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The Innocent Villain: Involuntary Manslaughter by Text

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THE INNOCENT VILLAIN: INVOLUNTARY MANSLAUGHTER BY TEXT

Charles Adside III*

Michelle Carter's texts instructing her mentally ill online boyfriend to commit suicide offended the social moral code. But the law does not categorize all morally reprehensible behavior as criminal. Commonwealth v. Carter is unprecedented in manslaughter law because Carter was convicted on the theory that she was virtually present as opposed to physically present—at the crime scene. The court's reasoning is expansive, as the framework it employs is excessively vague and does not provide fair notice to the public of which actions constitute involuntary manslaughter. Disturbingly, the Massachusetts Supreme Judicial Court affirmed the trial court's logic. This Article concludes that a conviction based upon a virtual-presence theory is unconstitutional, as it is void-for-vagueness. Hypotheticals are provided to illustrate how the Carter framework is unworkable when applied to online relationships based on electronic communications. State legislatures, not courts, should regulate this area, providing clear rules on when electronic encouragement of suicide violates the law. States can consider a physical-presence requirement and prohibit prosecutions on this basis. Or, legislators can borrow from aiding and abetting principles to expand their special relationship statutes to include online relationships, creating a duty to report when encouraging another to commit suicide. In either case, the law will provide citizens with bright-line rules to forecast when electronic conduct is subject to criminal sanction.

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INTRODUCTION

Not all villains are criminals. All morally reprehensible behavior cannot be subject to criminal sanction. If it was, the courts would be busy indeed; dockets would swell with cases in which defendants are charged under laws that cover unknown areas of life. The Founding Fathers warned about the adverse effects of a cumbersome legal code. As James Madison explained in *Federalist Paper* No. 62: “It will be of little avail to the people, that the laws are made by

men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood.”¹ Many scholars argue, though, that American society has already become over-criminalized with 4,500 federal statutes enforced by 300,000 administrative regulations that carry criminal penalties.² One scholar observed that over-criminalization

lessens the value of . . . important legislation when you flood the landscape with so many pieces of legislation. It makes it unwieldy, impossible for the lay person to understand what is criminal and what is not, and it grows the power of prosecutors—who can then pick and choose the crime of their choice.³

This is an alarming prospect considering that 2.3 million people are now incarcerated in the United States.⁴ Vague laws establish no limits on the state’s regulatory powers. A few thought experiments can better illustrate the point.

For a moment, imagine a world of legislative vagueness, where broad statutes criminalize a wide range of criminal conduct, but leave unresolved which specific acts are criminal.⁵ Say Congress enacted an anti-dishonesty statute that requires “all persons be honest and trustworthy at all times.”⁶ An adulterer or tax-evader could fall under the anti-dishonesty statute, but what about a parent who tells their child that the Tooth Fairy or Santa Claus exists? Is this, too, a punishable “dishonest” offense? Such a law, as written, cannot be enforced consistently; it fails to notify the public about the exact conduct that is considered criminally dishonest

1. THE FEDERALIST NO. 62 (James Madison).

2. Glenn Harlan Reynolds, *You Are Probably Breaking the Law Now*, USA TODAY, (Mar. 29, 2015, 4:14 PM), <https://www.usatoday.com/story/opinion/2015/03/29/crime-law-criminal-unfair-column/70630978/>.

3. Ellen S. Podgor, *Overcriminalization: New Approaches to a Growing Problem*, 102 J. CRIM. L. & CRIMINOLOGY 529, 530 (2012). See generally Sanford H. Kadish, *The Crisis of Overcriminalization*, 7 AM. CRIM. L.Q. 17 (1968) (explaining the social costs of overcriminalization); Ekow N. Yankah, *A Paradox in Overcriminalization*, 14 NEW CRIM. L. REV. 1 (2011) (arguing that criminalizing marijuana empowered police to search, detain, and arrest citizens in racially discriminatory ways).

4. Peter Wagner & Wendy Sawyer, *Mass Incarceration: The Whole Pie 2018*, PRISON POLICY INITIATIVE (Mar. 14, 2018), <https://www.prisonpolicy.org/reports/pie2018.html>.

5. Cf. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1239–40 (1994) (arguing that the federal statutes delegate authority to the executive branch through vague laws that create what he refers to as “little Goodness and Niceness Commissions” that are charged to enforce those statutes).

6. The anti-dishonesty statute raises the same problems that Lawson raised with Goodness and Niceness laws. See generally *id.*

and untrustworthy.⁷ As another example, legislators would run into the same vagueness issues if they codified the privacy doctrine established in *Griswold v. Connecticut*.⁸ Suppose a state legislature passed a law that ensures that “each citizen within this jurisdiction shall be entitled to a right to privacy.” Although everyone wants privacy, this statute is unenforceable as well because citizens are not told which activities the law protects from government interference.⁹ Can a person smoke marijuana in their basement while listening to Cardi B?¹⁰ Can a businesswoman email her spouse insider information from her office?¹¹ Under the statute, the answer to these questions is: Who knows? Whether a state would consider such absurd laws is not the point. Rather, the statutory language opens a new frontier for criminal liability and leaves it to the subjective judgment of a prosecutor or judge to decide whether to punish the parent like the tax evader or the marijuana user like an insider trader. The Constitution forbids such unfettered government discretion.

The Due Process Clauses of the Fifth and Fourteenth Amendments demand that the government cannot deprive any person of their liberty without “fair notice” of which behaviors are criminal.¹² The principle is a bulwark against unchecked prosecutorial discretion. Courts invalidate laws that violate this principle on the basis that they are void-for-vagueness.¹³ Michelle Carter’s conviction in *Commonwealth v. Carter* presents a vagueness issue in the context of online relationships based on electronic communications because

7. See ROBERT BORK, *THE TEMPTING OF AMERICA* 96 (1990) (suggesting that an anti-sodomy law that proscribes “unnatural practices” might be invalidated on vagueness grounds for not providing fair notice).

8. 381 U.S. 479 (1965) (announcing a penumbral right to privacy in the Constitution).

9. Jed Rubenfeld, *The Right to Privacy*, 102 HARV. L. REV. 737, 750–51 (1989) (“What, then, is the right to privacy? What does it protect? To be sure, the privacy doctrine involves the ‘right to make choices and decisions,’ which, it is said, forms the ‘kernel’ of autonomy. The question, however, is which choices and decisions are protected?”).

10. See BORK, *supra* note 7, at 99. (“[*Griswold*] said there was now a right of privacy but did not even intimate an answer to the question, ‘Privacy to do what?’ People often take addictive drugs in private . . .”).

11. See *id.* (“[E]xecutives conspire to fix prices in private . . .”).

12. See *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015); see, e.g., *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983) (finding an abortion ordinance too vague to be upheld); *Kolender v. Lawson*, 461 U.S. 352 (1983) (finding a law that required “loiterers” and “wanderers” to provide identification upon police demand void-for-vagueness); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (finding a vagrancy law void-for-vagueness); *Connally v. General Constr. Co.*, 269 U.S. 385 (1926) (holding unconstitutionally void-for-vagueness a statute requiring businesses to pay workers not less than the “current rate of per diem wages in the locality where the work is performed”).

13. See, e.g., *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018) (applying *Johnson* to hold that the definition of “crime of violence” as set forth in the Armed Career Criminal Act and incorporated in the Immigration and Nationality Act was unconstitutionally vague).

her conviction is based on a novel theory that she was virtually, not physically, present at the crime scene. It is a theory with no common understanding that may make many unsuspecting citizens into criminals. Carter is one such person.

Carter texted suicide methods to her online boyfriend Conrad Roy as he considered taking his life.¹⁴ They met in 2012 while visiting relatives in Florida.¹⁵ Carter and Roy then developed a romantic relationship but “the majority of their contact took place through the exchange of voluminous text messages.”¹⁶ They only met a few times. Knowing that Roy suffered from depression, Carter attempted to convince him to seek help; she began to encourage suicide in earnest, however, when Roy unequivocally stated that he wanted to die.¹⁷ She did her homework on this morbid question and texted:

Plastic bag over your head is only a 23% chance of dying. And the overdose on pills and drugs can take up to 2 hours so idk if that’s worth it. You want something quick. Gunshots to the head is a 99% chance of working, hanging is an 89% chance of working, carbon monoxide is a 80% chance of working. And pills hardly ever work. Carbon monoxide poisoning is the best option . . . if you fall asleep in your car while it’s running in a garage, it will kill you. Takes up to 15 mins. And there’s no pain.¹⁸

Roy eventually took his life through carbon monoxide poisoning.¹⁹ A Massachusetts grand jury indicted Carter for involuntary manslaughter on February 6, 2015.²⁰ Carter’s attorneys filed a motion to

14. *Commonwealth v. Carter*, 52 N.E.3d 1054, 1058 (Mass. 2016); *see also Carter*, 52 N.E.3d at 1057–58 n.4.

15. Carla M. Zavala, Comment, *Manslaughter by Text: Is Encouraging Suicide Manslaughter?*, 47 SETON HALL L. REV. 297, 300 (2016).

16. *Carter*, 52 N.E.3d at 1057; *see also All the Texts Between Michelle Carter and Conrad Roy the Day He Died*, BOSTON 25 NEWS (last updated Aug. 4, 2017), <https://www.fox25boston.com/news/all-the-text-messages-between-michelle-carter-and-conrad-roy-the-day-he-died/532942907> (follow “You can read all the messages presented as evidence here” link) [hereinafter Texts]. This source lists thousands of text messages between Carter and Roy that were entered into evidence during the criminal proceedings against Carter. For the sake of organization, references to the text messages within this article refer to them by their numbered placement in the spreadsheet in chronological order. The texts have been marked to read as dialogue and only edited where necessary to aid comprehension.

17. *See* Texts, *supra* note 16, nos. 280–82. (Carter sending Roy electronic links on how to obtain help for anxiety); *id.* nos. 1356, 1358 (Roy telling Carter, “No. you don’t understand . . . I WANT TO DIE.”); *id.* nos. 1360–1405 (back-and-forth between the two, with Carter encouraging Roy to commit suicide).

18. Texts, *supra* note 16, no. 2348.

19. *Carter*, 52 N.E.3d at 1063.

20. *Id.* at 1056.

dismiss, arguing that the Commonwealth failed to present sufficient evidence of involuntary manslaughter.²¹ On immediate appeal, the Massachusetts Supreme Judicial Court (SJC) affirmed the Juvenile Court's denial of the motion to dismiss.²² After waiving her right to a trial by jury, the trial court convicted Carter of involuntary manslaughter.²³ The fact that Carter was not physically present at the suicide scene mattered not: "[The circumstances of the suicide] included the defendant's *virtual presence* at the time of the suicide, the previous constant pressure the defendant had put on the victim, and his already delicate mental state."²⁴ In early March of 2018, Carter's attorneys appealed the conviction.²⁵

The SJC recently made its decision and upheld her conviction. It rejected, among other things, Carter's vagueness claim.²⁶ In doing so, the court declared that the principle that a defendant can be convicted for simply advising, without physical presence, a person to commit suicide is "found in centuries-old Massachusetts common law."²⁷ That state's common law may be centuries old, but the principle that a defendant's words without physical presence can justify an involuntary manslaughter conviction is not.²⁸ It is of recent vintage. In fact, all of the cases on which *Carter II* relied included defendants that were physically present.²⁹ The SCJ even heralded an 1816 decision, *Commonwealth v. Bowen*, that ruled that advising another to commit suicide constituted murder.³⁰ *Bowen* does not support *Carter* at all. The state accused Bowen of urging a fellow inmate to kill himself in order to avoid a public execution; the two prisoners had neighboring cells, enabling them to talk to one another. In other words, the state's theory could not work without Bowen's physical proximity to the other inmate.³¹

21. *Id.*

22. *See id.* at 1054.

23. Denise Lavoie, *Michelle Carter Guilty of Involuntary Manslaughter in Texting Suicide Case*, ASSOCIATED PRESS, <https://www.wbur.org/news/2017/06/16/michelle-carter-guilty> (last updated June 16, 2017, 6:55 PM).

24. *Carter*, 52 N.E.3d at 1054 (emphasis added).

25. *See* Travis Anderson, *Mass. High Court to Take Up Michelle Carter's Appeal in Suicide Texting Case*, BOSTON GLOBE (Mar. 15, 2018), <https://www.bostonglobe.com/metro/2018/03/15/sjc-will-hear-michelle-carter-appeal/59qvrwKFrWE44PYPj6iZmN/story.html>.

26. *Commonwealth v. Carter (Carter II)*, 481 Mass. 352, 363–64 (2019).

27. *Id.* at 365.

28. *Id.* at 363–64 ("The defendant argues that she lacked fair notice that she could be convicted of involuntary manslaughter for her role in the victim's suicide and that her conviction therefore violated her right to due process. That is, she argues that the law of involuntary manslaughter is unconstitutionally vague as applied to her conduct. We rejected this argument in *Carter I*, and we remain of the view that the law is not vague.").

29. *See id.* at 364–67.

30. *Id.* at 365 (citing *Commonwealth v. Bowen*, 13 Mass. 356, 356 (1816)).

31. *Bowen*, 13 Mass. at 356.

Even though Carter has been tried in the court system, Carter's innocence has been scrutinized in the "Court of Public Opinion." Many people might be outraged to learn that "when Roy began to feel the effects of the carbon monoxide poisoning and stepped out of his [truck], Carter was the one who instructed him . . . to 'get back in.'"³² In this respect, the public views Carter's conduct as no different than a police officer called upon to talk down a man threatening to jump from a ledge. And instead of persuading him from jumping, he tells the suicidal man: "Sir, stop wasting our time. If you are going to jump, then do it already."³³ Like the police officer's callous remarks, Carter did not talk Roy down, but her words effectively told him to jump off the ledge.

While Carter's conduct runs contrary to our standards on common decency, her conviction is based on unconstitutional reasoning. This Article illustrates that a prosecution based on a defendant's "virtual presence" at a suicide is similar to the state charging a parent for telling his child that the Tooth Fairy exists under an anti-honesty statute or a judge deciding that recreational drug use is not protected under a "right to privacy." Undefined legal terms like these provide no warning and thus permit arbitrary law enforcement.

However, the SJC presumed that the trial judge correctly applied the law because his finding of causation "in this [virtual] context . . . is supported by temporal distinctions" showing that Carter "overpowered the victim's will and thus caused his death."³⁴ Since the SCJ affirmed the trial court's reasoning, this Article focuses on the trial court's decision. It shows that the virtual-presence theory is undefinable and that it deprived Carter of any fair notice that she committed involuntary manslaughter. *Carter* attempted to define virtual presence; to the contrary, a closer read finds that the court apparently developed, or at least inferred, a test for determining when virtual presence in a suicide encouragement case becomes a crime.³⁵ The test raises more questions than answers, as the factors *Carter* employed to define virtual presence offer no concrete meaning to the term. In fact, the factors add to the unpredictability of the concept when applied to similar cases.

32. Issie Lapowsky, *The Texting Suicide Case is About Crime, Not Tech*, WIRED (June 6, 2017), <https://www.wired.com/story/texting-suicide-crime/>.

33. Cf. Danya Bazaraa & Joseph Wilkes, *Callous Motorists Abuse Man "Threatening to Jump" from Bridge over M5 and Demand Police "Drag Him Off"*, BRISTOLLIVE (Dec. 9, 2017), <https://www.bristolpost.co.uk/news/local-news/callous-motorists-abuse-man-threatening-901839> (describing an incident in the United Kingdom in which citizens turned to Twitter to mock a man who had threatened to jump from a bridge for holding up traffic).

34. *Carter II*, 481 Mass. at 362–63.

35. *Commonwealth v. Carter*, 52 N.E.3d 1054, 1065 n.13 (Mass. 2016).

Carter's logic could potentially influence other courts to follow suit. Many social connections are now forged virtually on electronic forums such as Facebook, Twitter, Instagram, Kik, Skype, or Facetime, and a host of phone applications. According to the Pew Research Center, “[t]he share of 18- to 24-year-olds who use online dating has roughly tripled from 10% in 2013 to 27% today.”³⁶ The idea that online activity can lead to suicide is not far-fetched. Online dating or chatting might be the new forum for people to freely express their suicidal thoughts. This may have profound legal consequences.

Prosecutors in other cases have expressed a similar intent to prosecute suicide encouragers who were not physically present when the victim committed suicide. In Minnesota, for example, the state prosecuted William Melchert-Dinkel under its anti-suicide encouragement statute.³⁷ In this case, the defendant posed as a depressed female nurse on suicide websites, instructing individuals on how to hang themselves while he watched via webcam.³⁸ Falsely claiming that he would commit suicide too, he lured five people to enter suicide pacts with him, two of whom killed themselves.³⁹

In 2006, a Missouri woman, Lori Drew, faced federal charges relating to online suicide encouragement.⁴⁰ Drew presented herself as a sixteen-year-old boy named “Josh Evans” on MySpace. She then used the account to flirt with a thirteen-year-old girl. Drew had “Josh” tell the girl that he no longer liked her and that “the world would be a better place without her in it.”⁴¹ The girl committed suicide that day.⁴² The federal government charged Drew under the Computer Fraud and Abuse Act (CFAA) for posting a photograph of a boy without his consent in violation of MySpace’s terms of service.⁴³

Neither of these cases provide clear models for prosecutors to follow. In *Melchert-Dinkel*, the Minnesota Supreme Court subsequently struck down portions of the Suicide Encouragement Law on First Amendment grounds.⁴⁴ In *United States v. Drew*, the district

36. Aaron Smith & Monica Anderson, *5 Facts About Online Dating*, PEW RESEARCH CTR. (Feb. 29, 2016), <http://www.pewresearch.org/fact-tank/2016/02/29/5-facts-about-online-dating/>.

37. See *State v. Melchert-Dinkel*, 844 N.W.2d 13, 17 (Minn. 2014).

38. *Id.* at 16; see also *Former Nurse Helped Instruct Man on How to Commit Suicide, Court Rules*, GUARDIAN (Dec. 28, 2015, 2:38 PM), <https://www.theguardian.com/us-news/2015/dec/28/minnesota-suicide-conviction-william-melchert-dinkel-mark-drybrough> (describing the circumstances of Melchert-Dinkel’s conviction).

39. *Melchert-Dinkel*, 844 N.W.2d at 17.

40. *United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009).

41. *Id.* at 452.

42. *Id.*

43. *Id.* at 452, 461.

44. *Melchert-Dinkel*, 844 N.W.2d at 16.

court held that the CFAA would not be applicable in every situation and is certainly not a solution to bring clarity to the law; in fact, a federal judge overturned Drew's conviction, finding that the statute was void-for-vagueness as applied to the case.⁴⁵ Both cases illustrate the need for clear rules on suicide encouragement. New proposals are needed in this emerging area, particularly when the suicide rate in the United States has "surged to the highest levels in nearly 30 years . . . with increases in every age group except older adults."⁴⁶

These cases show that electronic suicide encouragement is an important issue that needs legislative attention, but the virtual-presence theory is not an adequate solution because it is unconstitutionally vague. Modern technology has expanded the reach of communication beyond the bounds of existing law; state legislatures, therefore, should provide clear guidance about when suicide encouragement is criminal. This Article proceeds as follows: Part I provides factual background on the events that led to Roy's suicide and Carter's conviction. Part II argues that the trial court erred when it convicted Carter of involuntary manslaughter based upon a misreading of suicide encouragement cases, as well as a vague virtual-presence theory. Part III employs a series of hypotheticals to illustrate how this virtual-presence theory is unworkable and endangers individual liberty. And lastly, Part IV proposes that legislatures—not courts—are best suited craft clear guidelines to govern suicide encouragement; legislative reforms in this area are consistent with separation of powers principles that envisioned that legislators, the people's representatives, would decide when the law must deprive them of liberty. Two reforms are suggested. One includes a physical-presence requirement as a basis to prosecute someone who encourages suicide. The other uses well-known aiding and abetting principles as a framework to prosecute suicide encouragement in the context of electronic communication.

I. BACKGROUND

Carter and Roy did not have a typical teenage romance. According to most reports, Carter and Roy met in 2012, when both teens

45. *Drew*, 259 F.R.D. at 464–65.

46. Sabrina Tavernise, *U.S. Suicide Rate Surges to a 30-Year High*, N.Y. TIMES (Apr. 22, 2016), <https://www.nytimes.com/2016/04/22/health/us-suicide-rate-surges-to-a-30-year-high.html>.

were visiting relatives in Florida.⁴⁷ Roy and Carter bonded over their struggles with mental health: Roy suffered from social anxiety disorder and depression, while Carter had an eating disorder and admitted she had cut herself in the past.⁴⁸ They enjoyed an on-and-off relationship between 2012 and 2014, rekindling it for the final time a month before Roy's suicide.⁴⁹ Carter and Roy lived thirty-five miles apart in Massachusetts, and their distance meant that the majority of their contact took place through the exchange of voluminous text messages and cell phone calls.⁵⁰

There are over four thousand text messages, but over the course of a few conversations, Carter underwent a metamorphosis in her attitude towards Roy and suicide.⁵¹ Carter began as a supportive girlfriend. On June 20, 2014, she texted an encouraging message to Roy:

Carter: You need to know that you are loved and wanted every second of every day not just by me, but by so many people.⁵²

Roy: I f—d up my life but I did I feel like.⁵³

Carter: Stop it no you didn't. You're just so tied up in your thoughts that you believe you did. You're in a dark tunnel but it's not gonna last forever. You'll find the light someday and I'm gonna be here to help you find it. You didn't f—k up your life and you aren't a f—k up. You're just lost. But you're gonna be found again I'll never stop looking. You're gonna get thru this okay? I believe in you so much, I love you.⁵⁴

Two days later, Roy contemplated suicide and Carter discouraged the idea:

47. Zavala, *supra* note 15, at 297; Mike Lawrence & Curt Brown, *Police: Teen Coaxed Friend to Suicide, Sent Multiple Messages to Family*, SOUTHCOAST TODAY (Feb. 27, 2015, 2:25 PM), <http://www.southcoasttoday.com/article/20150227/NEWS/150229466>.

48. *See* Texts, *supra* note 16, nos. 7, 12 (alluding to Roy's history of anxiety and depression); *id.* no. 64 (alluding to Carter's eating disorder); *id.* no. 674 (alluding to her history of self-harm).

49. *See* Texts, *supra* note 16, nos. 1–92.

50. Zavala, *supra* note 15, at 298; *Prosecutors Alleged Woman in Texting Suicide Case Was Looking for Attention*, ASSOCIATED PRESS (June 6, 2017, 2:00 PM), <https://www.nydailynews.com/news/crime/prosecutors-woman-texting-suicide-case-wanted-attention-article-1.3225955>.

51. *See* Texts, *supra* note 16, no. 4274.

52. *Id.* no. 292.

53. *Id.* nos. 537–38.

54. *Id.* no. 538.

Carter: Take your life?⁵⁵

Roy: you think. I should⁵⁶

Carter: You're not gonna kill yourself. You say all the time you want to but look, you're still here. All the times you wanted to you didn't. You don't wanna die, you just want the pain to stop.⁵⁷

Roy: That's true. I just don't know what to do with myself.⁵⁸

Despite Carter's urging Roy to forget about suicide, Roy soon proposed that he and Carter enter a suicide pact:

Roy: we should be like Romeo and Juliet at the end.⁵⁹

Carter: Haha I'd love to be your Juliet ;) ⁶⁰

Roy: but do you know what happens at the end⁶¹

Carter: OH YEAH F——K NO! WE ARE NOT DYING⁶²

Despite Carter's initial support, their conversation took a dark turn a week later. On June 29, 2014, Roy emphatically texted Carter: "I WANT TO DIE, if I have to be obvious."⁶³ When Carter concluded that he would not change his mind, she began to brainstorm ideas for how Roy can die and advised him to ignore his doubts:

Carter: What about hanging yourself or [stabbing] yourself[?] ⁶⁴

Carter: What about over dosing on sleeping pills? Or [suffocation] with a plastic bag? ⁶⁵

Roy: am I really selfish . . . for wanting to kill myself so bad . . . and dragging you along with this. ⁶⁶

55. *Id.* no. 543. This exchange occurred on June 22, 2014.

56. *Id.* no. 544.

57. *Id.* nos. 545–46.

58. *Id.* nos. 547–48.

59. *Id.* no. 986.

60. *Id.* no. 987.

61. *Id.* no. 988.

62. *Id.* no. 989.

63. *Id.* no. 1358.

64. *Id.* no. 1377.

65. *Id.* no. 1382.

Carter: No you're not selfish don't ever think that. People can say all they want that suicide is selfish, but that's because they don't understand the pain you're going thru. And no don't worry about me! I'm here for you forever to help you thru this as best I can and support you. You aren't dragging me along. I chose to [stay].⁶⁷

Days before his suicide, Roy expressed hesitation:

Roy: Idk I'm just having really bad thoughts about it now. I wasn't in an hour ago. but I can just picture my sisters crying and crying about me.⁶⁸

Carter: Well. I would be devastated, shocked, and [extremely] upset for a week or 2. But as I said, I would have to find ways to cope. I would think about all the happy moments and the good times. I would remember all the beautiful ways that she lived, not stay stuck and focused on how she died. It would be so hard at first, but with support from her friends and mine, and family, I would move on and get thru it, keeping her memory alive. They will cry for a while, but they know you just wanted to be happy and get rid of all the pain. They will cry about the good times and the bad that they shared with you. But it won't hold them back. They will continue living their lives and maybe even live harder and stronger for you, because they know that's what you would have wanted.⁶⁹

Similar doubts resurfaced mere hours before Roy's death, to which Carter responded: "I know you just have to do it like you said."⁷⁰ After researching the effectiveness of various suicide methods, Carter eventually convinced Roy that his best bet was carbon monoxide poisoning.⁷¹

They decided that Roy would drive out to a parking lot and use a water pump to fill his truck with carbon monoxide until he eventually perished. Carter would remain on the phone with Roy throughout this process.⁷² According to the court, during the forty-seven-minute phone call, Roy exited the vehicle because the car-

66. *Id.* nos. 1428, 1430–31.

67. *Id.* no. 1432.

68. *Id.* no. 1962.

69. *Id.* nos. 1963–64.

70. *Id.* no. 4183.

71. *See id.* no. 3035.

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

bon monoxide was working, and he was afraid. It was at this point that Carter instructed Roy to reenter the vehicle, successfully completing his suicide attempt.⁷³ Based on these facts, the state prosecuted Carter for involuntary manslaughter.

II. CARTER DID NOT COMMIT INVOLUNTARY MANSLAUGHTER WHEN SHE ENCOURAGED SUICIDE THROUGH TEXTING

A. *The State's Case*

Under Massachusetts common law, Carter was convicted of involuntary manslaughter, defined as “an unlawful homicide unintentionally caused by an act which constitutes such a disregard of probable harmful consequences to another as to amount to wanton or reckless conduct.”⁷⁴ The prosecution’s case rested on the theory that Carter’s failure to act constituted “wanton and reckless” behavior. Wanton or reckless conduct may be established “by either the commission of an intentional act or an ‘omission where there is a duty to act.’”⁷⁵

In order to establish this, the law provides that “[a] defendant has a duty to act if (1) he or she has a special relationship to the victim or (2) he or she created a life-threatening condition.”⁷⁶ The state argued that Carter in fact created a life-threatening condition for Roy by directing him to obtain the tools for and commit suicide.⁷⁷ Thus, Carter had a duty to take reasonable steps to try to stop Roy from killing himself, such as alerting his family or the authorities.⁷⁸ Much of the state’s evidence included the four-thousand-plus text messages between Carter and Roy.

The juvenile court opinion explained the analytical basis for convicting Carter under an involuntary manslaughter theory. When analyzing that opinion, the court not only introduced the virtual-presence theory but implicitly developed a standard or test that identifies circumstances when a defendant’s virtual presence constitutes manslaughter. According to this standard, there are four conditions that establish criminal virtual presence when encouraging another to commit suicide.

73. *Id.* at 1063.

74. *Commonwealth v. Godin*, 371 N.E.2d 438, 442 (Mass. 1977) (internal citations and quotations omitted).

75. *Commonwealth v. Pugh*, 969 N.E.2d 672, 685 (Mass. 2012).

76. *Zavala*, *supra* note 15, at 304.

77. *Id.*

78. *Id.*

First, the court found that the intimate nature of Carter and Roy's relationship played a significant role in his suicide because the "particular circumstances of the defendant's relationship with the victim may have caused her verbal communications with him . . . to carry more weight than mere words."⁷⁹ Second, her words, according to the court, had a "coercive quality" to persuade Roy. Third, Carter's coercion led Roy to overcome the "doubts [he had] about killing himself."⁸⁰ Fourth, Carter should have known the gravity of this situation, considering their constant discussion about suicide and his "delicate mental state."⁸¹ This framework presents void-for-vagueness issues even when applied to the Carter case.⁸²

B. *Physical Presence: A Limiting Principle in Suicide Encouragement Cases*

Carter differs from two notable Massachusetts suicide encouragement cases: *Commonwealth v. Atencio* and *Persampieri v. Commonwealth*.⁸³ In *Atencio*, the court upheld an involuntary manslaughter conviction against a surviving member of a three-man group who played Russian roulette and one member killed himself. The game started when one defendant, found a revolver in the deceased's home and examined it to ensure that it had one bullet.⁸⁴ He pointed the revolver "at his head, and pulled the trigger. Nothing happened. He handed the gun to Atencio, who repeated the process, again without result. Atencio passed the gun to the deceased, who spun it, put it to his head, and pulled the trigger: The cartridge exploded, and he fell over dead."⁸⁵ The court found that the defendant's participation in the game fostered a dangerous environment "that created a high degree of likelihood that substantial harm [would] result to another," thus constituting "wanton or reckless conduct."⁸⁶

Similarly, *Persampieri* affirmed the involuntary manslaughter conviction of a man who, when his wife threatened to commit suicide, "said she was 'chicken—and wouldn't do it.'"⁸⁷ He then had

79. *Commonwealth v. Carter*, 52 N.E.3d 1054, 1063 (Mass. 2016).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Commonwealth v. Atencio*, 189 N.E.2d 223 (Mass. 1963); *Persampieri v. Commonwealth*, 175 N.E.2d 387 (Mass. 1961).

84. *Atencio*, N.E.2d at 224.

85. *Id.*

86. *See id.*

87. *Persampieri*, 175 N.E.2d at 389.

his wife retrieve a .22-caliber rifle from the kitchen. He loaded it for her and noticed that the safety was off. She then fatally shot herself.⁸⁸ In *Atencio*, the defendant was physically present, playing Russian roulette with the deceased, and, in *Persampieri*, the defendant was physically present with his wife, loading and giving her a rifle.⁸⁹ The glaring difference between *Atencio*, *Parsampieri*, and *Carter* is that the defendants in *Atencio* and *Persampieri* were physically present and made a physical contribution to the preparation of the killing instrument. *Carter* does not present the same situation—she neither purchased the generator used in the suicide, nor did she physically coerce Roy to get back in the truck.⁹⁰ Carter’s conviction for involuntary manslaughter is inconsistent with Massachusetts’s precedent. Virtual presence opened a new realm in suicide encouragement cases.

C. *Virtual Presence: A New Principle in Suicide Encouragement Cases*

In *Carter*, the court concluded that physical presence was not an essential element to the crime. Rather, it found that Carter’s knowledge of Roy’s mental condition, along with their extensive communications through texting, gave Carter’s commands a “coercive quality.”⁹¹ As a result, she convinced Roy to overcome his second-guessing about suicide.⁹² This dynamic, the court found, made Carter virtually present at the scene.⁹³ This finding was based on the nature of their relationship. They did not have a traditional relationship with dinners at the local diner or evenings watching movies together on Netflix. Rather, it primarily existed in a virtual setting. Thus, the messages that encouraged, coached, and instructed Roy to commit suicide would have carried the same or similar weight as physically being there, advising him.⁹⁴ In this context, physical presence does not dictate wantonness or recklessness, but “[t]he circumstances of the situation dictate whether the conduct is or is not wanton or reckless.” The court said: “We need not—and indeed cannot—define where on the spectrum between speech and physical acts involuntary manslaughter must fall. Instead, the inquiry must be made on a case-by-case basis.”⁹⁵ The

88. *Id.*

89. *Atencio*, 189 N.E.2d at 224; *Persampieri*, 175 N.E.2d at 389.

90. Zavala, *supra* note 15, at 304–05.

91. *Commonwealth v. Carter*, 52 N.E.3d 1054, 1063 (Mass. 2016).

92. *Id.*

93. *Id.*

94. *Id.* at 1057 nn.3–4, 1063.

95. *Id.* at 1062–63.

court acknowledged that there will be some subjective line drawing from one virtual-presence case to another. This is the sort of arbitrary decision making the Due Process Clauses forbid.

D. *Virtual Presence: The Slippery Slope*

As a concept, virtual presence does not exist anywhere in Massachusetts common law.⁹⁶ While the world increasingly communicates through electronic means, it appears that the law lags behind. *Carter* breaks new ground.⁹⁷ With online dating, virtual presence as a basis to convict an individual presents several questions. Does virtual presence arise in the context of an online relationship or can it occur in less defined connections, such as casual chatting on a dating website? Or, can virtual presence arise between two people that have a platonic, not a romantic, friendship? Is it necessary for the defendant to have knowledge that the defendant had a mental condition or is that an aggravating factor in the analysis? A possible response to these concerns is that there are no concrete answers to these questions because convictions would be decided on a case-by-case basis. But the lack of concrete answers could place a defendant's constitutional right to fair notice in jeopardy.

The nebulous nature of online relationships makes crimes like *Carter's* involuntary manslaughter almost boundless. An individual is virtually present whenever she texts, snapchats, or emails, each of which could make her subject to a criminal charge. Should *Carter* reach all virtual relationships, no matter their length, intensity, or intimacy, then almost every suicide-by-encouragement would constitute manslaughter. *Carter's* logic does not make these distinctions. Conceivably, a simple internet comment requesting that another commit suicide that, in fact, leads to a suicide may constitute manslaughter. Virtual presence, therefore, confuses manslaughter law because no one knows which types of relationships or kinds of conduct could make someone guilty.⁹⁸

96. *Id.* at 1063; see *Commonwealth v. Atencio*, 189 N.E.2d 223 (Mass. 1963); *Persampieri v. Commonwealth*, 175 N.E.2d 387 (Mass. 1961).

97. Katharine Q. Seelye, *Michelle Carter Gets 15-Month Jail Term in Texting Suicide Case*, N.Y. TIMES (Aug. 3, 2017), <https://www.nytimes.com/2017/08/03/us/texting-suicide-sentence.html> ("The outcome of the trial stunned legal experts, who said it broke ground by suggesting that words alone could be found to cause a suicide. Speech in this case was ruled to be as powerful as a loaded gun, a verdict with potentially broad implications.").

98. Virtual presence is not the only problem with the conviction; the court's focus on *Carter's* relationship with Roy was irrelevant. The state did not opt to pursue the special relationship theory. Zavala, *supra* note 15, at 304. Moreover, it is not clear if *Carter* and Roy's connection can be defined as a "special relationship," as a crime may not have been committed here. Under Massachusetts law, a person has a duty to report a crime as soon as possible.

III. THE *CARTER* MANSLAUGHTER TEST: VIRTUAL PRESENCE, DUE PROCESS, AND OTHER ANALYTICAL PROBLEMS

A. *Virtual Presence is Void-for-Vagueness*

The Fifth and Fourteenth Amendments of the United States Constitution demand that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”⁹⁹ In *Johnson v. United States*, the Court held that vague statutes violate an individual’s Fifth and Fourteenth Amendment rights when government deprives liberty “under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so stand-ardless that it invites arbitrary enforcement.”¹⁰⁰ More recently, in *Sessions v. Dimaya*, Justice Gorsuch’s concurring opinion powerfully explained the dangers of vague statutes to individual liberty:

Vague laws invite arbitrary power. . . . The founders cited the crown’s abuse of “pretended” crimes. . . as one of their reasons for revolution. Today’s vague laws may not be as in-vidious, but they can invite the exercise of arbitrary power all the same—by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up.¹⁰¹

To avoid this danger, criminal laws must state explicitly and def-initely which conduct is punishable by law. Laws that violate this requirement are void-for-vagueness because they endanger indi-vidual liberty by delegating authority to a judge or administrator that is so extensive that it can lead to arbitrary prosecutions.¹⁰² The void-for-vagueness doctrine thus advances two principles in safe-guarding due process. One, it demands that citizens receive notice

MASS. GEN. LAWS ch. 268, § 40 (2018); *id.* ch. 269, § 18. But the court referred to Carter’s relationship with Roy as a basis for her conviction anyway: “Here, the particular circum-stances of the defendant’s relationship with the victim may have caused her verbal commu-nications with him in the last minutes of his life on July 12, 2014, to carry more weight than mere words, overcoming any independent will to live he might have had.” *Carter*, 52 N.E.3d at 1063. Thus, this reasoning fell outside the perimeter of manslaughter law. Massachusetts requires that a person report to law enforcement if they witness “an aggravated rape, rape, murder, manslaughter or armed robbery” MASS. GEN. LAWS ch. 268, § 40 (2018); *see also id.* ch. 269, § 18 (setting forth a similar requirement for those who witness hazing). These circumstances were not present in this case.

99. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

100. *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015).

101. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223–24 (2018) (Gorsuch, J., concurring) (in-ternal citation omitted).

102. *Johnson*, 135 S. Ct. at 2557.

as to what behavior is criminal. Two, it forbids the state from enforcing standards that are incapable of consistent application. Laws that violate either principle run contrary to the doctrine as shown in both early and modern cases. This Article will show below how the virtual-presence theory violates both the federal and state vagueness doctrines.

1. Notice

Nineteenth century courts established the notice requirement for criminal statutes early in our republic's history. For example, *United States v. Sharp*, decided in 1815, found that a criminal statute had to provide notice so citizens could organize their behavior to avoid penalty or incarceration.¹⁰³ In that case, Justice Washington reversed convictions of several seamen charged under a statute that "made it a capital offence to make, or endeavor to make a revolt, or to confine the master."¹⁰⁴ Since Congress failed to define the phrase "to make revolt" in any way, the seamen could not know what specific conduct would arise to capital mutiny:

If we resort to definitions given by philologists, they are so multifarious, and so different . . . [that to select] from this mass of definitions, one . . . may fix a crime upon these men[,] . . . when, by making a different selection, it would be no crime at all. . . .¹⁰⁵

Sharp explained that notice requires that "[l]aws which create crimes, ought to be so explicit in themselves, or by reference to some other standard, that all men, subject to their penalties, may know what acts it is their duty to avoid."¹⁰⁶ Therefore, criminal statutes with words, phrases, or terms that are vulnerable to differing understandings violate this principle.

Notice continues to be a central focus in the void-for-vagueness doctrine; in fact, the Supreme Court established a standard to define what notice requires. According to one scholar, "when defining what constitutes notice in the void-for-vagueness doctrine, the Court has consistently over a period of at least a hundred years referred to common or ordinary men with common or ordinary intelligence, and has also historically and consistently referred to fair

103. See *United States v. Sharp*, 27 F. Cas. 1041, 1043 (C.C.D. Pa. 1815) (No. 16,264).

104. *Id.* at 1042.

105. *Id.* at 1043.

106. *Id.*

notice or fair warning.”¹⁰⁷ Criminal statutes with broadly drafted terms that reach lawful activity fail this standard. *Papachristou v. City of Jacksonville*, for example, involved five consolidated cases where defendants were convicted under a local vagrancy code that criminalized, “prowling by auto,” “vagabonds” “loitering” and “common thief[s].”¹⁰⁸ In one of the cases, two defendants were waiting for another friend “who was to lend them a car so they could apply for a job at a produce company.”¹⁰⁹ Unable to find their friend, they walked a two-block radius three times searching for him. At a store owner’s behest, police officers searched the two gentlemen; even though they found no weapons on them, they were charged as vagabonds.¹¹⁰

Papachristou invalidated the vagrancy code because the ordinance failed to provide a person with ordinary intelligence with notice because it “makes criminal activities which, by modern standards, are normally innocent.”¹¹¹ In other words, it reached lawful activity. If the defendants’ “wandering and strolling” made them “vagabonds,” the Court reasoned, then the ordinance captured country club members who may stroll golf courses and, as another vagrancy ordinance prohibited, “habitually spend[] their time by frequenting . . . places where alcoholic beverages are sold or served.”¹¹² Therefore, statutes that reach lawful activity cannot provide notice because the ordinary person could not, in this case, discern between lawful wandering and unlawful wandering that constitutes vagabonding.

2. Arbitrariness

A related principle to the notice requirement is the arbitrary enforcement rule. That requirement demands that “a legislature establish minimal guidelines to govern law enforcement” because when “the legislature fails to provide such minimal guidelines, a criminal statute may permit ‘a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.’”¹¹³ If an ordinary person does not know what a criminal law

107. Cristina D. Lockwood, *Defining Indefiniteness: Suggested Revisions to The Void for Vagueness Doctrine*, 8 CARDOZO PUB. L. POL’Y & ETHICS J. 255, 271 (2010).

108. 405 U.S. 156, 158 (1972).

109. *Id.* at 159.

110. *Id.*

111. *Id.* at 163.

112. *Id.* at 164.

113. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566 (1974)).

requires, then how could one expect an ordinary judge or police officer to know how to enforce it? The Court stressed this principle in the landmark *Kolander v. Lawson* decision.

There, the Court struck down a statute that required a suspect to provide “credible and reliable” identification to a police officer when they were stopped based on reasonable suspicion.¹¹⁴ *Kolander* found that the statute as drafted granted “complete discretion” to police officers “to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest.”¹¹⁵ Laws that give full discretion to law enforcement officials violate due process because they “entrust law-making to the moment-to-moment judgment of the policeman on his beat.”¹¹⁶ Without a standard to define “credible and reliable” identification, police could arrest and prosecutors could charge citizens based on their own whims.¹¹⁷ Modern cases reaffirm the arbitrary enforcement requirement as a tenet of the vagueness doctrine.

Johnson v. United States and *Sessions v. Dimaya* are two modern cases that illustrate the point. Both cases involved statutes with residual clauses that raised vagueness concerns. In *Johnson*, the Court struck down a provision of the Armed Career Criminal Act on vagueness grounds.¹¹⁸ That Act defined “violent felony” in part as an act that threatens the “use of physical force against the person of another;” “burglary, arson, or extortion;” “involves use of explosives;” or “otherwise involves conduct that presents a serious potential risk of physical injury to another.”¹¹⁹ *Johnson* found that the last part, known as the residual clause, required judges to imagine the “kind of conduct that the crime involves in ‘the ordinary case,’ and to judge whether that abstraction presents a serious potential risk of physical injury.”¹²⁰ The statute provided no standards or elements for the judge to determine what behavior constituted “a serious potential risk.”¹²¹ With dismay, the Court posited the following questions, “How does one go about deciding what kind of conduct the ordinary case of a crime involves? A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut in-

114. *Id.* at 352.

115. *Id.* at 358.

116. *Id.* at 360 (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)).

117. *Id.* at 358.

118. *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015).

119. *Id.* at 2555.

120. *Id.* at 2557.

121. *Id.* (quoting *United States v. Mayer*, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, C.J., dissenting from denial of rehearing en banc)).

stinct?”¹²² The voluminous amount of information that could be used to define what conduct posed “a serious potential risk” invited arbitrary enforcement by judges.¹²³

Sessions v. Dimaya involved an immigration law that made it an “aggravated felony” to be undocumented. Aggravated felony was defined, in part, as “any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” Like the residual clause in *Johnson*, the statute did not provide any predictability for how to measure what conduct posed a “serious potential risk” that could apply to an array of instances.¹²⁴ Therefore, the clause violated due process rights.¹²⁵

Similar to federal precedent, Massachusetts’s law demands notice and prohibits arbitrariness as the lynchpins of its void-for-vagueness doctrine. In *Commonwealth v. Williams*, for instance, the Massachusetts Supreme Judicial Court struck down an anti-sauntering and loitering ordinance for being void-for-vagueness on both notice and arbitrariness grounds.¹²⁶ That ordinance commanded that “[n]o person shall saunter or loiter in a street in such a manner as to obstruct or endanger travelers or in a manner likely to cause a breach of the peace or incite to riot.”¹²⁷ The court found that the ordinance was facially vague because “[i]t [wa]s unclear what conduct a person may engage in before it rises to the level of obstructing a traveler.”¹²⁸ Such a law granted police officers “unfettered discretion that could result in arbitrary or discriminatory enforcement,” as law enforcement was not provided with a standard to distinguish lawful sauntering and loitering from conduct that arises to obstructing travelers.¹²⁹

Another due process concern arose from arbitrary action in *City of Fitchburg v. 707 Main Corp.*¹³⁰ There, the court struck down an ordinance that permitted the mayor to “impose conditions upon a license but said conditions may only relate to public safety, health or order.”¹³¹ The city successfully obtained a restraining order against the defendant for operating a movie theatre without a license; however, the defendant attempted to comply with the ordi-

122. *Id.* (internal citations omitted).

123. *Id.* at 2557.

124. *Id.* at 1213–17.

125. *Id.* at 1216.

126. *Commonwealth v. Williams*, 479 N.E.2d 687, 688 (Mass. 1985).

127. *Id.* at 687.

128. *Id.* at 689.

129. *Id.*

130. 343 N.E.2d 149 (Mass. 1976).

131. *Id.* at 153.

nance, sending a letter to the mayor requesting an annual license with the fee enclosed.¹³² The mayor returned the fee with a copy of the ordinance instructing them to follow it.¹³³

The court found that the ordinance was void-for-vagueness because there were no objective standards in the ordinance that limited the mayor's discretion.¹³⁴ Thus, the decision reflected "an arbitrary and capricious administration of the ordinance, and hence [produced] unfairness and discrimination which justifies the vagueness doctrine."¹³⁵ Here, the ordinance did not specify any procedures for the defendant to follow other than the mayor's specifications that could change from case to case.¹³⁶ Like the federal cases, Massachusetts found that unrestrained official conduct violates the individual right to due process. Since Massachusetts law mirrors the federal void-for-vagueness doctrine, laws that fail to provide notice or permit discriminatory prosecutions offends both the state and federal constitutions. The virtual-presence theory, also runs contrary to the doctrine.

B. Carter is Void-for-Vagueness

The virtual-presence theory violates both tenets of the vagueness doctrine. First, Carter did not receive fair notice that her conduct was punishable by law. The concept of "virtual presence" itself is oxymoronic, as the Oxford Dictionary defines "virtual" as "not physically existing but made by technology to appear so."¹³⁷ In other words, if someone is "virtual" by definition they cannot be present. In addition, the standard explained above raises more questions than answers. For instance, what does it mean for the victim to be in a "delicate mental state?"¹³⁸ Does a delicate mental state require a doctor's diagnosis, or is erratic behavior or emotional volatility sufficient to constitute a delicate mental state? Such indefiniteness makes virtual presence as unconstitutionally vague as the standardless "revolt" in *Sharp*, the sweeping "vagabond" in *Paprachristou*, and the unpredictable residual clauses in *Johnson* and *Dimaya*. Second, similar to the licensing ordinance in *707 Main Corp.*, virtual presence provides law enforcement with no definition of

132. *Id.* at 152.

133. *Id.*

134. *See id.* at 153–54.

135. *Id.* at 153.

136. *Id.*

137. *Virtual*, OXFORD LIVING DICTIONARY, <https://en.oxforddictionaries.com/definition/virtual> (last visited Jan. 31, 2019).

138. *Commonwealth v. Carter*, 52 N.E.3d 1054, 1063 (Mass. 2016).

the alleged offense committed, empowering officials with unfettered discretion to decide when virtual presence permits criminal culpability and when it does not. This will result in arbitrary prosecutions. Assuming the standard provided a correct result in the *Carter* case, it does not follow that the framework is appropriate for similar cases. Subsection One will explain the test in detail, and then Subsection Two will provide hypotheticals to demonstrate that the virtual-presence theory is void-for-vagueness and may lead to arbitrary results.

In finding *Carter* guilty, the court established that “virtual presence” can constitute involuntary manslaughter when the following conditions are satisfied: (1) there is an intimate relationship between victim and defendant; (2) defendant has knowledge about victim’s “delicate” mental condition; (3) victim expresses doubt about committing suicide; and (4) defendant persuades victim to overcome their doubt to commit suicide.¹³⁹ We will refer to this as the “*Carter* test.” Two issues arise from this test: First, the court did not establish why any one of these factors are necessary to constitute involuntary manslaughter. Second, even assuming that the court sufficiently proved each factor, the test fails to provide the public with fair notice as to what type of behavior could be punishable by law. *Carter*’s reasoning is overly broad and cannot consistently provide a framework for virtual-presence cases. It is not clear that the absence of any of these factors would lead to a substantively different outcome. Consider the following hypothetical and the three following scenarios, where one factor is missing, to highlight this point.

1. Quentin and Vicky Hypothetical

Quentin Ward is looking to meet local singles at his new law school, so he creates a profile on Reddit, and begins posting frequently in the dating subreddit “R4R.”¹⁴⁰ On the site, Quentin posts that he is a six-foot-one twenty-four-year-old law student with a swimmer’s build. He elaborates that he “loves music, working out, and writing poetry” and that he is “looking for fun, but ultimately wants to date.” He includes a picture of himself in the post. An anonymous user responds to his post, describing herself as a five-foot-two twenty-year-old college student with a passion for “cook-

139. See *id.* at 1061–64.

140. See REDDIT: R/DATING, <https://www.reddit.com/r/dating/> (last visited Jan. 31, 2019). A subreddit is a forum on a social media network, Reddit, where members post links, images, and have discussions with each other online.

ing, working out, reading, and going out with friends.” She explains that she is also looking to date. However, she did not include a picture of herself in the post. Curious, Quentin private messages the profile. Based upon the following circumstances, did the defendant commit involuntary manslaughter under *Carter*?

2. Hypothetical Scenarios

Scenario 1: An Intimate Relationship?

Quentin and the user exchange messages for a week. Quentin learns that the girl’s name is Vicky. She says that she will show Quentin what she looks like once she feels comfortable. During the week, they message frequently, revealing personal information about themselves. Both believe that they have the potential to have a relationship, as it is “easy to talk to” the other. She admits that she has had “bouts with depression but takes medication.” After six days, Vicky finally sends a picture of herself to Quentin. Shocked, Quentin responds, “You look nothing like how you describe yourself. You totally catfished me! Bye. What a waste of time!” Vicky responds, “Please don’t. I really want you. If you go, I might hurt myself.” Quentin angrily responds: “If this is the type of lying you do on a regular basis, no wonder you don’t have a man. You should just kill yourself. Do mankind a favor.” Quentin blocks Vicky. That night, Vicky jumps off her apartment building to her death.

Analysis: Did Quentin Commit Involuntary Manslaughter?

Probably not. Although Quentin knew about Vicky’s “bouts with depression,” he did not have a relationship that was as intimate as Carter and Roy’s connection; their connection only lasted six days. That said, Quentin, like Carter, encouraged Vicky to commit suicide when she said that she might harm herself. Nevertheless, their relationship did not involve persistent discussions about suicide that would have likely created circumstances in which Quentin’s words would have had the same “coercive quality” as Carter’s comments.

Measuring intimacy based upon duration of the relationship suggests that there may be different degrees of coercion. Any coercive quality that Quentin’s instruction had was minimal. While Quentin and Vicky did see potential for a romantic relationship with one another, their six-day exchange did not mature into an “intimate relationship.” Though Quentin and Vicky’s relationship is distinguishable from Carter and Roy’s in many respects, the

Carter test does not provide any concrete guidance on what characteristics qualify a relationship as “intimate.” The *Carter* test does not necessarily allow a prosecutor or judge to make this distinction. The question is left to law enforcement to decide from case to case.

Scenario 2: Delicate Mental State?

Vicky sends a picture of herself to Quentin, to which he replies, “Love at first sight.” The two exchange phone numbers. Over a week, they text and send Snapchats to each other. They agree to meet up for one date at a local restaurant and clearly have a romantic connection. Vicky leaves campus the following week to study abroad in Spain for the semester. They video chat on Facebook every night, eventually telling one another “I love you.” After six weeks, Quentin tells Vicky that he “can’t wait to see her again” and that “he misses her.” But Vicky soon becomes alarmed by her video chats with Quentin. Crying, Quentin tells Vicky, “I can’t live without you.” Since Vicky’s departure, Quentin has been suffering from depressive bouts because of his bipolar disorder, something he does not disclose to others, including Vicky. Over the next week, Quentin calls Vicky multiple times, messaging that he is having “suicidal thoughts” because she is not responding to him. Alarmed, Vicky accepts his call. Quentin yells, demanding to know why she has not been responding.

Vicky: You’re making me uncomfortable. You’re too crazy. I didn’t sign up for this.

Quentin: I attempted suicide last night. I took a handful of Benadryl. But woke up. I might do it again.

Vicky: I don’t care. This is none of my business.

Quentin: I want to die. You want me to do it?

Vicky: Quentin, you just want attention. If you wanted to die you would’ve done something more dramatic like shoot yourself. Just be a man about it.

Quentin: I can get a handgun. I’m gonna do it.

Vicky: Do what you have to do. Bye.

The video chat ends. The next day, Quentin dies from a self-inflicted gunshot wound to the head.

Analysis: Did Vicky Commit Involuntary Manslaughter?

Probably. This is a close question, as it turns on whether Vicky had knowledge of Quentin's "delicate mental" state. Quentin never divulged that he was suffering from bipolar disorder. However, a prosecutor could assert that Vicky should have been able to conclude that Quentin was mentally disturbed after he admitted he was having suicidal thoughts and that he had attempted suicide the night before. She could argue that she relinquished any duty to Quentin when she said that the situation was none of her business. Whether that would be a persuasive defense is unknown.

The *Carter* test is unclear about when potential defendants like Vicky have acquired sufficient knowledge about the victim's mental infirmity to satisfy the knowledge element. If courts interpret this factor to require a "clear statement" of mental state, then Vicky did not have knowledge. But if a court applies the factor broadly, conferring culpability if she "should have known" about Quentin's mental disorder, then she is likely guilty. Vicky will not know if she committed a crime until a foreperson announces her verdict.

Scenario 3: Reconsideration and Persuasion

Vicky sends a picture of herself to Quentin, and they exchange phone numbers. They text and send Snapchats to the other for a week. They never meet. During the summer, Quentin leaves campus and heads to California. Similarly, Vicky moves back in with her parents in Massachusetts. They FaceTime every night for three months, eventually telling one another "I love you." They both reveal that they suffer from severe mental health issues. Vicky confides in Quentin that she suffers from post-traumatic stress disorder due to being sexual assaulted in high school.

She feels that she will "never be normal or the same again." Quentin admits his anxiety and that his relationships with his family make him feel "inadequate" and "worthless," admitting he had unsuccessfully attempted suicide a year ago. One day, after a severe panic attack, Vicky texts Quentin, telling him: "I want to end it all." Vicky expresses that she cannot be talked out of it. She says that she is only telling Quentin because she loves him and wants him to be there when she does it. She asks Quentin's advice on how to do it, to which he suggests taking a handful of Xanax and drinking a bottle of wine. She agrees and asks him to video chat her while she does it. The final conversation goes as follows:

Vicky: Okay, I'm ready.

Quentin: Are you sure you want to do this?

Vicky: Yes, babe. I can't keep living like this. I'd rather die than have to wake up every morning knowing I may break down at any moment.

Quentin: Okay, my love, I won't stop you.

Vicky takes the pills and begins drinking the wine. They talk for an hour.

Vicky: I'm feeling sleepy, babe.

Quentin: Let's try to go to sleep then.

Vicky: Okay, I'll see you on the other side. I love you.

Vicky and Quentin both fall asleep, Quentin wakes up the next morning to find Vicky passed out on the video chat, whispers "I love you," and ends the call.

Analysis: Did Quentin Commit Involuntary Manslaughter?

Applying the *Carter* framework, it is unclear if Quentin would be found guilty of involuntary manslaughter. The exchanges between Vicky and Quentin show that she neither reconsidered her decision and that Quentin did not persuade her to overcome any doubts. While these facts do not satisfy the final two Carter test conditions, this case is otherwise identical to *Carter*; thus, there is no rational reason why there should be a different outcome under the court's reasoning.

First, Quentin knew about her "delicate mental" state, that is, Vicky's post-traumatic stress disorder. Second, they had an "intimate relationship," frequently proclaiming their love for one another over FaceTime. Like Carter, he offered her advice about how to commit suicide when he suggested that she take Xanax. Moreover, he agreed to be virtually present with Vicky through video chat during the suicide. His virtual presence established a duty to take reasonable steps to prevent this tragedy. In *Carter*, the court found that defendant's instruction to reenter the vehicle was "reckless," since "an ordinary normal [person] under the same circumstances would have realized the gravity of the danger," and that to "the defendant's own knowledge, grave danger to others must have been

apparent and the defendant must have chosen to run the risk rather than alter [his or her] conduct so as to avoid the act or omission which caused the harm.”¹⁴¹ Similarly, an ordinary person in Quentin’s position would know to seek assistance. Like Carter, Quentin failed to do this.

The *Carter* test creates an anomaly in which close cases place defendants squarely under the specter of culpability, whereas a defendant in a case that is logically identical to Carter would likely be acquitted because there are two factors missing from the analysis. As a result, the test is too narrow because it does not always capture electronic encouragement of suicide. At the same time, the test is too broad, reaching situations where defendants have brief connections with victims and little or no knowledge about their mental health.

IV. LEGISLATIVE REFORMS

Legislatures, not courts, are best suited to regulate this area appropriately. Therefore, this Part recommends two reforms that should be implemented by legislatures. Section B recommends specific language that imposes a physical-presence requirement for involuntary manslaughter laws, overruling Carter’s virtual-presence theory. Then, Section C recommends that states adopt an aiding and abetting law for electronic encouragement of suicide that allows for the virtual-presence theory and imposes special relationship requirements to that creates a duty to report a person’s intent to commit suicide to law enforcement or emergency medical services. Finally, Section D illustrates how that aiding and abetting law would function, concluding that it would still find Michelle Carter guilty without upending the traditional physical-presence requirement for involuntary manslaughter.

A. *Why Legislatures?*

State legislators, not courts, should regulate this area for several reasons. First, whether an electronic encouragement of suicide constitutes a crime does not end the inquiry; rather, it introduces others. For instance, how does a court identify whether a victim second guessed their decision? Does the second guessing have to be an explicit statement, or is it just hesitation? Can the second

141. See *Carter*, 52 N.E.3d 1054, 1063 (citing *Commonwealth v. Pugh*, 969 N.E.2d 672 (Mass. 2012)).

guessing happen prior to the suicide attempt, or must it happen during the event? These questions do not require either statutory interpretation or the application of case law. Instead, these questions are inherently policy-based in nature.

As the hypotheticals show, judicially crafted solutions are not suited to drawing lines between lawful behavior and criminal conduct in virtual-presence cases. This line drawing is further complicated by the fact that suicide encouragement cases present complex moral, philosophical, and constitutional issues, as well. For example, does the decision to commit suicide fall within the range of the “most intimate and personal choices” that are “central to personal dignity and autonomy” protected under the Fourteenth Amendment?¹⁴² If so, how a person receives advice on the matter would be arguably free from government interference. Or, is this an area where government possesses countervailing interests, such as protecting the mentally or terminally ill, that outweigh an interest in suicide? It is tempting, to avoid political controversy, to entrust a group of highly educated lawyers to make these choices for us. And why not? The judiciary shaped American criminal law during the nation’s early years.

After the American Revolution, the states inherited their criminal law jurisprudence from England, and those American judges who “chose to accept or adapt a common law term to American circumstances often had to choose between [common law concepts] or reject the term entirely.”¹⁴³ But we do not live under the common law today; rather, criminal statutes enacted by legislatures govern because “[c]ommon law crimes, whether federal, state or local, have long been disfavored. They run afoul of our deepest notions of due process and raise the specter of the judiciary imposing its will and the coercive powers of the state against its citizens.”¹⁴⁴ The democratic process is the appropriate means by which we should identify criminal conduct because the people selected legislatures, not courthouses, as the forum where such decisions are made. Thus, criminal statutes possess a legitimacy that common law crimes do not. Statutes, unlike common law crimes, are scrutinized through open legislative deliberation and need public support to become law. Moreover, the legislative process can air out

142. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992) (joint opinion). Distinguishing between intimate and non-intimate activities could be an arbitrary exercise, as well.

143. Will Tress, *Unintended Collateral Consequences: Defining Felony in the Early American Republic*, 57 CLEV. ST. L. REV. 461, 463 (2009).

144. Ben Rosenberg, *The Growth of Federal Criminal Common Law*, 29 AM. J. CRIM. L. 193, 194 (2002).

multiple perspectives and yield proposals that can enrich debate on controversies about crime and punishment.

So, in emerging areas, such as suicide encouragement cases, states should be permitted to serve as “laboratories of democracy” in which legislatures can experiment with solutions to address these phenomena. Justice Brandeis warned his colleagues to not interfere with state level experimentation, because it denies the states the opportunity to consider the effects of measures designed to solve a common problem: “To stay experimentation in things social and economic is a grave responsibility. . . . It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel . . . experiments without risk to the rest of the country.”¹⁴⁵ I wrote elsewhere that this process offers practical benefits to policy formulation, even if legislative programs produce negative, or unanticipated, outcomes:

Federalism cultivates experimental democracy in which different perspectives arising from a heterogeneous population can be expressed through legislative action at the state level. . . . As these policies are implemented, the public assesses the results: the legislation can serve as a model to emulate, a starting point for further innovation, or an example of public policy failure.¹⁴⁶

Legislative reform and experimentation in criminal law is consistent with the void-for-vagueness doctrine; that doctrine reinforces separation of powers principles by “prevent[ing] the legislative branch from delegating lawmaking power to the judiciary by purposefully drafting statutes in vague terms in order to defer the responsibility of determining the specific conduct that should be classified as criminal to the judiciary.”¹⁴⁷ In other words, the vagueness doctrine maintains political accountability. Should lawmakers enact an anti-encouragement statute, for instance, they must regulate the area with some level of specificity, which forces them to make tough policy choices, so voters can intelligently evaluate the program and decide to either reward or punish them at the ballot box.

145. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

146. Charles Adside, III, *Constitutional Damage Control: Same-Sex Marriage, Smith’s Hybrid Rights Doctrine, and Protecting the Preacher Man After Obergefell*, 27 *GEO. MASON U. C.R.L.J.* 145, 195 (2017).

147. Ava Miller, Note, *How Vague is Too Vague?: Resurrecting the Void-for-Vagueness Doctrine in the Context of the Armed Career Criminal Act*, 89 *S. CAL. L. REV.* 1139, 1164 (2016).

Finally, judicial criminal lawmaking endangers individual liberty, opening a dragnet in which citizens can be arbitrarily swept up: “It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders,” the Supreme Court concluded in *United States v. Reese*, “and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.”¹⁴⁸ Ultimately, the democratic system is thwarted, because the public, via its representatives, that ratified the Due Process Clauses is denied the right to decide the circumstances when its members liberties are deprived. Therefore, should legislators decide to criminalize suicide encouragement, they must enact laws that afford citizens fair notice of what circumstances can place them in the prosecutor’s crosshairs.

B. Legislatures Should Adopt a Physical-Presence Requirement

States may decide to abolish prosecutions where suicide results from electronic communications and prevent its criminal justice system from adjudicating cases like *Carter* or the hypotheticals. Since a virtual-presence doctrine would be an unmanageable regime for adjudicating encouragement cases, legislation imposing a physical-presence requirement would abrogate the theory in criminal law. In addition to this rule, suicide encouragement statutes would benefit from aiding and abetting principles; these principals are preferable to new theories, such as virtual presence, because they do not force courts to develop standards or factors to decide what constitutes a special or intimate relationship in the digital age. Courts are ill-suited to make judgement calls about the importance of relationship duration or intimacy, particularly in cases involving video chats or online message boards. Such cases are novel and the results uncertain.

Legislatures, then, should amend involuntary manslaughter rules to impose a physical-presence requirement.

Model Statute § 000.001

A person shall be found guilty of involuntary manslaughter when:

- (a) he or she recklessly causes the death of another;
- and
- (b) is physically present when they commit the reckless act that causes death.

148. 92 U.S. 214, 221 (1876).

C. *Legislatures Should Adopt an Aiding and Abetting Statute for Electronic Suicide Encouragement*

Imposing a physical-presence requirement would exonerate Carter and others like her who use electronic communications to encourage suicide. After considered debate, legislators may conclude that electronic suicide encouragement is morally reprehensible and deserves criminal sanction. The challenge, however, is to craft a policy that is clear and avoids vagueness issues. Again, aiding and abetting principles provide an answer. After explaining the proper mental state for an electronic suicide encouragement aiding and abetting statute, this Section introduces special relationship laws to create a new model statute to apply in electronic encouragement of suicide cases.

1. Mental State and Origins

Still, the public's condemnation of Carter's suicide encouragement might indicate to legislatures that her conduct is worth criminalizing. Rather than develop an incoherent involuntary manslaughter doctrine, as the Massachusetts trial court did, aiding and abetting laws are well-established, providing more predictable results than elusive theories like virtual presence. Familiar to both judges and prosecutors alike, aiding and abetting laws are among the most used in American criminal law as the doctrine applies to "all offenses and to all participants."¹⁴⁹ At common law, the doctrine has existed since the Fourteenth Century, depending on the theory that "the law of homicide is quite wide enough to comprise . . . those who have 'procured, counselled, commanded or abetted' the felony."¹⁵⁰ Similar to the common law, American federal law has included aiding and abetting statutes since 1790.¹⁵¹ President William Howard Taft signed the current federal statute into law in 1909.¹⁵² That statute provides that "[w]hoever directly commits any act constituting an offense defined in any law of the

149. See, e.g., Baruch Weiss, *What Were They Thinking?: The Mental State of the Aider and Abettor and the Causer Under Federal Law*, 70 *FORDHAM L. REV.* 1341, 1346 (2002); James O'Connor, Note, *Criminal Law—"But I Didn't Know Who He Was!": What Is the Required Mens Rea for an Aider and Abettor of a Felon in Possession of a Firearm?*, 32 *W. NEW ENG. L. REV.* 245, 251 (2010) ("The aiding and abetting statute is among the most often used statutes in federal criminal law.").

150. *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (citations omitted); see also Weiss, *supra* note 149, at 1344.

151. See Weiss, *supra* note 149, at 1344.

152. See *id.*

United States or aids, abets, counsels, commands, induces, or procures its commission is a principal.”¹⁵³

The current jurisprudence on the mental state that an aider and abettor must possess originated with the storied Judge Learned Hand’s opinion in *United States v. Peoni*.¹⁵⁴ In that case, Peoni sold counterfeit money to Regno who then sold those bills to Dorsey.¹⁵⁵ Dorsey then attempted to pass on the money.¹⁵⁶ The jury convicted Peoni for aiding and abetting Dorsey’s possession of counterfeit money because Peoni placed the money in circulation and knew that Regno would likely sell it to another guilty possessor such as Dorsey.¹⁵⁷

Judge Hand, writing for the Second Circuit, reversed the conviction.¹⁵⁸ He found that the common law provided a lexicon that defined the aiding and abetting doctrine. One became an accessory, for instance, if they “‘command, hire and counsel’ another to commit petit treason, murder, robbery or ‘willful’ arson.”¹⁵⁹ Judge Hand pointed to other terms, such as “plotting, assenting, consenting or encouraging.”¹⁶⁰ He concluded that all these definitions had “nothing whatever to do with the probability that the forbidden result would follow upon the accessory’s conduct.”¹⁶¹ Thus, the defendant must “participate in [a venture] . . . he wishes to bring about, that he seek by his action to make it succeed. All the words used—even the most colorless, ‘abet’—carry an implication of *purposeful attitude* towards it.”¹⁶² Peoni did not act with any purposeful intent because he did not agree with Regno to sell the bills to Dorsey.¹⁶³ In fact, “Peoni had no concern with the bills after Regno paid for them.”¹⁶⁴

Peoni requires that the defendant act with a purposeful intent, establishing a high threshold of culpability; it is not enough, therefore, to know or foresee the crime but rather the aider and abettor must act to bring about the success of the criminal enterprise.¹⁶⁵ More specifically, the intent, or the ultimate goal, must be laid out

153. Act of Mar. 4, 1909, Pub. L. No. 350, § 332, 35 Stat. 1088, 1152 (codified as amended at 18 U.S.C. § 2(a) (2018)).

154. See *Peoni*, 100 F.2d at 402–03.

155. *Id.* at 401.

156. *Id.*

157. *Id.* at 401–02.

158. *Id.* at 403.

159. *Id.* at 402.

160. *Id.*

161. *Id.*

162. *Id.* (emphasis added).

163. *Id.* at 403.

164. *Id.*

165. *Id.* at 402–03.

clearly before the crime occurs.¹⁶⁶ For instance, a gun trafficker who sells an M-16 rifle to a drug-dealer and *knows* it will be used in a murder is not culpable; however, he will be culpable if he *wants* to sell the rifle so the drug dealer can kill a rival gang leader who refuses to purchase his merchandise.

The Supreme Court adopted the purposeful intent approach in *Nye & Nissen v. United States*. There, the Court affirmed the conviction of a company president as an accessory in a widespread conspiracy to defraud the federal government by misrepresenting invoices for the purchase of dairy products during World War II.¹⁶⁷ Citing to *Peoni*, the *Nye* court found that a conspirator must work with his or her co-conspirators in a way that makes the crime succeed.¹⁶⁸ Such a theory, the Court reasoned, “is well engrained in the law.”¹⁶⁹ In this case, there was adequate evidence that he promoted the conspiracy, instructing his subordinates to make false invoices.

While the purposeful intent theory is “engrained” in doctrine, “[i]nterpretation of Hand’s test has varied and led to a number of schools of thought relative to the required [mental state] for aiding and abetting.”¹⁷⁰ Some courts still require a lesser state of mind for culpability,¹⁷¹ the knowledge standard, which stands in stark contrast to the purposeful intent approach.¹⁷² The knowledge standard simply requires that the aider and abettor’s participation in a crime that they know will occur.¹⁷³ An inmate, for example, can be an aider and abettor if he or she gives a shiv to another inmate, knowing that it would be used in a jailhouse killing.¹⁷⁴

There are other approaches, to be sure. One scholar counted as many as six different tests that courts use in this area.¹⁷⁵ This Article does not take a position on any specific approach; legislatures, armed with their investigative powers, should experiment in this field to examine if a particular approach targets the kinds of cases that the public finds morally reprehensible or if a test reaches cases with unsuspecting accessories found in ambiguous circumstances. That said, the purposeful intent approach does capture the narrow

166. *Id.*

167. *Nye & Nissen v. United States*, 336 U.S. 613, 613–17 (1949).

168. *Id.* at 619.

169. *Id.* at 618.

170. O’Connor, *supra* note 149, at 253.

171. *See id.* at 253–55.

172. *See Weiss, supra* note 149, at 1366–67.

173. *Id.* at 1402.

174. *See United States v. Fountain*, 768 F.2d 790 (7th Cir. 1985), *modified*, 777 F.2d 345 (7th Cir. 1985).

175. *See generally Weiss, supra* note 149, at 1373–76 (explaining the approaches courts use to identify the culpable mental state of an aider and abettor).

class of cases where a defendant participates in another's suicide plan with the desire to ensure its success. Under the knowledge approach, however, a person may be an accessory if they simply knew of the victim's suicide plan and unknowingly aided the scheme but were indifferent about the outcome.

Consider the following hypothetical: On a suicide-help website, Matt chats with David for several hours and tells him that he is contemplating suicide. David encourages Matt to take his anti-depression medication and to seek help. Matt responds and says "Hey bro, you don't understand I want to die. What should I do?" David responds in frustration, "Man, I give up. Just cut your wrists or something. Leave me alone!" Matt cuts his wrists in his bathtub and dies. Although David did not care if Matt committed suicide, he knew he was suicidal and should have foreseen that Matt was likely to take his suggestion to cut his wrists. So, David might be culpable under the knowledge test even though he does not have any desire to bring about Matt's suicide. As this scenario shows, the knowledge approach may be too broad for suicide encouragement cases because it may not provide individuals with sufficient warning that their words or actions make them a participant in another's suicide mission. While the appropriate mental state is debatable, this Article contends that aiding and abetting is the best theory to pursue electronic encouragement of suicide cases.

Aiding and abetting rules are a perfect fit for prosecuting non-present criminals, particularly in the "venue where the [criminal act] took place, which may well have been thousands of miles away."¹⁷⁶ While suicide is not criminal in the United States, aiding someone in such an effort establishes a substantive crime.¹⁷⁷ This is no different from anti-doctor-assisted-suicide laws that criminalize assistance from a physician and not the suicide itself.¹⁷⁸ These laws reach co-conspirators, such as a defendant who supplied a gun for a robbery while she stayed at her apartment or a mastermind who paid others to commit murder on his behalf.¹⁷⁹ Similarly, these laws can reach persons who assist another in committing suicide

176. *Id.* at 1370; see also U.S. DEP'T OF JUSTICE, CRM 2478, WHAT IS NOT AIDING AND ABETTING (2018), <https://www.justice.gov/jm/criminal-resource-manual-2478-what-not-aiding-and-abetting> (explaining that physical presence is not required to establish aiding and abetting).

177. See, e.g., Sean Sweeney, Note, *Deadly Speech: Encouraging Suicide and Problematic Prosecutions*, 67 CASE W. RES. L. REV. 941, 945–48 (2017); *Is Suicide Illegal? Suicide Laws by Country*, MENTAL HEALTH DAILY, (July 24, 2014), <https://mentalhealthdaily.com/2014/07/24/is-suicide-illegal-suicide-laws-by-country/> ("Currently there is no law against the act of committing suicide in the United States.").

178. See MICH. COMP. LAWS § 750.329a(1)(a)–(c) (2018).

179. *Id.*

through electronic communication provided that the statutory elements are satisfied.¹⁸⁰

Aiding and abetting statutes offer an additional benefit, in that they avoid First Amendment issues when prosecuting suicide encouragement cases. The Minnesota Supreme Court, for instance, struck down portions of a law that criminalized “intentionally advising, encouraging, or assisting in the taking of another’s own life.”¹⁸¹ The court held that the prohibitions against encouraging and advising another to commit suicide violated the First Amendment because they were not narrowly drawn.¹⁸² A statute based on the aiding and abetting model, however, avoids this problem. Participating and assisting are far more narrowly tailored than general advocacy.

2. Special Relationships and the Duty to Report

One way states can capture electronic encouragement of suicide is to enact a general “special relationship” statute that creates a duty to report to authorities. About ten states have general “right to aid” or “right to rescue” statutes that bestow a duty upon any person to report to law enforcement officials when they witness certain violent crimes.¹⁸³ For example, Massachusetts confers a duty to report a crime to police “as soon as reasonably practicable” whenever someone “knows that another person is a victim of aggravated rape, rape, murder, manslaughter or armed robbery [or hazing] and is at the scene of said crime.”¹⁸⁴ Other states impose broader duty to report rules. Instead of focusing on specific crimes, Wisconsin requires that an individual at least “summon” police if they “know[] that a crime is being committed and that a victim is exposed to bodily harm.”¹⁸⁵ Drawing from these laws, states can craft narrowly focused laws that punish individuals that aid and abet others to commit suicide when they fail to report to law enforcement or seek aid from medical personnel. Legislatures may consider the below model statute:

180. *Id.*

181. *State v. Melchert-Dinkel*, 844 N.W.2d 13, 16 (Minn. 2014).

182. *Id.* at 24–25.

183. *See infra* notes 188–89.

184. MASS. GEN. LAWS ch. 268, § 40 (2018); *id.* ch. 269, § 18. Other states have laws similar to the Massachusetts statute. *See* CAL. PENAL CODE § 152.3 (West 2018); FLA. STAT. § 794.027 (2018); OHIO REV. CODE ANN. § 2921.22 (West 2018); R.I. GEN. LAWS §§ 11-1-5.1, 11-56-1 (2018); WASH. REV. CODE § 9.69.100(1) (2018).

185. WIS. STAT. ANN. § 940.34 (2018); *see also* HAW. REV. STAT. § 663-1.6 (2018); MINN. STAT. § 604A.01 (2018); VT. STAT. ANN. tit. 12, § 519 (West 2018).

Model Statute § 000.002

Any person shall be found guilty of aiding and abetting suicide through electronic encouragement if he or she:

- (a) purposefully aids someone or solicits another to commit suicide through electronic communication;
- (b) without obtaining or attempting to obtain aid from law enforcement or medical personnel; and
- (c) death results from the failure to obtain aid as referred to in subsection (a).

As opposed to the virtual-presence theory, Model Statute § 000.02 provides clear answers in electronic communication cases. Consider the application of the model statute to the hypotheticals. The Article will apply the general rule that the defendant must act with a purposeful intent or desire to bring about another's suicide.¹⁸⁶

D. *Better Than Virtual Presence:*
Model Statute § 000.02 and Clear Answers

Scenario 1

Quentin and Vicky engage in weeks of online messaging, before Quentin learns that Vicky had falsely described her appearance. They fight. Quentin ends the conversation by saying "You should just kill yourself. Do mankind a favor."

Answer

Not Guilty. Under the model statute, courts need not consider the nature of this online relationship, or the potential "coercive" power Quentin might have had over Vicky. Instead, Quentin would clearly face no liability for his actions. For Quentin to be liable under the statute, he must "assist or participate" in the suicide. Quentin's vague statement that Vicky should kill herself does not rise to this level of assistance or participation. There was no agreement between the two that Quentin would assist her in committing suicide. Subsection (a) of § 000.002 is thus not triggered because Quentin did not purposefully aid or solicit Vicky's suicide. Quentin is under no duty to obtain aid from law enforcement or medical personnel.

186. See Weiss, *supra* note 149, at 1375.

Scenario 2

Quentin and Vicky begin a romantic relationship online and in person. After Vicky attempts to pull away in the relationship, Quentin tells Vicky that he struggles with bipolar disorder and has had suicidal thoughts. Quentin finally tells Vicky on the phone that he attempted suicide the night prior and that he might do it again if she hangs up. Quentin states that he has a handgun and intends to shoot himself. Vicky ultimately says, "Do what you have to do. Bye." Quentin commits suicide.

Answer

Not Guilty. Scenario 2 is a closer call than Scenario 1, but Model Statue § 000.02 still gives a clear answer. The fact pattern shows that, while Vicky does have knowledge about Quentin's suicidal thoughts, she did not provide assistance and did not participate in the suicide. To the contrary, she attempts to leave the relationship and end the call; in fact, she says that his intention to commit suicide is none of her business, revealing that she had no purposeful desire for him to shoot himself. Thus, subsection (b) is not triggered, and Vicky is under no duty to report.

Scenario 3

After months of texting and video chats, Vicky tells Quentin that she wants to kill herself. Quentin offers advice on how to do it, specifically recommending that Vicky take a handful of Xanax and drink a bottle of wine. Vicky follows his advice. Quentin video chats with Vicky while she takes the pills, drinks the wine, and kills herself.

Answer

Guilty. Here, Quentin takes several steps that constitute participating in or aiding the suicide. Quentin purposefully acted to ensure that Vicky succeeded in her mission to commit suicide. Quentin suggested that she take the Xanax and drink the wine that Vicky ultimately uses to kill herself. At this point, the subsection (b) of the Model Statute § 000.02 is triggered. Quentin had a duty to obtain aid from law enforcement or medical personnel.

Scenario 4: Commonwealth v. Carter

As the previous three scenarios demonstrate, the Model Statute provides a more workable rule that can be applied in electronic suicide encouragement cases. But how would it apply in *Commonwealth v. Carter*?

Carter would be guilty under Model Statute § 000.002. Upon Roy's insistence, Carter researched suicide methods and ultimately recommended a specific technique: carbon monoxide poisoning in a vehicle. This reflected an agreement between the two that Carter would aid and abet him in committing suicide. This level of specific instruction rises to participation and assistance, triggering subsection (b). Carter thus had an obligation to seek out law enforcement or medical personnel. Not only did Carter fail to notify, she coached and soothed Roy during the suicide, even encouraging Roy to continue with the suicide attempt after he had fearfully left his truck. Carter's level of specific intent, participation, and failure to notify anyone of Roy's suicide attempt makes her clearly liable under the Model Statute.

V. CONCLUSION

Due process demands notice prior to conviction. Michelle Carter may be a villain, but Massachusetts denied her this guarantee. Therefore, the SJC erred when it upheld her fifteen-month prison sentence. Understanding that many consider her conduct criminal, however, this Article proposes that future Carters can be warned based upon clear laws that include physical-presence requirements or suicide aiding and abetting statutes.

One may argue that these reforms add to the national overcriminalization problem, punishing defendants for crimes that never existed before.¹⁸⁷ Suicide is no longer prohibited or penalized in the United States.¹⁸⁸ No one, arguably, should be convicted of aiding a crime that no longer exists. More broadly, maybe this subject should not concern the state at all. The decision to commit suicide "involv[es] the most intimate and personal choices a person may make in a lifetime."¹⁸⁹ Put differently, whether a person should consider advice from another about their choice to live or

187. See Reynolds, *supra* note 2.

188. Washington v. Glucksberg, 521 U.S. 702, 705–06 (1997).

189. Compassion in Dying v. Washington, 850 F. Supp. 1454, 1460 (W.D. Wash. 1994) (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992) (joint opinion)), *rev'd*, 49 F.3d 586 (9th Cir. 1995), *rev'd sub nom.* Washington v. Glucksberg, 521 U.S. 702 (1997).

die is their business. This Article does not take a position on that matter. Nor does it advocate that states *should* enact these proposals. Rather it suggests that states that decide to criminalize suicide encouragement should *consider* these issues to avoid vagueness difficulties.

For states that decide to criminalize suicide encouragement, these reforms offer societal benefits. They reinforce the democratic system, providing society with an opportunity to discuss spiritual, moral, and philosophical views on suicide. Society may enact laws to protect the vulnerable and mentally ill like Conrad Roy, because “[t]hose who attempt suicide . . . often suffer from depression or other mental disorders.”¹⁹⁰ Potentially, these proposals can instruct future Carters to encourage someone contemplating suicide to seek professional help rather than to take their lives. Moreover, it can deter those with sinister motives, like an abusive caregiver or a money-grubbing heir, from aiding suicide for personal or financial gain.¹⁹¹ The central point is that whether or when suicide encouragement through electronic communication should be criminal is a question for society to decide. Answers to these policy questions should be developed democratically and not based on the subjective opinions of judges or prosecutors.

Ultimately, many will find Michelle Carter’s encouragement of Conrad Roy’s suicide morally repugnant and utterly deserving of criminal punishment. Though that may be the case, criminal punishment should not be imposed by an *ad hoc* judicial reinterpretation of longstanding doctrines of criminal law. If society wishes to criminalize this conduct, it should pass legislation to that end while preserving doctrinal integrity and affording fair notice. Our Constitution recognizes that due process is a right shared by all, villains no less than the innocent.

190. *Glucksberg*, 521 U.S. at 705–06; see MENTAL HEALTH DAILY, *supra* note 177 (“In 90% of cases, it was found that the person who ended up committing suicide did so as a result of untreated depression.”).

191. *Glucksberg*, 521 U.S. at 732 (discussing that those contemplating suicide, particularly those with terminal illness, can be susceptible to coercion).