentality, he may be punished by imprisonment of up to 14 years under the Suicide Act of 1961.¹¹¹ But if the survivor was in charge of the instrumentality, he may be

108. *State v. Webb*, 216 Mo. 378, 115 S.W. 998 (1909). This case further held that one is not liable for the crime of assisting suicide if he makes an attempt, although unsuccessfully, to extract himself from the pact.

109. *G. WILLIAMS*, *supra* note 12, at 298-99.

110. *See* p. 476 *supra*.

111. 9 & 10 Eliz. 2, c. 60, § 2(1).

punished by life imprisonment under the Homicide Act of 1957¹¹² as amended by the Suicide Act of 1961.¹¹³ The shortcoming of this approach due to the difficulty in pinpointing who has control of the instrumentality in certain situations has been well noted.¹¹⁴

The second problem to be considered concerns the actual intent of the survivor of a suicide pact. The following three hypothetical situations illustrate the different intentions which might be involved in a suicide pact.

Situation 1. *H* and *W* decide to shoot themselves. *W* kills herself. Before *H* gets a chance to end his own life, the police arrive and stop him.

Situation 2. *H* and *W* decide to shoot themselves. *W* kills herself. *H* looks at the mutilated corpse and changes his mind.

Situation 3. *H* has no desire to commit suicide, but he feigns the intent in order to induce *W* to end her life. *W* shoots herself.

Situation 1 represents the model suicide pact in which *H*, as a potential suicide victim, is in such an aberrated mental state that his actions are not criminal. Situation 3 represents the deception situation described in the New York murder statute.¹¹⁵ Here, *H*'s actions indicate a true criminal intent, rather than mental illness. In situation 2, *H*'s change of mind evidences a different mental condition than in situation 1. His rational reconsideration demonstrates that he did not have the psychotic state of mind found in the typical suicide attempt. However, his sincere planning distinguishes him from the murderer in situation 3. Although this is hardly a clear-cut situation, the intermediate state of mind present in situation 2 is probably more closely related to aiding and abetting than to anything else.

The Model Penal Code has recognized the problem of suicide pacts in its comments. While conceding the logic of assimilating the suicide pact with the non-culpable single suicide attempt, it concluded that the difficulty in differentiating the genuine from the spurious attempt was decisive in not specifically exempting the survivor of a pact from punishment.¹¹⁶ Although such a determination may be difficult, it is not so beyond the realm of possibility as to outweigh the need for such a distinction.¹¹⁷

112. The Homicide Act of 1957, 5 & 6 Eliz. 2, c. II, § 4(1) (as amended), provides that: "It shall be manslaughter, and shall not be murder, for a person acting in pursuance of a suicide pact between him and another to kill the other."

113. The Suicide Act of 1961, 9 & 10 Eliz. 2, c. 60, § 3(2).

114. *E.g.*, J. SMITH & B. HOGAN, CRIMINAL LAW 240 (1965).

115. *See* note 96 *supra*.

116. MODEL PENAL CODE § 201.5, Comment 3, at 59 (Tent. Draft No. 9, 1959).

117. In fact, this determination is central to the very definition of a suicide pact under English law.

[A suicide pact is] a common agreement between two or more persons having for its object the death of all of them, whether or not each is to take his own life, but nothing done by a person who enters into a suicide pact shall be treated

Therefore, it is submitted that this distinction should be made clear by legislative enactment and followed by juries in helping to decide whether to punish the survivor of a suicide pact. It is suggested that this reasoning be codified into the following addition to the Model Penal Code.

1. *The law with respect to aiding, abetting, advising, and soliciting suicide is inapplicable to the survivor of a suicide pact as defined within this section.*
2. *The survivor of a suicide pact is guilty of no offense, whether or not he furnished the fatal instrumentality, provided he did not actually kill the deceased.*¹¹⁸
3. *For the purposes of this section, a suicide pact is defined as a common agreement between two or more persons to end their respective lives, into which each person enters with the intention of ending his life according to the pact.*

VI. ACCIDENTAL DEATH OF ANOTHER

When one, while attempting suicide, accidentally kills another, the question arises whether he has committed a crime. This situation usually occurs when a would-be rescuer wrestles with the suicide attempter and the gun accidentally discharges. The question has confronted four courts. Indiana,¹¹⁹ Massachusetts,¹²⁰ and South Carolina¹²¹ have taken the view that such death is criminal homicide based respectively on the premise that attempted suicide is unlawful, an attempted felony, and *malum in se*, and that a death occurring during the commission of such an act is criminal. On the other hand, an Iowa court¹²² reasoned that attempted suicide is not a crime in that jurisdiction and, therefore, an accidental death occurring during a suicide attempt is not a crime.

Although the Iowa view has been criticized,¹²³ it appears to be the better reasoned and more modern approach. It is based on the proposition that attempted suicide is a symptom of mental illness rather than an act of a felonious state of mind¹²⁴ and, therefore, one who accidentally

as done by him in pursuance of the pact *unless it is done while he has the settled intention of dying in pursuance of the pact.*

The Homicide Act of 1957, 5 & 6 Eliz. 2, c. II, § 4(3) (emphasis added). Swiss law provides that the survivor of a suicide pact can be punished only if he was impelled by "selfish motives." See G. WILLIAMS, *supra* note 12, at 298. This is not unlike the "deception" requirement in the New York statute, *supra* note 96 and the situation presented by the commentary, *supra* note 104.

118. This provision leaves undisturbed the rule that consent to one's own murder is no defense.

119. *Wallace v. State*, 232 Ind. 700, 116 N.E.2d 100 (1953).

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

121. *State v. Levelle*, 34 S.C. 120, 13 S.E. 319 (1891).

122. *State v. Campbell*, 217 Iowa 848, 251 N.W. 717 (1933).

123. A commentator has argued that such an accidental death should be considered criminal by comparing attempted suicide to such dangerous behavior as "reckless driving, pointing of firearms and handling poisoned drinks." 19 IOWA L. REV. 445, 448 (1934).

124. See pp. 469-73 *supra*.

kills another while attempting suicide should be no more guilty of a crime than one who is involved in a fatal automobile accident after suffering a heart attack.

One *caveat* should, however, be added. If one attempts suicide in an extremely dangerous or reckless manner, such as setting fire to his house in a crowded neighborhood, there is every indication that he is at least as mentally ill as the individual who attempts suicide in an ordinary fashion. To be theoretically consistent, then, this individual also should not be punished by the criminal law. However, unlike the ordinary suicide attempt, there is a great need for society to be protected from future reckless attempts. This additional factor would seem to offer sufficient justification for the incarceration of such an attempted suicide.

The foregoing discussion leads to the proposal of one final addition to the Model Penal Code.

1. Barring any act of extreme recklessness, one who accidentally kills or injures another while attempting suicide is guilty of no crime.

VII. CONCLUSION

This discussion has purposely avoided any analysis based on the ethics and morals of suicide. The reason for this omission is that morality *per se* is an inadequate basis for criminal sanctions and that the ethics of any single group should not be imposed upon the whole society for the sole purpose of enforcement of those ethics.¹²⁵ Regardless of how immoral or cowardly one considers suicide to be, it can still, consistently, be considered immune from criminal sanctions.

The basic proposition in this Comment is that suicide is a medical rather than a legal problem. This is supported by medical, psychiatric, and sociological evidence which has shown that the potential suicide is driven by motives beyond the power of criminal sanctions to change. For this reason, it is submitted that the common law view of suicide as a felony be repudiated; that attempted suicide no longer be considered criminal; that aiding and abetting suicide be punished to a degree commensurate with the degree of culpability involved; and finally, that one involved in a genuine suicide pact be treated as mentally ill rather than as a criminal.

These changes in the criminal law are supported by the view that the imposition of criminal sanctions must always be justified, and that there is a complete failure of justification for punishing persons suffering from mental illness. They are proposed in order to conform the existing law to present knowledge of psychiatry, motivation, culpability, the goals of punishment, and, finally, basic justice.

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125. See generally H. HART, *LAW, LIBERTY, AND MORALITY* (1966).