Morally Wrong, Constitutionally Vague: The Improper Conviction of Michelle Carter

*Madison N. Heckel**

Michelle Carter became national news when she was charged with involuntary manslaughter of her boyfriend who died fifty miles away from her. This charge was based on the texts and calls they exchanged shortly before his death, where she encouraged and commanded him to succumb to his suicidal thoughts and kill himself. Many were outraged and felt she deserved jail time. But it was difficult to understand if her words were sufficient for any homicide charge. Carter was eventually found guilty of involuntary manslaughter due to her own admission to a friend of telling her boyfriend to get back into the carbon monoxide filled car that eventually killed him.

Carter's conviction relied heavily on Massachusetts common law cases where the defendants did not cause the physical harm that resulted in the victim's death. These cases, the judge argued, showed that words alone were sufficient to result in the conviction of manslaughter. The fair warning requirement, however, says otherwise. In Carter's appeal, the Massachusetts Appellate Court ignored the full extent of the fair warning requirements and incorrectly determined that there was appropriate notice that Carter's conduct could result in criminal prosecution.

This Note contends that the U.S. Supreme Court erred in denying Carter's writ of certiorari and that her conviction was unconstitutional under the fair warning requirement.

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INTRODUCTION

In *Commonwealth v. Michelle Carter*, Michelle Carter, a seventeen-year-old teenager, was charged with the involuntary manslaughter of her boyfriend who had committed suicide thirty miles away.[1] Carter and her boyfriend, Conrad Roy III, had a relationship where they told each other everything—including their suicidal thoughts.[2] Roy ultimately did commit suicide by running a generator in his car, dying of carbon monoxide poisoning.[3] Investigators eventually found text messages between the couple where Carter was not only telling Roy about different

1. Jess Bidgood, *She's Accused of Texting Him to Suicide. Is That Enough to Convict?*, N.Y. TIMES (June 6, 2017), https://www.nytimes.com/2017/06/06/us/suicide-texting-manslaughter-trial.html [https://perma.cc/FCN6-EGGD]; I LOVE YOU, NOW DIE: THE COMMONWEALTH V. MICHELLE CARTER, PT. 1: THE PROSECUTION (HBO Documentary, 2019).

2. I LOVE YOU, NOW DIE, *supra* note 1; Commonwealth v. Carter (*Carter I*), 52 N.E.3d 1054, 1058 (Mass. 2016).

3. I LOVE YOU, NOW DIE, *supra* note 1; *Carter I*, 52 N.E.3d at 1056.

methods of suicide, but encouraging him to attempt to take his life.[4] Investigators turned these messages over to prosecutors, who eventually charged her with involuntary manslaughter.[5]

Carter resisted the charge before trial began, arguing that there was not sufficient evidence for any reasonable jury to find her guilty of involuntary manslaughter.[6] After being convicted, Carter appealed and argued that the evidence was not strong enough to be found guilty beyond a reasonable doubt and that her words were protected by the First Amendment of the United States Constitution.[7] The Massachusetts appellate court found this argument insufficient and upheld her conviction.[8] On July 8, 2019, Carter filed a petition for a writ of certiorari to the Supreme Court of the United States.[9]

However, the precedent used to convict Carter was lacking. There was insufficient notice for Carter to be found guilty under the existing common law interpretation of involuntary manslaughter in Massachusetts at the time of Roy's death.[10] Nevertheless, prosecutors and law enforcement found Carter's texts with Roy to be morally wrong, so they shoehorned her actions into a statute not meant to cover this form of behavior.[11] In doing so, the trial judge convicted Carter for a crime that, while morally reprehensible, had not been codified into statute in

4. I LOVE YOU, NOW DIE, *supra* note 1; *Carter I*, 52 N.E.3d at 1057; Katharine Q. Seelye & Jess Bidgood, *Guilty Verdict for Young Woman Who Urged Friend to Kill Himself*, N.Y. TIMES (June 16, 2017), https://www.nytimes.com/2017/06/16/us/suicide-texting-trial-michelle-carter-conrad-roy.html [https://perma.cc/LDU6-CM2C].

5. I LOVE YOU, NOW DIE, *supra* note 1; *Carter I*, 52 N.E.3d at 1056–57; *see* Seelye & Bidgood, *supra* note 4 (explaining that text messages between Carter and the victim involved her encouraging him to kill himself in the two weeks leading up to his suicide).

6. *Carter I*, 52 N.E.3d at 1056; Bidgood, *supra* note 1.

7. *Carter I*, 52 N.E.3d at 1064; I LOVE YOU, NOW DIE, *supra* note 1; Commonwealth v. Carter (*Carter II*), 115 N.E.3d 559, 562 (Mass. 2019).

8. *Carter II*, 115 N.E.3d. at 562; Kate Taylor, *What We Know About the Michelle Carter Suicide Texting Case*, N.Y. TIMES (July 9, 2019), https://www.nytimes.com/2019/07/09/us/michelle-carter-i-love-you-now-die.html [https://perma.cc/5MP4-3NLR].

9. Petition for Writ of Certiorari, *Carter II*, 115 N.E.3d 559 (No. 19–62); Isaac Stanley-Becker, *She Urged Her Boyfriend to Die. Now She's Asking the Supreme Court to Call It Free Speech.*, WASH. POST (July 9, 2019), https://www.washingtonpost.com/nation/2019/07/09/she-urged-her-boyfriend-die-now-shes-asking-supreme-court-call-it-free-speech/ [https://perma.cc/N9AX-NGZW].

10. Commonwealth v. Welansky, 55 N.E.2d 902, 910 (Mass. 1944) ("The essence of wanton or reckless conduct, by way either of commission or omission where there is a duty to act, which conduct involves a high degree of likelihood that substantial harm will result to another."); *see infra* Section I.A (discussing the fair warning requirement).

11. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 2 (AM. L. INST. 2010) (defining wanton and reckless conduct); *see also Carter I*, 52 N.E.3d at 1064 (calling Carter's behavior a "systemic campaign of coercion" in which she "subvert[ed] his willpower in favor of her own.").

Massachusetts.[12] Carter's conduct did not constitute criminal activity under the common law interpretation of manslaughter in Massachusetts, and thus her conviction is unconstitutional under the fair warning requirement.[13]

I. BACKGROUND

Many object to assisted suicide on moral grounds, and multiple states have attempted to criminalize it.[14] The U.S. Supreme Court has found these laws constitutional, though these cases have almost always been in regard to someone who was physically present at the suicide.[15] At least eleven states have statutes penalizing assisted suicide in some fashion,[16] whereas eight states and Washington DC currently have "death with dignity" statutes.[17] A "death with dignity" statute is being considered by

12. *See* Bidgood, *supra* note 1 (questioning the sufficiency of Carter's conviction); Sean Sweeney, Note, *Deadly Speech: Encouraging Suicide and Problematic Prosecutions*, 67 CASE W. RES. L. REV., 941, 958 (2017).

13. *See Welansky*, 55 N.E.2d at 910 ("The essence of wanton or reckless conduct, by way either of commission or omission where there is a duty to act, which conduct involves a high degree of likelihood that substantial harm will result to another."); *see infra* Section II.A (discussing the fair warning requirement).

14. *Compare Medical Aid in Dying Is Not Assisted Suicide, Suicide or Euthanasia*, COMPASSION & CHOICES, https://compassionandchoices.org/about-us/medical-aid-dying-not-assisted-suicide/ [https://perma.cc/N59H-XJC4] (last visited Oct. 26, 2019), *with* Lydia Dugdale, *Doctors Should Heal Patients, Not Kill Them. Assisted Suicide Makes Us Agents of Death.*, USA TODAY (Sept. 25, 2019, 5:00 AM), https://www.usatoday/story/opinion/voices/2019/09/25/physician-assisted-suicide-euthanasia-dementia-doctors-column/2426908001/ [https://perma.cc/5L3R-MSXS].

15. *See* Washington v. Glucksberg, 521 U.S. 702, 705–06 (1997) (finding that Washington's prohibition against causing or aiding a suicide does not violate the Due Process Clause); *see also* Vacco v. Quill, 521 U.S. 793, 797 (1997) (finding that New York's statute prohibiting assisting suicide does not violate the Equal Protection Clause); Sampson v. Alaska, 31 P.3d 88, 90 (2001) (finding Alaska's manslaughter statute's general prohibition of assisted suicide did not violate equal protection rights of mentally competent, terminally ill adults); Michigan v. Kevorkian, 527 N.W.2d 714, 716 (Mich. 1994) (finding that the United States Constitution does not prohibit a state from imposing criminal penalties on one who assists another in committing suicide, even where a defendant merely is involved in events leading up to death, such as providing means).

16. *See* MICH. COMP. LAWS ANN. § 752.1027 (2020) (Criminal assistance to suicide); KAN. STAT. ANN. § 21-5407 (2020) (Assisting suicide); S.D. CODIFIED LAWS § 22-16-37 (2020) (Aiding and abetting suicide—Felony); ARK. CODE ANN. § 5-10-106 (2020) (Physician-assisted suicide); VA. CODE ANN. § 8.01-622.1 (2020) (Injunction against assisted suicide; damages; professional sanctions); LA. STAT. ANN. § 14:32.12 (2020) (Criminal assistance to suicide); OKLA. STAT. tit. 61B, § 3141.5–3141.8 (2020) (Assisted Suicide Prevention Act); N.M. STAT. ANN. § 30-2-4 (2020) (Assisting suicide); NEB. REV. STAT. § 28-307 (2020) (Assisting suicide, defined; penalty); ALA. CODE § 22-8B (2020) (Assisted Suicide Ban Act); MINN. STAT. § 609.215 (2020) (Suicide); MISS CODE ANN. § 97-3-49 (2020) (Assisting suicide).

17. CAL. HEALTH AND SAFETY CODE § 443.1.85 (West 2020) (End of Life Option Act); COLO. REV. STAT. § 25-48 (2020) (Colorado End-of-Life Options Act); D.C. CODE § 7-661 (2020) (Death with Dignity Act of 2016); HAW. REV. STAT § 19-327L (2020) (Our Care, Our Choice Act); ME. STAT. tit. 22, § 2140 (2019) (Death with Dignity Act); N.J. STAT. ANN. § 26:16-1 (West 2020)

the Massachusetts legislature as of this writing but does not currently exist.[18]

The conduct involved in Carter's case is one of encouraged suicide, where there is no explicitly stated statute or any physical connection by the defendant to the death involved.[19] As opposed to assisted suicide cases involving terminally ill patients,[20] many of the cases discussed below involve those who only want to die due to depression and emotional pain.[21] These cases do not involve any attempt to classify the depressed as a protected class, as argued in cases of assisted-suicide, and as such do not analyze the constitutionality of any such provisions through the Due Process or Equal Protections Clauses of the U.S. Constitution.[22] Instead, these cases turn on the constitutionality of the statute under which the prosecution is brought.[23]

A. Fair Warning Requirement

In 1931, Justice Holmes observed in *McBoyle v. United States* that there must be "fair warning" to the world for a statute to criminalize certain conduct.[24] While there is no actual requirement that the specific perpetrator must know that the act in question is criminal, a statute must be clear as to what conduct the law proscribes.[25] The purpose of the fair

(Medical Aid in Dying for the Terminally Ill); OR. REV. STAT. § 127.800 (2020) (Death with Dignity Act); VT. STAT. ANN. tit. 18, § 5281 (2020) (Patient Choice at End of Life); WASH. REV. CODE § 11.125.420 (2020).

18. An Act Relative to End of Life Options, S. 2745, 2020 Leg., 191 Gen. Ct. (Mass. 2020); An Act Relative to End of Life Options, H. 4782, 2020 Leg., 191 Gen. Ct. (Mass. 2020).

19. *See infra* Section II.A (discussing the facts behind the *Carter* cases).

20. *See generally Vacco*, 521 U.S. 793 (1997) (finding that New York's statute prohibiting assisted suicide does not violate the Equal Protection Clause); *Sampson*, 31 P.3d 88 (2001) (finding Alaska's manslaughter statute's general prohibition of assisted suicide did not violate equal protection rights of mentally competent, terminally ill adults); *Kevorkian*, 527 N.W.2d 714 (Mich. 1994) (finding that the United States Constitution does not prohibit state from imposing criminal penalties on one who assists another in committing suicide, even where defendant merely is involved in events leading up to death, such as providing means).

21. *See infra* Section II.B (looking at United States v. Drew, 259 F.R.D. 449 (C.D. Cal. 2009) and State v. Melchert-Dinkel, 844 N.W.2d 13 (Minn. 2014)).

22. *See generally Vacco*, 521 U.S. 793 (1997); *see also Sampson*, 31 P.3d 88 (2001); *Kevorkian*, 527 N.W.2d 714 (Mich. 1994).

23. *See infra* Section II.B. (discussing the overturning of convictions in *State v. Melchert-Dinkel* and *United States v. Drew*).

24. United States v. Drew, 259 F.R.D. 449, 462 (C.D. Cal. 2009) (citing McBoyle v. United States, 283 U.S. 25, 27 (1931)).

25. *McBoyle*, 283 U.S. at 27; *see also* Screws v. United States, 325 U.S. 91, 103–04 (1945) (plurality opinion) ("The constitutional requirement that a criminal statute be definite serves a high function. It gives a person acting with reference to the statute fair warning that his conduct is within its prohibition.").

warning requirement is to ensure that a person has reasonable notice of prohibited conduct before they[26] are held criminally responsible.[27]

There are three related aspects to the fair warning requirement.[28] First, a statute that forbids or requires an act must not be written in terms so vague that someone of common intelligence must guess what it means, although those of common intelligence may have different understandings of the law's application.[29] Second, in order to resolve ambiguity, a criminal statute should only apply to conduct that is clearly covered by it.[30] Third, due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.[31] The general concept of the fair warning requirement is that a statute, whether on its own or as it is construed, must be reasonably clear at the time the defendant acted criminally. As will be discussed further below, Carter's conviction fails when analyzed through the three prongs of the fair warning requirement.[32]

The first aspect of the fair warning requirement is generally called the void for vagueness doctrine.[33] This doctrine states that a statute that is overly broad can be found unconstitutional due to its vagueness.[34] The void for vagueness doctrine itself has two prongs in determining if a statute is vague. First, there is a definitional sufficiency requirement, and second, there is a guideline setting element in how to enforce the law.[35]

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26. Please note the pronoun "they" is intentionally used throughout by the author as a gender-neutral pronoun.

27. Bouie v. Columbia, 378 U.S. 347, 352 (1964); *see also Screws*, 325 U.S. at 104 ("One who does act with such specific intent is aware that what he does is precisely that which the statute forbids. He is under no necessity of guessing whether the statute applies to him for he either knows or acts in reckless disregard of its prohibition of the deprivation of a defined constitutional or other federal right.").

28. United States v. Lanier, 520 U.S. 259, 266 (1997); Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

29. *Lanier*, 520 U.S. at 266 (quoting *Connally*, 269 U.S. at 391).

30. *Lanier*, 520 U.S. at 266; *see also* Liparota v. United Sates, 471 U.S. 419, 420 (1985) (quoting United States v. Bass, 404 U.S. 336, 348 (1971)).

31. *Lanier*, 520 U.S. at 266; Marks v. United States, 430 U.S. 188, 191 (1977); Rabe v. Washington, 405 U.S. 313, 317 (1972).

32. *See* Part III (analyzing Carter's conviction and what the Supreme Court should rule, if it is to grant certiorari).

33. *Connally*, 269 U.S. at 391; Kolender v. Lawson, 461 U.S. 352, 357 (1983); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (quoting *Connally*, 269 U.S. at 391).

34. *See generally* Chicago v. Morales, 527 U.S. 41 (1999) (finding that an ordinance that is impermissibly vague on its face and an arbitrary restriction on personal liberties violates due process); *see also* Coates v. Cincinnati, 402 U.S. 611 (1971) (finding that an ordinance subjecting the exercise of right to assembly to an unascertainable standard was unconstitutionally vague on its face).

35. *See Kolender*, 461 U.S. at 357–58 ("[T]he void-for-vagueness doctrine requires that a penal

A statute can be held unconstitutionally vague either on its face or as applied.[36] If a statute cannot withstand both prongs of the void-for-vagueness doctrine, the statute is found unconstitutional.[37] If a statute is unconstitutional on its face, then the statute itself is too vague to be applied in any and all situations.[38] A statute can be found unconstitutional as applied to a particular situation, though this does not necessarily mean the statute is unconstitutional as a whole.[39] If this were to happen, the court would need to reconstruct the legal understanding of the statute itself in order to sufficiently define its meaning.[40]

While both prongs have been considered necessary in the past, the U.S. Supreme Court has since decided that the second prong, requiring the legislature establish minimal guidelines to govern law enforcement, is the more important aspect.[41] A statute must give a clear understanding of the prohibited conduct, and provide "objective criteria" to determine whether a crime has been committed.[42] Without clear guidelines, a statute could allow police officers, prosecutors, and juries to make decisions based on their personal predilections.[43]

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statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."); *see also* Smith v. Goguen, 415 U.S. 566, 574 (1974).

36. United States v. Harriss, 347 U.S. 612, 617 (1954); United States v. Petrillo, 332 U.S. 1, 6–7 (1947).

37. *Kolender*, 461 U.S. at 357–58; Smith v. Goguen, 415 U.S. 566, 574 (1974).

38. *Harriss*, 347 U.S. at 617; *see also* Jordan v. De George, 341 U.S. 223, 231–32 (1951) ("The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.").

39. *See Harriss*, 347 U.S. at 618 ("On the other hand, if the general class of offenses to which the statute is plainly within its terms, the statute will not be struck down as vague even though marginal cases could be put where doubts might arise." (citing United States v. Petrillo, 332 U.S. 1, 7 (1947))).

40. *See Id*. (citing Screws v. United States, 325 U.S. 91 (1945)) (upholding the definiteness of the Civil Rights Act by a reasonable construction of the statute).

41. *See* Kolender v. Lawson, 461 U.S. 352, 357–58 (1983) ("Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.'" (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974))).

42. *See* United States v. Drew, 259 F.R.D. 449, 463 (C.D. Cal. 2009) ("To avoid contr[i]ving the void for vagueness doctrine, the criminal statute must contain 'relatively clear guidelines as to prohibited conduct' and provide 'objective criteria' to evaluate whether a crime has been committed." (citing Gonzalez v. Carhart, 550 U.S. 124, 149 (2007))).

43. Smith v. Goguen, 415 U.S. 566, 575 (1974); *see also* Papachristou v. Jacksonville, 405 U.S. 156, 165–69 (1972) (explaining that some statutes cast the net of power too large); Gregory v. Chicago, 394 U.S. 111, 120 (1969) ("To let a policeman's command become equivalent to a criminal statute comes dangerously near making our government one of men rather than of laws.").

B. Encouraged Suicide Cases Outside of Massachusetts

Like in Carter's case, the following two cases involve fact patterns where the victims committed suicide after the defendants encouraged them through technological means.[44] Both cases overturned the defendants' trial court convictions due to insufficiently narrow statutes.[45]

1. *State v. Melchert-Dinkel*

State v. Melchert-Dinkel is an important case for Carter because the defendant's conduct with the victims was entirely virtual, like Carter's, and was found to be insufficient for a criminal conviction.[46] William Melchert-Dinkel, a resident of Minnesota, posed as a suicidal female nurse on websites where users discussed their depression and desire to commit suicide.[47] He responded to posts by Mark Drybrough from England and Nadia Kajouji from Canada.[48] He formed a bond with them by feigning care and understanding and then encouraged both of them to hang themselves, claiming that he would do the same.[49] Melchert-Dinkel attempted to persuade each of them to let him watch their suicide through the use of a webcam.[50]

Melchert-Dinkel was charged with two counts of aiding suicide.[51] He stipulated to the facts on the condition that he preserve his right to appeal his convictions based on sufficiency of the evidence.[52] He was found guilty on both counts, with the Minnesota trial court finding that he "intentionally *advised* and *encouraged*" both Drybrough and Kajouji and that the speech fell outside the protections of the First Amendment of the U.S. Constitution.[53]

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44. State v. Melchert-Dinkel (*Melchert-Dinkel II*), 844 N.W.2d 13 (Minn. 2014); *see, e.g.*, *Drew*, 259 F.R.D. 449.

45. *Melchert-Dinkel II*, 844 N.W. 2d at 23 (explaining that the statutory language was too broad); *Drew*, 259 F.R.D. at 467 ("However, if every such bread does qualify, then there is absolutely no limitation or criteria as to which the breaches should merit criminal prosecution.").

46. *Melchert-Dinkel II*, 844 N.W.2d at 16; State v. Melchert-Dinkel (*Melchert-Dinkel I)*, 816 N.W.2d 703, 706 (Minn. Ct. App. 2012) (outlining that Minnesota officials learned of the online messages shortly before the suicide).

47. *Melchert-Dinkel II*, 844 N.W.2d at 16; *Melchert-Dinkel I*, 816 N.W.2d at 706.

48. *Melchert-Dinkel II*, 844 N.W.2d at 16; *Melchert-Dinkel I*, 816 N.W.2d at 705–06.

49. *Melchert-Dinkel II*, 844 N.W.2d at 16; *Melchert-Dinkel I*, 816 N.W.2d at 706.

50. *Melchert-Dinkel II*, 844 N.W.2d at 16; *Melchert-Dinkel I*, 816 N.W.2d at 707.

51. *Melchert-Dinkel II*, 844 N.W.2d at 17; *see also* Aiding Suicide, MINN. STAT. § 609.215 (2020) (*invalidated by* State v. Melchert-Dinkel, 844 N.W.2d 13 (Minn. 2014)) ("Whoever intentionally advises, encourages, or assists another in taking the other's own life may be sentenced to imprisonment for not more than 15 years or to payment of a fine of not more than $30,000, or both.").

52. *Melchert-Dinkel II*, 844 N.W.2d at 17; *Melchert-Dinkel I*, 816 N.W.2d at 712.

53. *Melchert-Dinkel II*, 844 N.W.2d at 17–18 (citing Order at 28, 32, State v. Melchert-Dinkel, No. 66-CR-10-1193 (filed Mar. 15, 2011)).

On appeal, the Minnesota Supreme Court determined the statute violated the First Amendment of the U.S. Constitution when it allowed for the prosecution of someone for encouraging or advising suicide, even though the prosecution of aiding in suicide was constitutional.[54] The Minnesota Supreme Court conceded that the State had satisfied the first prong of the strict scrutiny test, as the State has a compelling interest in preserving human life.[55] The statute, however, was not found to be sufficiently narrowly tailored because it did not define "advise" or "encourage."[56] Therefore, the Minnesota Supreme Court found the portion of the statute criminalizing advising or encouraging suicide was unconstitutional, and Melchert-Dinkel's conviction was reversed and his case remanded.[57]

While this Minnesota case is not binding precedent in Carter's jurisdiction of Massachusetts, its reliance on the federal Constitution means its reasoning directly applies to Carter's case. Carter's charge rests on her encouraging Roy to commit suicide. Using the same reasoning as in *Melchert-Dinkel*, Carter's conviction would be found unconstitutional—had an explicit statute even existed.

2. *United States v. Drew*

Lori Drew was a resident of Missouri.[58] She registered and created a page for a fictitious sixteen-year-old male named "Josh Evans" on www.MySpace.com, a social media website.[59] Drew used this profile to

54. *Melchert-Dinkel II*, 844 N.W.2d at 18; Sweeney, *supra* note 12, at 958 ("The court only struck down the statute as it pertained to encouraging suicide, and it upheld the portion of the statute prohibiting assisting suicide.").

55. *Melchert-Dinkel II*, 844 N.W.2d at 22 (concluding that a statute prohibiting the causing or aiding of suicide is not unconstitutional (citing Washington v. Glucksberg, 521 U.S. 702, 710 (1997))); *see generally* Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood Ass'n of Kansas City v. Ashcroft, 462 U.S. 476 (1983) (determining that the State has a compelling interest in preserving human life).

56. *Melchert-Dinkel II*, 844 N.W.2d at 23 ("In the absence of an applicable statutory definition, we generally give statutory terms their common and ordinary meanings." (citing State v. Leathers, 799 N.W.2d 606, 609 (Minn. 2011))); Sweeney, *supra* note 12, at 972 (examining the possible issues to come if society begins prosecuting encouraged suicides).

57. *Melchert-Dinkel II*, 844 N.W.2d at 25; Sweeney, *supra* note 12, at 963 (explaining that Melchert-Dinkel's conviction was later reversed and remanded).

58. United States v. Drew, 259 F.R.D. 449, 452 (C.D. Cal. 2009); Jennifer Steinhauer, *Verdict in MySpace Suicide Case*, N.Y. TIMES (Nov. 26, 2008), https://www.nytimes.com/2008/11/27/us/27myspace.html [https://perma.cc/3YQM-J4EV] [hereinafter Steinhauer, *Verdict in MySpace Suicide Case*] (explaining the conviction of a "Missouri woman").

59. *Drew*, 259 F.R.D. at 452; Jennifer Steinhauer, *Woman Who Posed as Boy Testifies in Case That Ended in Suicide of 13-Year-Old*, N.Y. TIMES (Nov. 20, 2008), https://www.nytimes.com/2008/11/21/us/21myspace.html [https://perma.cc/N7K2-ED5G] [hereinafter Steinhauer, *Woman Who Posed as Boy Testifies*] (illustrating that the defendant created a fake MySpace account for a "cute teenage boy").

chat with Megan Meier, a thirteen-year-old girl.[60] The two chatted and flirted for a few weeks, then "Josh" told Megan that he was no longer interested in her and that "the world would be a better place without her in it."[61] Upset by the rejection, Meier committed suicide.[62] Drew deleted the MySpace account the same day.[63] Drew denied creating the account, and Missouri law enforcement was unable to find sufficient evidence to charge Drew.[64] Because no Missouri statute applied to Drew's conduct, federal prosecutors chose to charge Drew under the Computer Fraud and Abuse Act (CFAA) with violating the user agreement of MySpace, which prohibits phony accounts to "further a tortious act, namely, intentional infliction of emotional distress."[65] Of the four charges she was indicted on, the jury was only able to find her guilty of "accessing a computer involved in interstate or foreign communication without authorization or in excess of authorization to obtain information, a misdemeanor."[66]

In making "Josh's" MySpace page, Drew had agreed to MySpace's terms of agreement, stating she would not make a page that was untruthful or inaccurate.[67] In doing so, she agreed to legally binding terms for her use of the services.[68] However, an individual of common

60. Jennifer Steinhauer, *Woman Indicted in MySpace Suicide Case*, N.Y. TIMES (May 16, 2008), https://www.nytimes.com/2008/05/16/us/16myspace.html [https://perma.cc/U5W9-YJ4M] [hereinafter Steinhauer, *Woman Indicted in MySpace Suicide Case*] (indicating that "Josh Evans" began chatting online with Megan Meier).

61. *Drew*, 259 F.R.D. at 452; *see also* Steinhauer, *Woman Indicted in MySpace Suicide Case*, *supra* note 60 (outlining that "Josh Evans" began sending nasty messages to Megan Meier before she committed suicide).

62. *Drew*, 259 F.R.D. at 452; *see also* Steinhauer, *Woman Who Posed as Boy Testifies*, *supra* note 59 (explaining that the girl stated "You're the kind of boy a girl would kill herself over" before committing suicide).

63. *Drew*, 259 F.R.D. at 452; *see also* Steinhauer, *Woman Indicted in MySpace Suicide Case*, *supra* note 60 (stating that Drew ended the account activity after Megan Meier committed suicide).

64. Steinhauer, *Woman Indicted in MySpace Suicide Case*, *supra* note 60 (explaining that Drew denied creating the account); Steinhauer, *Woman Who Posed as Boy Testifies*, *supra* note 59 (elaborating that Drew testified under an immunity agreement).

65. *Drew*, 259 F.R.D. at 452; *compare* Thomas v. Special Olympics Mo., 31 S.W.3d 442, 446 (Mo. Ct. App. 2000), *with* Hailey v. Cal. Physicians' Serv., 69 Cal.Rptr.3d 789, 806–07 (2007) (comparing the elements of tort of intentional infliction of emotional distress under Missouri and California state laws); 18 U.S.C. § 1030 (describing the statute regarding fraud in connection with computers).

66. *Drew*, 259 F.R.D. at 452–53, referring to *MySpace Services Terms of Use Agreement*, MYSPACE.COM, https://myspace.com/pages/terms [https://perma.cc/5TNM-A425] (last visited Jan. 12, 2021) (stating that the conduct violated MySpace's terms of service).

67. *Drew*, 259 F.R.D. at 454; Dan Glaister, *Neighbour Found Guilty on Lesser Charges in MySpace Suicide Case*, THE GUARDIAN (Nov. 26, 2008), https://www.theguardian.com/world/2008/nov/26/myspace-suicide-cyber-bully [https://perma.cc/F2BS-7QAQ] ("But prosecutors decided to charge Drew on the basis that she had violated the terms of MySpace's user agreement, which prohibits the use of false names, the harassment of other users and the soliciting of personal information from minors.").

68. *Drew*, 259 F.R.D. at 452–53; *MySpace Services Terms of Use Agreement*, *supra* note 66 (stating that a user agrees to the terms of service when creating an account).

intelligence is arguably not on notice that violating a website's terms of service could put them in prison.[69] Breaches of contract are not normally the subject of criminal prosecution.[70] As such, a person of "common intelligence" may expect to be liable for civil liabilities but would not expect to be criminally prosecuted.[71] This made Drew's conviction unconstitutional.[72] By attempting to squeeze Drew's conduct into the CFAA, the federal prosecutors were creating a law that "affords too much discretion to the police and too little notice to citizens who wish to use the [internet]."[73] Thus, her conviction was overturned on appeal.[74]

Drew shows the inability for a shoehorned conviction to withstand appellate scrutiny in a situation of encouraged suicide. While Drew was shoehorned into a much different statute than Carter, the reasoning follows that the statute did not create sufficient notice for a defendant to be convicted for these actions.

C. Self-Inflicted Manslaughter Cases in Massachusetts

Carter's conviction cited three specific Massachusetts cases in which the charge of involuntary manslaughter was successful against a defendant where the death was self-inflicted.[75] These cases all discuss the defendants' amount of participation in the act that resulted in the death and what factual changes could have influenced the determination of guilt.

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69. *Drew*, 259 F.R.D. at 464; Glaister, *supra* note 67 (examining the facts of the *United States v. Drew* case).

70. *Drew*, 259 F.R.D. at 464; *see also TOS Violation Can't Justify Woman's Prosecution Under CFAA*, 27 NO. 8 ANDREWS COMPUT. & INTERNET LITIG. REP. 6 (2009) (explaining that Congress did not intend for the Computer Fraud and Abuse Act to be applicable to TOS violations).

71. *Drew*, 259 F.R.D. at 464; Brandon Darden, *Definitional Vagueness in the CFAA: Will Cyberbullying Cause the Supreme Court to Intervene?*, 13 SMU SCI. & TECH. L. REV. 329, 345 (2010) ("First, ordinary people, while reasonably foreseeing civil penalties, would not expect criminal punishment for contract breaches.").

72. *See generally Drew*, 259 F.R.D. (explaining the numerous reasons why Drew's conviction was unconstitutional); Darden, *supra* note 71, at 345 (describing the void for vagueness doctrine and how it applies to the CFAA). The court considered the lack of notice of potential criminal prosecution as one of several reasons that Drew's conviction was ultimately reversed. Other issues included the terms of service that Drew agreed to being written by the website's manufacturers rather than the legislature, as well as the lack of consistency in which breaches of contract result in prosecution.

73. *Drew*, 259 F.R.D. at 467 (quoting Chicago v. Morales, 527 U.S. 41, 64 (1999)).

74. *Id*. at 468; Steinhauer, *Verdict in MySpace Suicide Case*, *supra* note 58 (reporting the verdict found in the *United States v. Drew* case).

75. *Carter I*, 52 N.E.3d 1054, 1062 (Mass. 2016) (citing Commonwealth v. Atencio, 189 N.E.2d 223, 223–24 (Mass. 1963); Persampieri v. Commonwealth, 175 N.E.2d 387, 387 (Mass. 1961)).

1. *Commonwealth v. Atencio*

In *Commonwealth v. Atencio*, James Atencio was charged with manslaughter arising out of a game of "Russian roulette."[76] The deceased checked the gun and saw that there was only one cartridge, put the gun to his head, and pulled the trigger.[77] Nothing happened.[78] Atencio repeated the process, and again nothing happened.[79] Atencio passed the gun to the deceased, who then pulled the trigger.[80] The gun went off, and the deceased fell over dead.[81]

Atencio argued his conduct could not fall into the definition of wanton or reckless conduct necessary for a manslaughter conviction, but the trial court disagreed.[82] The crucial element of wanton or reckless conduct, it explained, was that the conduct involved a high degree of likelihood that substantial harm would result to another.[83] While the trigger was pulled by the decedent, the decedent and Atencio were playing the game of Russian roulette *together*, as opposed to "two separate games of solitaire."[84] Had Atencio not played the game with the decedent, stated the trial court, the death would not have occurred, making Atencio's conduct a cause and not a mere condition of the death.[85] Regardless of who pulled the trigger first, Atencio engaged in wanton or reckless conduct, as his participation in the game was a necessary component to his death.[86] Atencio could have been found not guilty only if he had abandoned or quit before the shot was fired.[87] Consequently, his conviction was affirmed.[88]

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76. *Atencio*, 189 N.E.2d at 223–24; Charles Adside III, *The Innocent Villain: Involuntary Manslaughter by Text*, 52 U. MICH. J.L. REFORM 731, 744 (2019); *Russian Roulette*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/dictionary/english/russian-roulette [https://perma.cc/UAG3-GKJU] (last visited Dec. 6, 2020) ("a very dangerous game of chance where each player aims at their own head with a gun that has one bullet in it and five empty chambers").

77. *Atencio*, 189 N.E.2d at 224; Adside, *supra* note 76, at 744.

78. *Atencio*, 189 N.E.2d at 224; Adside, *supra* note 76, at 744.

79. *Atencio*, 189 N.E.2d at 224; Adside, *supra* note 76, at 744.

80. *Atencio*, 189 N.E.2d at 224; Adside, *supra* note 76, at 744.

81. *Atencio*, 189 N.E.2d at 224; Adside, *supra* note 76, at 744.

82. *Atencio*, 189 N.E.2d at 224 (citing Commonwealth v. Bouvier, 55 N.E.2d 913 (Mass. 1944)).

83. *Atencio*, 189 N.E.2d at 224 (quoting Commonwealth v. Welansky, 55 N.E.2d 902, 910 (Mass. 1944)).

84. *Atencio*, 189 N.E.2d at 225; Shawnee Melnick, *Prosecution for Encouraging Suicide: How the Massachusetts Supreme Court Ignored the First Amendment*, 28 KAN. J.L. & PUB. POL'Y 282, 288 (2019).

85. *Atencio*, 189 N.E.2d at 225; Melnick, *supra* note 84, at 288.

86. *Atencio*, 189 N.E.2d at 225; Melnick, *supra* note 84, at 287–88.

87. *Atencio*, 189 N.E.2d at 225; Melnick, *supra* note 84, at 288.

88. *Atencio*, 189 N.E.2d at 226; Melnick, *supra* note 84, at 287–88.

Unlike in Carter's case, Atencio was physically present at the time of the victim's death. In order to play Russian roulette at all, Atencio *had* to be physically present—he couldn't simply text the decedent from afar. Nonetheless, *Atencio* stands for the proposition that an individual may be held accountable for another's self-inflicted death.

2. *Persampieri v. Commonwealth*

In *Persampieri v. Commonwealth*, Persampieri was convicted of manslaughter.[89] Persampieri told his wife he wanted to get a divorce, and she responded by saying she was going to commit suicide.[90] Persampieri reminded her of past attempts and said that she was "chicken—and wouldn't do it."[91] He told her to get their gun from the kitchen, which she did.[92] At the deceased's request, he loaded the gun, after which he noticed the safety was off.[93] He gave the gun back to her, and she put the rifle between her legs with the butt on the floor and the muzzle or barrel against her forehead.[94] When she could not reach the trigger, Persampieri told her to take off her shoes so she could reach.[95] The gun then went off, and she died the following day.[96]

The appellate court found Persampieri's conduct was criminally wanton or reckless.[97] By giving a drunk, "emotionally disturbed" person a gun, loading it for her, and telling her how to pull the trigger, Persampieri showed a reckless disregard to his wife's safety and the possible consequences of his conduct.[98] Like in *Atencio*, Persampieri was physically present at the time of the victim's death. Persampieri was arguably even more active in his victim's death than Atencio, as he offered verbal encouragement to his wife to continue her suicide attempt. He paired his verbal encouragement with physical actions, such as giving her a gun and loading it, going beyond mere words.[99]

89. Persampieri v. Commonwealth, 175 N.E.2d 387, 389 (Mass. 1961); Adside, *supra* note 76, at 744.

90. *Persampieri*, 175 N.E.2d at 388; Adside, *supra* note 76, at 744.

91. *Persampieri*, 175 N.E.2d at 388; Adside, *supra* note 76, at 744.

92. *Persampieri*, 175 N.E.2d at 389; Adside, *supra* note 76, at 744–45.

93. *Persampieri*, 175 N.E.2d at 389; Adside, *supra* note 76, at 745.

94. *Persampieri*, 175 N.E.2d at 389; Adside, *supra* note 76, at 745.

95. *Persampieri*, 175 N.E.2d at 389; Adside, *supra* note 76, at 745.

96. *Persampieri*, 175 N.E.2d at 389; Adside, *supra* note 76, at 745.

97. *Persampieri*, 175 N.E.2d at 390; Guyora Binder & Luis Chiesa, *The Puzzle of Inciting Suicide*, 56 AM. CRIM. L. REV. 65, 106 (2019) (examining the legal reasoning behind *Persampieri*).

98. *Persampieri*, 175 N.E.2d at 390; Binder & Chiesa, *supra* note 97, at 106 (examining the legal reasoning behind *Persampieri*).

99. *Persampieri*, 175 N.E.2d at 388; Binder & Chiesa, *supra* note 97, at 106; Adside, *supra* note 76, at 745 (describing the facts of *Atencio* and examining the legal reasoning behind *Persampieri*).

3. *Commonwealth v. Bowen*

In *Commonwealth v. Bowen*, Bowen was charged with the murder of a fellow inmate.[100] Bowen and the victim had been in neighboring cells, able to converse freely.[101] The victim was sentenced to death, and Bowen repeatedly and frequently advised the victim to disappoint both the sheriff and those who were to come and see his execution by putting an end to his own life.[102] The victim hanged himself the night before his scheduled execution.

The appellate court had to determine whether Bowen's words constituted action sufficient for a charge of murder.[103] For the jury to find Bowen guilty, the state argued, the jury must find that he was instrumental in the decedent's death, by advice or otherwise.[104] The state was not required to show that the deceased would not have hanged himself had the defendant not advised him to do so because "the very act of advising to the commission of a crime is of itself unlawful."[105] If the decedent would have determined to commit suicide himself, then the defendant could not be found guilty.[106] But, if the advice given to the decedent was the "but for" factor in causing the decedent to kill himself, then the jury could find him guilty.[107]

This case, which occurred in Massachusetts almost 200 years prior to Roy's death, is the most synonymous to Carter's case. It is the only case found where the defendant was successfully convicted for encouraging one to commit suicide through words alone. Thus, it is the case on which the trial judge most relied in determining Carter's fate.[108]

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100. Commonwealth v. Bowen, 13 Mass. 356, 356 (1816); Binder & Chiesa, *supra* note 97, at 77 (describing the facts of *Bowen*).

101. *Bowen*, 13 Mass. at 356; Adside, *supra* note 76, at 736 (describing the facts of *Bowen*).

102. *Bowen*, 13 Mass. at 356; Adside, *supra* note 76, at 736 (describing the facts of *Bowen*).

103. *Bowen*, 13 Mass. at 359; Carla Zavala, *Manslaughter by Text: Is Encouraging Suicide Manslaughter?*, 47 SETON HALL. L. REV. 297, 308 (2016) (describing the analysis behind *Bowen*).

104. *Bowen*, 13 Mass. at 359; Zavala, *supra* note 103, at 308 (describing the analysis behind *Bowen*).

105. *Bowen*, 13 Mass. at 359; Zavala, *supra* note 103, at 308 (describing the analysis behind *Bowen*).

106. *Bowen*, 13 Mass. at 359; Zavala, *supra* note 103, at 308 (describing the analysis behind *Bowen*).

107. *Bowen*, 13 Mass. at 359; Zavala, *supra* note 103, at 308 (describing the analysis behind *Bowen*); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 (AM. L. INST. 2020) (stating that an act is the "but-for" causation if, in the absence of the act, the outcome would not have occurred).

108. Commonwealth v. Michele Carter (*Carter II*), 115 N.E.3d, 559, 569–70 (Mass. 2019); Kaitlin Flanigan, *How a 200-Year-Old Massachusetts Court Case Impacted the Michelle Carter Verdict*, NECN (June 16, 2017), https://www.necn.com/news/new-england/How-a-200-Year-Old-Massachusetts-Case-Applied-to-the-Michelle-Carter-Verdict-428906283.html [https://perma.cc/YV4S-XDZN].

II. DISCUSSION

A. Carter and Roy's Relationship

Michelle Carter and Conrad Roy met and began dating when they were sixteen in 2012 in Florida while both were visiting relatives.[109] Carter and Roy both lived in Massachusetts, approximately a one-hour drive apart.[110] Roy suffered from depression and social anxiety and had been receiving treatment for these issues since 2011.[111] Roy attempted suicide multiple times during their two-year relationship.[112] After an attempt on October 10, 2012, Roy was hospitalized.[113] Roy discussed this attempt with Carter over text, telling her about the voices he heard telling him the different ways he could kill himself.[114] Roy conveyed his feelings of depression and suicide to Carter multiple times over text, telling her that nothing anyone did or said was going to make him want to stay alive.[115] Initially, Carter encouraged Roy to get help with his mental illness and offered support.[116]

Due to the physical distance between them, the majority of the contact between Carter and Roy was through text messages and phone calls.[117] They physically met a total of five times over their relationship but exchanged thousands of text messages over those two years. [118] The majority of the communication between Carter and Roy focused on the topic of suicide.[119] Not only did they discuss Roy's suicidal thoughts, but Carter encouraged him to commit suicide—instructing him how and when to do it, assuaging him when he discussed his worries and fears over killing himself, and chastising him any time he delayed attempting

109. I LOVE YOU, NOW DIE, *supra* note 1; *Carter II* 115 N.E.3d at 562.

110. I LOVE YOU, NOW DIE, *supra* note 1; *Carter II* 115 N.E.3d at 562.

111. *Carter I*, 52 N.E.3d 1054, 1057 (Mass. 2016); I LOVE YOU, NOW DIE, *supra* note 1.

112. *Carter II*, 115 N.E. at 562 ("Between October 2012 and July 2014, the victim attempted suicide several times by various means, including overdosing on over-the-counter medication, drowning, water poisoning, and suffocation. None of these attempts succeeded, as the victim abandoned each attempt or sought rescue."); I LOVE YOU, NOW DIE, *supra* note 1.

113. *Carter I*, 52 N.E.3d at 1057; I LOVE YOU, NOW DIE, *supra* note 1.

114. *Carter I*, 52 N.E.3d at 1057; I LOVE YOU, NOW DIE, *supra* note 1.

115. *Carter I*, 52 N.E.3d at 1057; I LOVE YOU, NOW DIE, *supra* note 1.

116. *Carter II*, 115 N.E.3d at 562–63 ("Indeed, in early June 2014, the defendant, who was planning to go to McLean Hospital for treatment of an eating disorder, asked the victim to join her, saying that the professionals there could help him with his depression and that they could mutually support each other."); I LOVE YOU, NOW DIE, *supra* note 1.

117. *Carter II*, 115 N.E.3d at 562–63; I LOVE YOU, NOW DIE, *supra* note 1.

118. I LOVE YOU, NOW DIE, *supra* note 1; Taylor, *supra* note 8 (describing the facts behind Carter and Roy's romance).

119. *Carter I*, 52 N.E.3d at 1057; Taylor, *supra* note 8 (describing the facts behind Carter and Roy's romance).

suicide.[120] Carter even suggested an empty parking lot when he said he didn't know where to do it.[121]

On July 12, 2014, Roy drove his truck to an empty parking lot with a gasoline-powered water pump that produced carbon monoxide.[122] Telephone records show that Carter and Roy had two phone calls that night; Roy called Carter at 6:28 p.m., where they spoke for forty-three minutes, and then Carter called Roy at 7:12 p.m. where they spoke for forty-six minutes.[123] At one point while running the generator in his truck, Roy stepped out of the car out of fear.[124] Still on the phone with Roy, Carter told him to get back into the car.[125] Roy eventually got back

120. *Carter I*, 52 N.E.3d at 1057–58, n.6 (referencing messages between Carter and Roy between July 4, 2014 and July 12, 2014, "You're gonna [*sic*] have to prove me wrong because I just don't think you really want this. You just keeps [*sic*] pushing it off another night and say you'll do it but you never do . . . SEE THAT'S WHAT I MEAN. YOU KEEP PUSHING IT OFF! You just said you were gonna [*sic*] do it tonight and now you're saying eventually . . .But I bet you're gonna [*sic*] be like 'oh, it didn't work because I didn't tape the tube right or something like that' . . . I bet you're gonna [*sic*] say an excuse like that."). On another occasion, Carter and Roy had the following text message exchange:
CARTER: Well there's more ways to make CO. Google ways to make it . . . .
ROY: Omg
CARTER: What
ROY: portable generator that's it
CARTER: That makes CO?
ROY: yeah! It's an internal combustion engine.
CARTER: Do you have one of those?
ROY: there's one at work.
Id.

121. *Id.* Sometime between July 4, 2014 and July 12, 2014, Carter and Roy had the following exchange:
CARTER: You just need to do it Conrad or I'm gonna [*sic*] get you help
CARTER: You can't keep doing this everyday
ROY: Okay I'm gonna [*sic*] do it today
CARTER: Do you promise
ROY: I promise babe
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*
Id. (emphasis added in *Carter II*); *see also* I LOVE YOU, NOW DIE, *supra* note 1.

122. *See* Taylor, *supra* note 8 (describing the facts of Carter and Roy's relationship); *Carter I*, 52 N.E.3d at 1056.

123. *Carter I*, 52 N.E.3d at 1058; I LOVE YOU, NOW DIE, *supra* note 1.

124. *Carter I*, 52 N.E.3d at 1059, n.8 ("The text message to Samantha Boardman, in relevant part, stated: '. . .I was on the phone with him and he got out of the [truck] because it was working and he got scared. . ."); I LOVE YOU, NOW DIE, *supra* note 1.

125. *Carter I*, 52 N.E.3d at 1059, n.8 ("The text message to Samantha Boardman, in relevant part, stated: '[I] fucking told him to get back in . . . .'"); I LOVE YOU, NOW DIE, *supra* note 1.

into the car and succumbed to the carbon monoxide.[126] This phone call with Carter was Roy's final communication before his death.[127]

Roy's body and truck were found the next day.[128] Because his death was untimely, the police investigated his death to determine it was, in fact, suicide.[129] Investigators discovered a notebook of suicide notes containing passwords for Roy's different accounts and technology which led them to discover his text conversations with Carter.[130] After contacting the district attorney's office, investigators obtained a search warrant for Carter's phone, in which they found numerous messages from Carter to her friend Samantha Boardman soon after Carter's second call with Roy the night of his death.[131] Weeks after Roy's death, Carter had texted Boardman, explaining that Roy had gotten out of the truck out of fear, and that she had commanded him to get back in the car.[132] Carter also acknowledged that she could have stopped Roy's suicide in a separate text to Boardman: "I helped ease him into it and told him it was ok, I was talking to him on the phone when he did it I coud [*sic*] have easily stopped him or called the police but I didn't."[133]

Carter was indicted on February 5, 2015 for the involuntary manslaughter of Conrad Roy III as a youthful offender, asserting that her wanton or reckless conduct was the cause of Roy's death.[134]

B. Carter I

Carter first moved to have her case dismissed, which was denied.[135] She then filed a petition for relief, arguing that she did not cause his death

126. *Carter I*, 52 N.E.3d at 1056; *Carter II*, 115 N.E.3d at 565.

127. *Carter II*, 115 N.E.3d at 565; I LOVE YOU, NOW DIE, *supra* note 1.

128. *Carter I*, 52 N.E.3d at 1054; I LOVE YOU, NOW DIE, *supra* note 1.

129. *Carter I*, 52 N.E.3d at 1056; I LOVE YOU, NOW DIE, *supra* note 1.

130. *Carter I*, 52 N.E.3d at 1057; I LOVE YOU, NOW DIE, *supra* note 1.

131. *Carter II*, 115 N.E.3d at 559 ("The defendant, however, sent a text to a friend at 8:02 p.m., shortly after the second call: "he just called me and there was a noise like a motor and I heard moaning like someone was in pain, and he wouldn't answer when I said his name. I stayed on the phone for like 20 minutes and that's all I heard." And at 8:25 p.m., she again texted that friend: "I think he just killed himself.").

132. *Carter I*, 52 N.E.3d at 1059, n.8 ("The text message to Samantha Boardman, in relevant part, stated: 'Sam, Conrad's 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 fucking 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."); I LOVE YOU, NOW DIE, *supra* note 1.

133. *Carter I*, 52 N.E.3d at 1059; I LOVE YOU, NOW DIE, *supra* note 1.

134. *Carter I*, 52 N.E.3d at 1059; Katharine Q. Seelye, *For Urging a Suicide, 15 Months in Jail*, NEW YORK TIMES (Aug. 3, 2017), https://www.nytimes.com/2017/08/03/us/texting-suicide-sentence.html [https://perma.cc/4PGU-C32R].

135. *Carter I*, 52 N.E.3d at 1059; Kim Tunnicliffe, *Michelle Carter's Defense Denied Motion to Dismiss Case*, CBS BOSTON (June 9, 2017), https://boston.cbslocal.com/2017/06/09/michelle-carter-defense-dismiss-case-attempt/ [https://perma.cc/22RV-KN2J].

by wanton or reckless conduct because she was neither physically present when Roy killed himself nor did she provide him with the instrument with which he killed himself.[136] Carter also argued that no matter how forcefully, verbally encouraging someone to commit suicide cannot constitute wanton or reckless conduct.[137] The trial court had to consider whether the evidence was sufficient to warrant the return of an indictment for involuntary manslaughter where Carter's conduct did not extend beyond words.[138] The first decision given in Carter's case is not on her guilt, but on the sufficiency (or lack thereof) of the evidence of her indictment.[139]

The judge determined that there was sufficient evidence for the grand jury to find that an ordinary person under the circumstances would have realized the gravity of the danger Carter's words posed and the possible consequence of Roy's death.[140] Thus, the judge moved forward with the bench trial, and Carter was found guilty of manslaughter.[141] The judge focused his decision on Roy's final moments when he got out of the car and Carter instructed him to get back in, as this was the moment when her conduct appeared truly wanton and reckless.[142] While it was Roy who did the research, secured the generator, secured the water pump, and went to an unnoticeable location to begin his suicide attempt, "he [broke] the chain of self-causation by exiting the vehicle."[143] Roy had attempted suicide four times prior, and each time he had sought help, making his leaving the truck and his call to Carter consistent with his prior, *unsuccessful* attempts.[144] Carter argued in trial that Roy's mental health

136. *Carter I*, 52 N.E.3d at 1061; I LOVE YOU, NOW DIE, *supra* note 1.

137. *Carter I*, 52 N.E.3d at 1061; *see* Zavala, *supra* note 103, at 304 (depicting the district attorney's case against Carter).

138. *Carter I*, 52 N.E.3d at 1056; *see* Zavala, *supra* note 103, at 303 (depicting the district attorney's case against Carter).

139. *Carter I*, 52 N.E.3d at 1056; *Carter II*, 115 N.E.3d 559, 561–62 (Mass. 2019).

140. *Carter I*, 52 N.E.3d at 1063 (citing Commonwealth v. Levesque, 766 N.E.2d 50 (Mass. 2002)).

141. *Carter II*, 115 N.E.3d at 559; *see* Seelye and Bidgood, *supra* note 4 (discussing guilty verdict).

142. *Carter II*, 115 N.E.3d at 565:

The judge found that when the defendant realized he had gotten out of the truck, she instructed him to get back in, knowing that it had become a toxic environment and knowing the victim's fears, doubts, and fragile mental state. The victim followed that instruction. Thereafter, the defendant, knowing the victim was inside the truck and that the water pump was operating . . . took no steps to save him. . . .[T]he judge concluded that the defendant's actions and her failure to act constituted, "each and all," wanton and reckless conduct that caused the victim's death.

See also RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 2 (AM. L. INST. 2010) (defining wanton and reckless conduct).

143. *Carter II*, 115 N.E.3d at 568 (quoting the trial judge's decision); I LOVE YOU, NOW DIE, *supra* note 1.

144. *Carter II*, 115 N.E.3d at 568; *see* Bidgood, *supra* note 1 (discussing the mental health issues both Carter and Roy faced).

issues could have led to his success in suicide at a later time, and she therefore could not be a "but for" factor in his death.[145] This fact was of no consequence to the trial court's decision.[146]

C. Carter II

After the decision in *Carter I*, Carter was found guilty in a bench trial of involuntary manslaughter.[147] Carter appealed her conviction, giving the appellate court multiple questions to consider:[148] (1) whether the evidence at trial was sufficient to support the finding of proof beyond a reasonable doubt that she committed manslaughter, (2) whether Carter had sufficient notice that she could be tried for involuntary manslaughter when her conduct consisted of words alone, and (3) whether her conduct was protected under the First Amendment of the U.S. Constitution.[149] The Massachusetts Appellate Court found that none of Carter's arguments were valid, and determined that her wanton and reckless conduct was sufficient for her conviction.[150]

1. Sufficiency of the Evidence

Carter again argued that there was insufficient evidence of her committing involuntary manslaughter.[151] While Carter raised the same argument as in the motion in *Carter I*, the standard of appeal was increased from probable cause to beyond a reasonable doubt because it was appealing a conviction rather than a grand jury indictment.[152] Carter argued that the fact used to determine her guilt—her telling Roy to get back into the truck—was improperly based on her after-the-fact statement in a text to Boardman nearly two months later, which was uncorroborated.[153] The appellate court found her statement to Boardman

145. *Carter II*, 115 N.E.3d at 568; *see* Bidgood, *supra* note 1 (discussing the mental health issues both Carter and Roy faced).

146. *Carter II*, 115 N.E.3d at 568; *Commonwealth vs. Michelle Carter*, NEW YORK TIMES (June 16, 2017), https://www.nytimes.com/interactive/2017/06/16/us/document-Commonwealth-vs-Michelle-Carter.html?searchResultPosition=4 [https://perma.cc/UDV9-U8R8].

147. *Carter II*, 115 N.E.3d at 559; *see* Seelye & Bidgood, *supra* note 4 (discussing guilty verdict).

148. Carter also argued that her conviction could not survive G. L. c. 119 § 54 (regarding charges against juveniles) because she did not inflict any bodily harm on Roy, that her actions should have been evaluated under a "reasonable juvenile" standard, rather than a "reasonable person" standard, and that the judge wrongly denied her motion in limine to admit expert testimony by a forensic psychologist. None of these will be discussed in this paper due to their irrelevancy to the topic of this paper. *See Carter II*, 115 N.E.3d at 572–74; MASS. GEN. LAWS ch. 119, § 54 (2019) (Delinquent Children; Complaint; Indictment; Examination of Complaint).

149. *Carter II*, 115 N.E.3d at 562; Petition for Writ of Certiorari, *supra* note 9, at i.

150. *Carter II*, 115 N.E.3d at 574; Petition for Writ of Certiorari, *supra* note 9, at 8.

151. *Carter I*, 52 N.E.3d at 1056; *Carter II*, 115 N.E.3d at 565.

152. *Carter I*, 52 N.E.3d at 1056; *Carter II*, 115 N.E.3d at 565.

153. *Carter II*, 115 N.E.3d at 566; Petition for Writ of Certiorari, *supra* note 9, at 5.

was corroborated by Roy's death, the messages exchanged between Carter and Roy where she encouraged him to commit suicide, and the fact that Carter and Roy were on the phone while the suicide was in progress.[154] While the legal causation in the context of suicide is an overly complex inquiry, the appellate court found sufficient evidence to support a finding beyond a reasonable doubt that Carter's behavior was wanton and reckless in causing Roy's death.[155]

2. Due Process Claims

Carter also argued that the law of involuntary manslaughter was unconstitutionally vague as applied to her conduct due to the void for vagueness and fair warning doctrines.[156] The appellate court dismissed this argument, as it has long been established in the state of Massachusetts that wanton or reckless conduct that causes a person's death constitutes involuntary manslaughter, regardless of the fact that Massachusetts uses common law rather than a statute for manslaughter.[157] The Massachusetts judicial system has clarified the definition of involuntary manslaughter through numerous cases, and thus the appellate court determined Carter had sufficient notice that wanton and reckless conduct resulting in a death could find her guilty of manslaughter.[158] Carter was considered on notice through the finding in *Bowen* that procuring a suicide by advice or otherwise could constitute a homicide.[159] As such, the law was not considered unconstitutionally vague as applied to Carter's conduct.[160]

3. Free Speech Claims

Finally, Carter argued that her conviction violated her right to free speech under the First Amendment of the U.S. Constitution and Article 16 of the Massachusetts Declaration of Rights.[161] The appellate court found this argument invalid because the Massachusetts common law

154. *Carter II*, 115 N.E.3d at 567; *Carter I*, 52 N.E.3d at 1058, n.6 (referencing messages between Carter and Roy between July 4, 2014 and July 12, 2014).

155. *Carter II*, 115 N.E.3d at 568; *see* Seelye & Bidgood, *supra* note 4 (discussing guilty verdict).

156. *Carter II*, 115 N.E.3d. at 569; *see supra* Section I.A. (discussing void for vagueness doctrine).

157. *Carter II*, 115 N.E.3d. at 569; *see also* Commonwealth v. Campbell, 226 N.E.2d 211, 218 (Mass. 1967) (judicial interpretation of manslaughter in the state of Massachusetts).

158. *Carter II*, 115 N.E.3d at 569; Commonwealth v. Welansky, 316 Mass. 383, 399 (1944) (defining wanton and reckless conduct).

159. *Carter II*, 115 N.E.3d at 570; Commonwealth v. Bowen, 13 Mass. 356, 359 (1816).

160. *Carter II*, 115 N.E.3d at 570; *see* Seelye & Bidgood, *supra* note 4 (discussing guilty verdict).

161. *Carter II*, 115 N.E.3d at 570; U.S. CONST. amend. I; MASS. CONST. art. XVI, *amended by* MASS. CONST. art. LXXVII ("The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this commonwealth. The right of free speech shall not be abridged.").

requirements for manslaughter make no reference to restricting or regulating speech, do not regulate speech of any particular content or viewpoint, and are directed at "a course of conduct, rather than speech, and the conduct it proscribes is not necessarily associated with speech."[162] Just because a defendant commits a crime verbally does not mean it raises a First Amendment concern.[163] The U.S. Supreme Court has held that "speech or writing used as an integral part of conduct in violation of a valid criminal statute" is not protected by the First Amendment.[164]

Carter argued that prosecuting and convicting her of involuntary manslaughter for encouraging Roy's suicide is essentially a content-based restriction on her speech that does not withstand strict scrutiny.[165] Any content-based restriction on speech by the government must be narrowly tailored to a compelling government interest to be constitutional.[166] The Commonwealth's interest in this case is that of preserving human life, which Carter acknowledged was compelling.[167] Carter argued that *Carter I* did not determine whether the restriction was narrowly tailored to further that interest.[168] The appellate court did not find this argument persuasive because the only speech being punished was that which was integral to a criminal act.[169] None of the previous Massachusetts cases used as precedent determined that the defendants'

162. *Carter II*, 115 N.E.3d at 570 (quoting Commonwealth v. Johnson, 21 N.E.3d 937, 945 (Mass. 2014)).

163. *Carter II*, 115 N.E.3d at 570; *see generally* Giboney v. Empire Storage & Ice, 336 U.S. 490 (1949) (determining the First Amendment of the U.S. Constitution does not protect speech that is an integral part of unlawful conduct); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 279 (1981) (examining the difficulty in using categorization in analyzing the First Amendment); *see generally* KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 6–7 (1989) (exploring the three-way relationship between the idea of freedom of speech, the law of crimes, and the many uses of language).

164. *Giboney*, 336 U.S. at 498; *see also* United States v. Stevens, 559 U.S. 460, 493–94 (2010) (Alito, J., dissenting) (determining that true threats have no First Amendment protection because they are meant to cause injury rather than add to the discourse).

165. *Carter II*, 115 N.E.3d at 571; Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 164 (2015) ("[D]istinctions drawn based on the message a speaker conveys . . . are subject to strict scrutiny.").

166. *See generally* Sable Commc'ns of Cal. v. FCC, 492 U.S. 115 (1989); Simon & Schuster v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991); and Boos v. Barry, 485 U.S. 312 (1988) (finding statutes unconstitutional because they are content-based restrictions not allowed by the First Amendment of the U.S. Constitution).

167. *Carter II*, 115 N.E.3d at 571; *see generally* Roe v. Wade, 410 U.S. 113, 113 (1973); and Planned Parenthood Ass'n of Kansas City v. Ashcroft, 462 U.S. 476, 476 (1983) (determining that the state has a compelling interest in preserving human life).

168. *Carter II*, 115 N.E.3d at 570; *see also Reed*, 576 U.S. at 165 (content-based regulations must be narrowly tailored to a compelling government interest to withstand strict scrutiny).

169. *Carter II*, 115 N.E.3d at 570 (quoting United States v. Stevens, 559 U.S. 460, 468–69 (2010)).

First Amendment rights were violated.[170] Because the speech in question was integral to Carter's criminal conduct, there was no need for the appellate court to apply the narrowly tailored requirement of strict scrutiny. Rather, the appellate court merely needed to determine whether Carter's speech fell into one of the few well-defined and narrowly limited classes of speech that the U.S. Supreme Court has found unprotected.[171]

The appellate court determined, however, that even if strict scrutiny were to apply, the statute would still be upheld.[172] The statute was only restricting the wanton or reckless pressuring of a person to commit suicide that overpowers a person's will to live.[173] The minor restriction on speech was therefore necessary to further the government interest of preserving life.[174]

III. ANALYSIS

A. Writ of Certiorari

The Massachusetts Supreme Judicial Court (SJC) denied Carter's appeal, relying on the U.S. Supreme Court's exception to the First Amendment of the U.S. Constitution brought forth by *Giboney v. Empire Storage & Ice Co.*[175] In *Giboney*, the SJC held that the constitutionality for free speech does not protect coinciding actions when the speech is an integral part of conduct in violation of a valid criminal statute.[176]

Michelle Carter filed a petition for writ of certiorari to the United States Supreme Court, which was also denied.[177] The SJC's reliance on *Giboney*, according to Carter's writ, interpreted *Giboney* incorrectly.[178]

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170. Persampieri v. Commonwealth, 175 N.E.2d 387, 387 (Mass. 1961); Commonwealth v. Bowen, 13 Mass. 356, 356 (1816).

171. *Carter II*, 115 N.E.3d at 571 (quoting Brown v. Entm't Merch. Ass'n, 564 U.S. 786, 804 (2011)).

172. *Id.* at 572 ("[T]his case does not involve the prosecution of end-of-life discussions between a doctor, family member, or friend and a mature, terminally ill adult . . . ."). It was also not of general discussions about euthanasia or suicide targeting the ideas themselves, which would be found unconstitutional under Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

173. *Carter II*, 115 N.E.3d at 572; *see also* Commonwealth v. Bigelow, 59 N.E.3d 1105, 1113 (Mass. 2016) (discussing the importance of the context and content of the speech at issue in First Amendment's protective reach).

174. *Carter II*, 115 N.E.3d at 572 (stating that the restriction is necessary to further the compelling interest of preserving human life); Roe v. Wade, 410 U.S. 113, 113 (1973); Planned Parenthood Ass'n of Kansas City v. Ashcroft, 462 U.S. 476, 476 (1983).

175. Petition for Writ of Certiorari, *supra* note 9, at 8; Giboney v. Empire Storage & Ice, 336 U.S. 490, 498 (1949).

176. *Giboney*, 336 U.S. at 498; Brief for Petitioner, *supra* note 9, at 10.

177. Petition for Writ of Certiorari, *supra* note 9.

178. Petition for Writ of Certiorari, *supra* note 9, at 10; *Carter II*, 115 N.E.3d at 571.

Using *Giboney*, the SJC determined that Carter's speech was the conduct that resulted in Roy's death, instead of finding that her words were integral to a broader course of criminal actions by which she caused Roy to commit suicide.[179] Carter did not provide Roy with the means of death, and she did not participate in his conduct. Her speech was not integral to any conduct, let alone criminal conduct, as defined by *Giboney*.[180]

In determining that Carter's verbal conduct was not protected by the First Amendment of the U.S. Constitution, according to the petition, the SJC created a conflict with the Minnesota State Court's interpretation of the scope of the First Amendment.[181] The Minnesota court in *Melchert-Dinkel* expressly rejected the prosecution's usage of *Giboney* by determining his words were speech integral to criminal conduct.[182] *Melchert-Dinkel* emphasized that speech is unprotected when it is integral to conduct that is a violation of a *valid criminal statute*.[183] Melchert-Dinkel's conviction was overturned because the statute he was found to violate was not constitutional and there was no statute that criminalized suicide in Minnesota.[184] This was also the case in Massachusetts, and thus, argues Carter, her conduct was not in violation of a valid statute.[185]

The SJC effectively created a new exception to the First Amendment of the U.S. Constitution, in contrast to the Minnesota Supreme Court's refusal to add any new categories of unprotected speech.[186] It is extremely uncommon for the U.S. Supreme Court to create new categories of unprotected speech, and the Court has chastised lower courts for doing so.[187] The U.S. Supreme Court has never considered a First Amendment challenge to a statutory prohibition against assisting another in committing suicide, and thus any lower court's determination

179. Petition for Writ of Certiorari, *supra* note 9, at 10; *Carter II*, 115 N.E.3d at 572.

180. Petition for Writ of Certiorari, *supra* note 9, at 13 (citing *Giboney*, 336 U.S. at 498).

181. Petition for Writ of Certiorari, *supra* note 9, at 8; *Melchert-Dinkel II*, 844 N.W.2d 13, 13 (Minn. 2014).

182. Petition for Writ of Certiorari,, *supra* note 9, at 8; *Melchert-Dinkel II*, 844 N.W.2d at 20.

183. Petition for Writ of Certiorari, *supra* note 9, at 12 (citing *Giboney*, 336 U.S. at 498).

184. Petition for Writ of Certiorari, *supra* note 9, at 12 (citing *Melchert-Dinkel II*, 844 N.W.2d at 20–21).

185. Petition for Writ of Certiorari, *supra* note 9, at 12 (citing *Melchert-Dinkel II*, 844 N.W.2d at 20).

186. Petition for Writ of Certiorari, *supra* note 9, at 20 (quoting *Melchert-Dinkel II*, 844 N.W.2d at 20).

187. Petition for Writ of Certiorari, *supra* note 9, at 20–21 ("[H]olding 'new categories of unprotected speech may not be added to the list by [a court] that concludes certain speech is too harmful to be tolerated.'" (citing Brown v. Entm't Merch. Ass'n, 564 U.S. 786, 791 (2011))).

of encouraged suicide as unprotected forms a new understanding of the First Amendment.[188]

To square these two circles—the misusage of *Giboney* and the formation of a new area of unprotected speech—the U.S. Supreme Court should have granted certiorari to Carter's case and clarified the meaning of *Giboney*'s holding. In denying her case writ, the U.S. Supreme Court has created a jurisdictional split.

B. Encouraged Suicide and Void for Vagueness

The discussion in *Carter II* clearly addresses the first prong of the void for vagueness doctrine, as the trial court used Massachusetts precedent to determine that Carter was sufficiently "on notice" that her conduct could constitute criminal behavior.[189] The trial court ignored, however, the second prong and the need for guidelines for prosecutors and police officers, which the U.S. Supreme Court has found to be the most meaningful aspect of the void for vagueness doctrine.[190] The judges ignored the need for meaningful guidance for prosecutors. The statute in question has no prosecutorial guidance, and the law authorizes decisions to be made on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.[191]

Carter believes that the clear guidelines required by the second prong of the void for vagueness doctrine are especially necessary for assisted or encouraged suicide cases due to the emotionality of the situation raising difficult and profound problems.[192] Assisted suicide has been treated as a separate crime with less onerous penalties than murder due to a shifting view on the morality of the practice.[193] These laws, however, limit the liability only to those who provide "physical assistance," and leave no liability for those who give verbal encouragement.[194] In the over forty

188. *Melchert-Dinkel II*, 844 N.W.2d at 22; *but see* Washington v. Glucksberg, 521 U.S. 702, 7102 (1997) (rejecting a due process challenge to a statute prohibiting a person from knowingly causing or aiding another person to attempt suicide).

189. *Carter II*, 115 N.E.3d at 566 (citing Carter I, 55 N.E.3d 1054 (Mass. 2016)).

190. Petition for Writ of Certiorari, *supra* note 9, at 29 (citing Smith v. Goguen, 415 U.S. 566, 574 (1974)); *see Goguen*, 415 U.S. at 575 ("Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections."); *see also* Papachristou v. Jacksonville, 405 U.S. 156, 165–69 (1962) ("[Vague statutes place] unfettered discretion . . . in the hands of the . . . police."); *see also* Gregory v. Chicago, 394 U.S. 111, 120 (1969) ("[Laws are] not entrusted to the moment-to-moment judgment of the policeman on his beat.").

191. Petition for Writ of Certiorari, *supra* note 9, at 30 (quoting Grayned v. Rockford, 408 U.S. 104, 109 (1972)).

192. Petition for Writ of Certiorari, *supra* note 9, at 27 (citing Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 277 (1990)).

193. Petition for Writ of Certiorari, *supra* note 9, at 27–28 (citing People v. Kevorkian, 527 N.W.2d 714, 736 (Mich. 1994)).

194. Petition for Writ of Certiorari, *supra* note 9, at 28 (citing In re Joseph G., 34 Cal. 3d 429, 434–35 (1983) *and* State v. Sexson, 869 P.2d 301, 305 (N.M. 1994)).

states that had assisted suicide statutes as of Roy's death, Carter would not have faced prosecution, much less been convicted, in any of them.[195]

The SJC recognized that not all assisted or encouraged suicide cases warranted criminal prosecution, but it failed to distinguish when it was acceptable to assist in or encourage suicide versus when it would constitute unlawful involuntary manslaughter.[196] When deciding *Carter II*, the SJC noted that there may be other cases in the future in which prosecution was not required.[197] Nothing in its decision, however, gave police, prosecutors, or future courts guidance on how to draw these distinctions.[198] If there is no clear distinction, then the prosecutor's subjective opinion on situations like suicide would guide the decision to prosecute.[199] This decision-making process is clearly contrary to the void for vagueness doctrine because the classification of an act as a crime would turn on the chance of location and current police and prosecutors.[200]

C. Analyzing Massachusetts Precedent

Not only does Carter's conviction fail under the fair warning doctrine, but it uses insufficient case law to render its decision.[201] As the courts relied heavily on case law, the adequacy of the case law forms the

195. Brief for Petitioner, *supra* note 9, at 28; *see also* ARIZ. REV. STAT. ANN. § 13-1103 (2020); GA. CODE ANN. § 16-5-5 (2020); 720 ILL. COMP. STAT. 5/12-34.5(a)(2) (2011); IDAHO CODE § 18-4017 (2011); IND. CODE § 35-42-1-2.5 (2019); KAN. STAT. ANN. § 21-5407 (2020); KY. REV. STAT. ANN. § 216.302 (2020); MD. CODE ANN., CRIM. LAW § 3-102(2)-(3) (LexisNexis 2020); OHIO REV. CODE ANN. § 3795.04 (LexisNexis 2020); S.C. CODE ANN. § 16-3-1090 (2020); TENN. CODE ANN. § 39-13-216 (2020) (statutes dealing with criminalizing assisted suicide).

196. Petition for Writ of Certiorari, *supra* note 9, at 30; *see also* Marinello v. United States, 138 S. Ct. 1101, 1108–09 (2018) ("[T]o rely upon prosecutorial discretion . . . places great power in the hands of the prosecutor . . . which could result in the nonuniform execution of that power across time and geographic location.").

197. *Carter II*, 115 N.E.3d 559, 572 (Mass. 2019) ("Nothing in *Carter I*, our decision today, or our earlier involuntary manslaughter cases involving verbal conduct suggests that involuntary manslaughter prosecutions could be brought in these very different contexts without raising important First Amendment concerns." (citing Commonwealth v. Bigelow, 59 N.E.3d 1105, 1112–13 (2016))).

198. Petition for Writ of Certiorari, *supra* note 9, at 31; *see also* United States v. Stevens, 559 U.S. 460, 477 (2010) (warning of heavy reliance on the "mercy of a prosecutor").

199. Petition for Writ of Certiorari, *supra* note 9, at 33 ("Whatever the answers to these difficult questions, there is no doubt that Carter has 'cast[ed] a pall of potential prosecution' over all these situations." quoting McDonnell v. United States, 136 S. Ct. 2355, 2372 (2016))).

200. *See supra* Section I.A (discussing the void for vagueness doctrine); *see also* Marinello v. United States, 138 S. Ct. 1101, 1108–09 (2018) ("[T]o rely upon prosecutorial discretion . . . places great power in the hands of the prosecutor . . . which could result in the nonuniform execution of that power across time and geographic location.").

201. *See generally* Commonwealth v. Atencio, 189 N.E.2d 223 (Mass. 1963); Persampieri v. Commonwealth, 175 N.E.2d 387 (Mass. 1961); Commonwealth v. Bowen, 13 Mass. 356, 356 (1816).

foundation of her conviction.[202] The cases used by the trial court to justify Carter's conviction, while somewhat similar, are not sufficiently parallel or persuasive enough to be used as the backbone of Carter's conviction.[203]

1. Applying *Persampieri*

While somewhat factually synonymous, the differences between *Persampieri* and *Carter* are sufficient to render its reliance misplaced. Both Persampieri and Carter knew of their partners' mental health issues, both knew their partners had attempted suicide in the past, and both knew that their partners were about to or were currently attempting suicide.[204] Both advised their partners on the method of suicide.[205] Persampieri helped her get the right angle on the gun while in the same room as her; Carter texted Roy to get back in the car while fifty miles away.[206] The judge in *Persampieri* gave great weight to the physical loading of the gun by the defendant.[207] Conversely, Carter's role in Roy's death was limited to mere words from miles away.[208] Carter's conduct did not go nearly as far as Persampieri's; thus, the *Carter* court's reliance on *Persampieri* was misplaced.[209]

2. Applying *Atencio*

While *Atencio* resulted in a conviction for manslaughter regardless of the absence of any action taken by Atencio himself, the case as a whole does not relate to the facts in *Carter*.[210] Atencio's conviction relied solely on his participation in the game of "Russian Roulette," as it is not a solitary game and the victim would not have played alone.[211] While

202. Adside, *supra* note 76, at 752 ("[L]aws that fail to provide notice or permit discriminatory prosecutions offends both [Massachusetts] state and federal constitutions."); Melnick, *supra* note 84, at 297 (explaining that the decision in Carter "runs afoul of the Supreme Court's jurisprudence").

203. Adside, *supra* note 76, at 752; Melnick, *supra* note 84, at 297.

204. *Persampieri*, 175 N.E.2d at 389; Adside, *supra* note 76, at 744.

205. *Persampieri*, 175 N.E.2d at 389; *Carter II*, 115 N.E.3d 559, 562–63 (Mass. 2019).

206. *Persampieri*, 175 N.E.2d at 389; *Carter I*, 52 N.E.3d 1054, 1063 (Mass. 2016).

207. *Persampieri*, 175 N.E.2d at 390 ("The petitioner, instead of trying to bring her 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. He thus showed a reckless disregard of his wife's safety and the possible consequences of his conduct."); Adside, *supra* note 76, at 744–45.

208. *Carter I*, 52 N.E.3d at 1063; *Carter II*, 115 N.E.3d at 562.

209. *Persampieri*, 175 N.E.2d at 388; Adside, *supra* note 76, at 744–45 (noting the difference that Persampieri was physically present and loaded the gun, which the wife used to commit suicide).

210. Commonwealth v. Atencio, 189 N.E.2d 223, 224 (Mass. 1963); Adside, *supra* note 76, at 744–45.

211. *Atencio*, 189 N.E.2d at 225 ("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.'").

words of consent may have been exchanged, there were no words involved in the action that led to the conviction of Atencio.[212] The only comparison between *Atencio* and *Carter* is the fact that both victims died by their own hand.[213]

In convicting Carter, the judge had to answer the simple question of whether words could constitute action for involuntary manslaughter.[214] While *Atencio* stated that one can be convicted for homicide for a death by self-infliction, it does not determine whether words alone are sufficient.[215] Thus, *Atencio* only partially answers this question and does not resolve the question in *Carter* of whether a defendant can be found guilty even when the death is the direct result of the victim's own hand. The court in *Carter* incorrectly applied the holding in *Atencio* to extend to a case with the added complexity of a lack of any physical presence or conduct.

3. Applying *Bowen*

Bowen, though antiquated, seems to be the most analogous case to *Carter*. *Bowen* is unique in that it, too, premises its manslaughter conviction on words alone.[216] The trial judge in *Bowen* told the jury that Bowen could be found guilty if he was instrumental in the death of the victim, or, more precisely, if his advice procured the victim's death.[217] This closely mirrors the question at hand in *Carter*: were Carter's words to Roy instrumental in his suicide?[218]

The appellate court in *Bowen* recognized that the encouragement of suicide was not intended to be covered by the statute at hand.[219] Yet it stated that the "murder was not less atrocious" merely because the victim had been sentenced to be executed the following day.[220] This shows the

212. *Atencio*, 189 N.E.2d at 224; Melnick, *supra* note 84, at 288 (explaining that the defendants mutually encouraged the victim to participate in Russian Roulette).

213. *Atencio*, 189 N.E.2d at 224; *Carter II*, 115 N.E.3d at 565, 569.

214. *Carter II*, 115 N.E.3d at 562; Sweeney, *supra* note 12, at 957.

215. *Atencio*, 189 N.E.2d at 225–26; Sweeney, *supra* note 12, at 956.

216. Commonwealth v. Bowen, 13 Mass. 356, 359 (1816); Zavala, *supra* note 103, at 308; Sweeney, *supra* note 12, at 958.

217. *Bowen*, 13 Mass. at 359; Jack Tager, *"Murder by Counseling": The 1816 Case of George Bowen*, 38 HIST. J. OF MASS. 102, 104 (2010).

218. *Carter II*, 115 N.E.3d at 562; Sweeney, *supra* note 12, at 957 (noting that Michelle Carter's conduct was only verbal, not physical).

219. *Bowen*, 13 Mass. at 358 ("That suicide was not intended to be included in the forecited enacting clause, is further evident from the second section of the same statute, which provides, among other things, for the punishment of such as shall knowingly receive, harbour, comfort, any principal offender after a wilful murder done and committed as aforesaid. It seems, then, that no punishment has been provided by statute for him who counsels the commission of suicide."); Tager, *supra* note 217, at 111.

220. *Bowen*, 13 Mass. at 357 ("Nor was the murder less atrocious in the case at bar, or the guilt

appellate court's desire to punish the defendant for morally reprehensible acts, even though the court recognized that the case at bar did not fit under the current statute. Neither the conduct in *Bowen* nor *Carter* was clearly covered by Massachusetts's understanding of manslaughter due to their lack of physical presence at the scene of the death.

Further, *Bowen* is a case from 1816, decided almost 200 years before Roy's death.[221] *Persampieri* and *Atencio* failed to address the exact situation in *Carter*, leaving only the 200-year-old precedent in *Bowen* as notice for the criminality of Carter's actions.[222] Communication alone has significantly changed in this time, allowing for instantaneous communication between two individuals who are miles apart through methods such as calling, texting, and email. This has created a wider range of possible criminal situations, for which the law is still evolving.[223] Case law is meant to shift and grow with society, to apply laws to modern situations and develop a current understanding of what the law is supposed to mean to its citizens.[224] Is the usage of a 200-year-old case antithetical to the reasoning behind the common law theory?[225] Particularly when the case at bar uses technology not even imaginable by those alive at the time of the preceding case?[226] Arguably yes.

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of the prisoner less heinous, because the death of *Jewett* [the victim] must inevitably have taken place within a few hours; for a man is under the protection of the law until he dies by order of law."); Tager, *supra* note 217, at 104.

221. *Bowen*, 13 Mass. at 356; *see generally* Flanigan, *supra* note 108 (explaining how a 200-year-old case became so significant in the *Carter* case).

222. *See supra* Sections III.C.1 and 2 (analyzing *Persampieri* and *Atencio*); *see generally* Flanigan, *supra* note 108 (explaining how a 200-year-old case became so significant in the *Carter* case).

223. *See generally* Amanda A. Navarro, *The Innovation of Crime: Defining Criminal Culpability in the Digital Age*, 71 RUTGERS U. L. REV. 709 (2019) (examining how telecommunications can be used to show the mens rea or actus reus by prosecutors); *see generally ACLU of Massachusetts Statement on Michelle Carter Guilty Verdict*, ACLU (June 16, 2017), aclu.org/news/aclu-massachusetts-statement-michelle-carter-guilty-verdict [https://perma.cc/C5GK-9UKM] (stating that the use of telecommunications to satisfy mens rea or actus reus "exceeds the limits of our criminal laws and violates free speech protections guaranteed by the Massachusetts and U.S. Constitutions.").

224. *See generally* Flanigan, *supra* note 108 (explaining how a 200-year-old case became so significant in the *Carter* case); *see supra* Section I.A (examining how the fair warning requirement connects to case law); *see generally* Allan C. Hutchinson, *Making Progress?: Change and the Common Law*, 4 HIBERNIAN L.J. 25, 29–30 (2003) (examining whether viewing change in the common law system as "evolution" is overly idealistic).

225. *See generally* Flanigan, *supra* note 108 (explaining how a 200-year-old case became so significant in the *Carter* case); *see supra* Section I.A (examining how the fair warning requirement connects to case law).

226. *See generally* Makenzie Keene, *Bullies Behind Bars: How Changing Statewide Cyberbullying Policy May Do More Harm Than Good*, 51 TEX. TECH L. REV. 333 (2019); Adside, *supra* note 77; Zavala, *supra* note 1034; Jenna Connors, *Turning Suicide to Homicide: Can You Be Bound by Your Text Messages?*, 19 J. HIGH TECH. L. 477 (2019) (all discussing how the law is changing with emerging technology).

D. State Variance in Constitutional Understanding

Denying Carter's petition for writ of certiorari created a fundamental split between Massachusetts and other states on an understanding of constitutional law.[227] While federalism allows for the states to create their own criminal laws, the issues at hand are those of federal constitutional law, and thus this misalignment must be resolved.[228] The cases of *Melchert-Dinkel* and *Drew* both involved defendants who communicated with their victims over the internet before they ultimately committed suicide.[229] Both cases, however, resulted in overturned convictions based on the statutes in question being overly vague.[230] The constitutional reasoning behind invalidating the statutes for vagueness in both *Melchert-Dinkel* and *Drew* applies to the understanding of manslaughter in *Carter*, and maintaining Carter's conviction creates a disparity in constitutional protections among the states.[231]

1. Applying *Melchert-Dinkel*

In some ways, *Melchert-Dinkel* is arguably the most factually similar case to *Carter*.[232] All of the actions taken by Melchert-Dinkel were words to the victims, encouraging them to commit suicide and giving them advice on how to best do so.[233] The difference, however, was that Melchert-Dinkel was not shoehorned into an involuntary manslaughter statute, for Minnesota had a statute clearly stating the aiding, advising, and encouragement of suicide was illegal.[234] This was challenged on First Amendment grounds.[235]

First Amendment challenges are very difficult to survive.[236] Content-based restrictions are generally not allowed, but the U.S. Supreme Court

227. *Melchert-Dinkel II*, 844 N.W.2d 13, 18 (Minn. 2014), United States v. Drew, 259 F.R.D. 449, 467 (C.D. Cal. 2009).

228. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by the States, are reserved to the States respectively, or to the people."); U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.").

229. *Melchert-Dinkel II*, 844 N.W.2d at 17; *Drew*, 259 F.R.D. at 452.

230. *Melchert-Dinkel II*, 844 N.W.2d at 25; *Drew*, 259 F.R.D. at 467.

231. *Melchert-Dinkel II*, 844 N.W.2d at 25; *Drew*, 259 F.R.D. at 467.

232. *Melchert-Dinkel II*, 844 N.W.2d at 13; *Carter II*, 115 N.E.3d 559, 562 (Mass. 2019).

233. *Melchert-Dinkel II*, 844 N.W.2d at 16–18; *Melchert-Dinkel I*, 816 N.W.2d 703, 705–11 (Minn. App. 2012).

234. *Melchert-Dinkel II*, 844 N.W.2d at 16; MINN. STAT. § 609.215, subd. 1 (2020) (making it illegal to "intentionally advise[], encourage[], or assist[] another in taking the other's own life.").

235. *Melchert-Dinkel II*, 844 N.W.2d at 18; U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech.").

236. *See* Police Department of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, [the government] has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

has found some specific exceptions.[237] A challenged statute can withstand strict scrutiny, however, by ensuring the law is justified by a compelling government interest and is sufficiently narrowly tailored to serve that interest.[238] To do so, the state must specify a specific problem in need of solving and must show a direct link between the restriction imposed and the injury to be prevented.[239] One accepted restriction on speech is that which is integral to the violation of a valid criminal statute.[240] It can be assumed that the Minnesota legislature expected the statute under which Melchert-Dinkel was convicted to fall under this particular exception to the First Amendment.[241] This exception does not apply, however, because suicide was no longer a crime in the state of Minnesota.[242] The Minnesota statute in question in *Melchert-Dinkel* did not withstand this strict scrutiny test because it was not narrowly tailored in its restriction of advising and encouraging another to commit suicide.[243] It would then logically follow that a statute used to convict Carter for encouraging another to commit suicide would need to be more narrowly-tailored than the statute in *Melchert-Dinkel*.[244] This was not the case.

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237. *See Mosley*, 408 U.S. at 96 (restricting expressive activity because of its content "would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" (quoting New York Times Co. v. Sullivan, 376 U.S. 254 (1964))); *see generally* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (identifying obscenities, certain profane and slanderous speech, and "fighting words" as not protected by the First Amendment of the U.S. Constitution); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (determining speech can be prohibited if it (1) is "directed to inciting or producing imminent lawless action" and (2) is "likely to incite or produce such action").

238. *Melchert-Dinkel II*, 844 N.W.2d at 21; *see also* Brown v. Entm't Merchants Ass'n, 564 U.S. 786, 799 (2011) (describing how a statute restricting speech must withstand strict scrutiny by being narrowly tailored to a government's compelling interest).

239. *Brown*, 564 U.S. at 799; United States v. Alvarez, 567 U.S. 709, 725 (2012).

240. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949); *see generally* New York v. Ferber, 458 U.S. 747, 761 (1982) (permitting the restriction of advertising and sale of child pornography from First Amendment protection partially because these acts are an "integral part" of the unlawful production of child pornography).

241. *Melchert-Dinkel I*, 816 N.W.2d 703, 714 (Minn. App. 2012); *Giboney*, 336 U.S. at 498.

242. *Melchert-Dinkel II*, 844 N.W.2d at 19; *see* MINN. STAT. § 609.215, subd. 1 (2020) (including no part making suicide itself illegal).

243. MINN. STAT. § 609.215, subd. 1 (2020); *Melchert-Dinkel II*, 844 N.W.2d at 23–24. ("Unlike the definition of "assist," nothing in the definitions of "advise" or "encourage" requires a direct, causal connection to suicide. . . . [T]he common definitions of "advise" and "encourage" broadly include speech that provides support or rallies courage. Thus, a prohibition on advising or encouraging includes speech that is more tangential to the act of suicide and the State's compelling interest in preserving life than is speech that "assists" suicide.").

244. *See Brown*, 564 U.S. at 799 ("Because the Act imposes a restriction on the content of protected speech, it is invalid . . . unless it is justified by a compelling government interest and is narrowly drawn to serve that interest, The State must specifically identify an 'actual problem' in need of solving, and the curtailment of free speech must be actually necessary to the solution. That

Due to the common law nature of Massachusetts manslaughter law, there is not an explicit statute to analyze in the case of Michelle Carter.[245] Which, in and of itself, would suggest the current understanding of manslaughter in Massachusetts is not narrowly tailored.[246] While the mental state requirement for involuntary manslaughter is very clearly established in Massachusetts common law, the action requirement is not specified.[247] For a statute to be narrowly tailored, the action(s) it criminalizes must be clear and specific.[248] Because the statute is not narrowly tailored, it cannot withstand strict scrutiny.[249] Thus, this criminalization of Carter's mere speech is unconstitutional under the First Amendment.[250]

2. Applying *United States v. Drew*

United States v. Drew is the most analogous case to *Carter* with respect to how the state attempted to indict the defendant.[251] In *Drew*, the defendant was not prosecuted under any existing homicide statute, as the state could not overcome her constitutional claims of vagueness.[252] The prosecutor instead prosecuted Drew for violating MySpace's Terms of Service—a breach of contract.[253] While Carter was indicted under a

is a demanding standard." (citing R.A.V. v. St. Paul, 505 U.S. 377, 395 (1992))), United States v. Playboy Ent. Group, Inc., 529 U.S. 803, 822–23 (2000)). It is difficult to logically conclude that an unwritten statute can withstand such a demanding statute.

245. *See* Commonwealth v. Welansky, 316 Mass. 383, 399 (1944) ("The essence of wanton or reckless conduct, by way either of commission or omission where there is a duty to act, which conduct involves a high degree of likelihood that substantial harm will result to another."); *see also* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 2 (AM. L. INST. 2010) (defining wanton and reckless conduct).

246. *See R.A.V.*, 505 U.S. at 395; *Playboy*, 529 U.S. at 822–23 (describing the difficulty in reaching the narrowly drawn component of strict scrutiny).

247. *See Welansky*, 316 Mass. at 399 ("The essence of wanton or reckless conduct, by way either of commission or omission where there is a duty to act, which conduct involves a high degree of likelihood that substantial harm will result to another."); *see also* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 2 (AM. L. INST. 2010) (defining wanton and reckless conduct).

248. *See R.A.V.*, 505 U.S. at 395; *Playboy*, 529 U.S. at 822–23.

249. *See Brown*, 564 U.S. at 799; *R.A.V.*, 505 U.S. at 395; *Playboy*, 529 U.S. at 822–23.

250. *Brown*, 564 U.S. at 799; *R.A.V.*, 505 U.S. at 395; *Playboy*, 529 U.S. at 822–23.

251. *Compare Carter II*, 115 N.E.3d 559, 562 (Mass. 2019), *with* United States v. Drew, 259 F.R.D. 449 (C.D. Cal. 2009) (showing the similarities between the State's attempts at indictment).

252. *Drew*, 259 F.R.D. at 451 ("Originally, the question arose in the context of Defendant Lori Drew's motions to dismiss the Indictment on grounds of vagueness, failure to state an offense, and unconstitutional delegation of prosecutorial power. . . .At that time, this Court found that the presence of the scienter element . . . within the CFAA felony provision . . . overcame Defendant's constitutional challenges and arguments . . . ."); Megan McArdle, *Should Lori Drew Be Prosecuted?*, ATLANTIC (May 20, 2008), https://www.theatlantic.com/business/archive/2008/05/should-lori-drew-be-prosecuted/3471/ [https://perma.cc/GS5U-ABGU].

253. *Drew*, 259 F.R.D. at 451; Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(2)(C).

homicide statute, her indictment required a contorted construction of the law, much like in *Drew*.[254]

The prosecutors were unsuccessful in *Drew* because they failed to satisfy both prongs of the fair warning requirement.[255] First, and most obviously, prosecutors chose to indict Drew under contract law, contradicting the requirement for notice that an act could lead to criminal prosecution.[256] Second, and more closely related to *Carter*, this indictment violated both prongs of the void for vagueness doctrine.[257] *Drew* stands as an example of prosecutors charging an individual with a crime that doesn't quite match the actions.[258] Regardless of the morality of their situations, neither Drew nor Carter could constitutionally be charged with the crimes for which they were indicted.[259] When Massachusetts prosecutors chose to indict Carter with involuntary manslaughter, they were criminalizing such actions for the first time.[260] Neither Carter, nor anyone else in Massachusetts, had sufficient notice that words alone could constitute involuntary manslaughter.[261] The lack of direct guidance on how to prosecute these cases meant that its enforcement may be arbitrary and random.[262] These both lead to the same conclusion: the conviction is unconstitutional and cannot stand.

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254. *Compare Carter II*, 115 N.E.3d at 562, *with Drew*, 259 F.R.D. 449 (showing the similarities between the state's attempts at indictment).

255. *See generally Drew*, 259 F.R.D. 449 (examining how Drew's prosecution did not fit either prong of the void for vagueness test); McBoyle v. United States, 283 U.S. 25, 27 (1931); United States v. Lanier, 520 U.S. 259, 266 (1997); Gonzales v. Carhart, 550 U.S. 124, 149 (2007).

256. *Drew*, 259 F.R.D. at 451; *see generally* United States v. Handaka, 286 F.3d 92, 107 (2d Cir. 2002) (explaining that breach of contract is not normally the subject of criminal prosecution); United States v. Rybicki, 354 F.3d 124, 144 (2d Cir. 2003) (explaining that while "ordinary people" might expect to be exposed to civil liabilities for violating a contractual provision, they would not normally expect criminal penalties).

257. *Drew*, 259 F.R.D. at 464–67; *see generally* Posters 'N' Things v. United States, 511 U.S. 513, 525–26 (1994) (stating that websites need to set forth clear guidelines or objective criteria as to the prohibited conduct).

258. Kristopher Accardi, *Is Violating an Internet Service Provider's Terms of Service an Example of Computer Fraud and Abuse?: An Analytical Look at the Computer Fraud and Abuse Act, Lori Drew's Conviction and Cyberbullying*, 37 W. ST. U. L. REV. 67, 72 (2009); *TOS Violation Can't Justify Woman's Prosecution Under CFAA*, *supra* note 70.

259. *Drew*, 259 F.R.D. at 467; *see supra* Section II.A.1 (explaining the void for vagueness doctrine).

260. Bidgood, *supra* note 1; RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 2 (AM. L. INST. 2010) (defining wanton and reckless conduct).

261. Kolender v. Lawson, 461 U.S. 352, 357–58 (1983) ("[T]he void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement"), *see also* Smith v. Goguen, 415 U.S. 566, 574 (1974) (stating that the more important aspect "is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.").

262. *Goguen*, 415 U.S. at 575; Papachristou v. Jacksonville, 405 U.S. 156, 165–69 (1972); Gregory v. Chicago, 394 U.S. 111, 120 (1969).

CONCLUSION

The conviction of Michelle Carter for involuntary manslaughter is unconstitutional due to its lack of fair warning to society and does not follow the constitutional logic used in other jurisdictions' examinations of similar cases. The fair warning requirement prohibits the prosecution that the common understanding of the law would not consider criminal. This directly conflicts with Carter's conviction, as the common law understanding of manslaughter does not indicate that words encouraging suicide alone would be sufficient for a conviction. This lack of notice is proven through the existence of only one prior case in which words were the only action taken by the defendant resulting in another person's death. Further, the cases of *Melchert-Dinkel* and *Drew* show that free speech and due process prohibit charging someone for encouraging another's self-inflicted death. These all indicate that Carter's conviction creates a constitutional issue between jurisdictions that must be resolved.

The U.S. Supreme Court incorrectly denied Carter's petition for writ of certiorari, leaving a split among lower courts as to how to examine encouraged suicide cases. Ambiguity still exists, leaving legislatures unsure of how to best create a clear statute dealing with online or verbal conduct resulting in another person's suicide, and leaving prosecutors to continue shoehorning encouraged suicides into already existing, inapplicable statutes.