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Kill Me Through the Phone: The Legality of Encouraging Suicide in an Increasingly Digital World

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INTRODUCTION

It was the middle of the summer, and an eighteen-year-old boy sat alone in his truck in Fairhaven, Massachusetts, waiting to die.[1] In his backseat, a gasoline-powered water pump emitted dangerous carbon monoxide levels within the confined space of the vehicle.[2] At some point, fear overcame the boy as he realized that the carbon monoxide was beginning to steal his life.[3] He exited the truck in a panic.[4] His girlfriend, who was on the phone with him at the time, gave him one simple command: "Get back in."[5]

The following afternoon, on July 13, 2014, a local police officer found the dead body of Conrad Roy.[6] During the investigation that ensued in the wake of Roy's suicide, local law enforcement reviewed Roy's electronic communications.[7] Their findings caused officials to more closely examine his relationship with his girlfriend, seventeen-year-old Michelle Carter.[8] The officials discovered that Carter and Roy met in 2011 and dated at various times in the three years that followed.[9] The majority of this relationship and contact took place via text messages and cellphone conversations.[10]

The content of these electronic communications was of particular concern to the police.[11] While Roy had a history of mental health issues and attempted suicides, Carter appeared to have exacerbated her boyfriend's problems by constantly encouraging Roy to kill himself.[12] For example, in the days leading up to his death, Carter and Roy had brainstormed ideas for devices that could produce carbon monoxide.[13] Carter had suggested that Roy "Google ways to make it[,]" and subsequently recommended using

1. Commonwealth v. Carter, 52 N.E.3d 1054, 1056 (Mass. 2016).
2. *Id.*
3. *Id.* at 1059 n.8.
4. *Id.*
5. *Id.*
6. *Id.* at 1056.
7. *Id.* at 1057.
8. *Id.* at 1056–57.
9. *Id.* at 1057.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 1057 n.4.

a generator.[14] The next day, Carter sent Roy a text promising that she would stay up with him if he wanted to kill himself that night.[15] When Roy responded that he wished to wait, Carter replied, "You can't keep pushing it off."[16] Over text, Carter promised to take care of Roy's family after his death, and she threatened to get him help unless Roy went through with his suicide plan.[17] She also recommended that he "go in a quiet parking lot" to kill himself.[18] Finally, the morning before Roy committed suicide, Carter sent increasingly demanding texts to Roy.[19] For example, she told him, "You keep pushing it off and you say you'll do it but u [sic] never do. Its [sic] always gonna [sic] be that way if u [sic] don't take action . . . . You're just making it harder on yourself . . . , you just have to do it . . . ."[20]

While these messages may seem incriminating, none of these texts truly convinced Judge Lawrence Moniz to find Carter guilty of involuntary manslaughter. In a widely publicized decision,[21] Judge Moniz explained that Roy was in fact responsible for his own death in the time period leading up to his suicide.[22] Judge Moniz found that Roy, who struggled with mental health problems, "took significant actions of his own towards" ending his life.[23] These actions included researching methods of suicide, securing a generator, obtaining a water pump, placing his truck in an unnoticeable area, and turning on the pump.[24] However, Judge Moniz stressed that Roy "br[oke] that chain of self-causation by

14. *Id.*
15. *Id.* at 1057 n.3.
16. *Id.* at 1057.
17. *Id.* at 1058 nn.5–6.
18. *Id.* at 1058 n.6.
19. *Id.* at 1057 n.4.
20. *Id.*
21. *See, e.g.*, Katherine Q. Seelye & Jess Bidgood, *Guilty Verdict for Young Woman Who Urged Friend to Kill Himself*, N.Y. TIMES (June 16, 2017), https://www.nytimes.com/2017/06/16/us/suicide-texting-trial-michelle-carter-conrad-roy.html.
22. Dan Glaun, *Michelle Carter Trial: Watch Guilty Verdict Being Read by Judge Lawrence Moniz*, MASSLIVE (June 15, 2017), http://www.masslive.com/news/index.ssf/2017/06/verdict_reached_in_michelle_ca.html.
23. *Id.*
24. *Id.*

exiting the vehicle. He t[ook] himself out of the toxic environment that it ha[d] become."[25]

It was then that Carter told Roy to return to the truck and finish the job, even knowing Roy's history and his fears. At that exact moment, Judge Moniz reasoned, Carter became responsible for Roy's life.[26] Judge Moniz found that "instructing Mr. Roy to get back in the truck constituted . . . wanton and reckless conduct by Ms. Carter," which created a situation where it was highly likely that substantial harm would befall Roy.[27]

The court found that Carter's instructions to "get back in" the truck created the circumstances that threatened Roy's life.[28] The court held that, therefore, Carter had "a duty to take reasonable steps to alleviate the risk," the failure of which can result in a charge of manslaughter under Massachusetts law.[29] Judge Moniz found it damning that Carter took no such steps, asserting that "[Carter] did not call the police or Mr. Roy's family. . . . She called no one. And finally, she did not issue a simple, additional instruction: Get out of the truck."[30] Instead, Carter simply listened to the sound of the motor and to Roy's coughs as her boyfriend died, obeying her instructions until his last breath.[31] For these reasons, the court found that, "Carter's actions, and also her failure to act, where she had a self-created duty to Mr. Roy since she had put him into that toxic environment, constituted . . . wanton and reckless conduct" sufficient for a verdict of involuntary manslaughter.[32] In February of 2019, the Supreme Judicial Court of Massachusetts affirmed Judge Moniz's decision without conditions or reservations.[33] Michelle Carter appealed her conviction to the United States Supreme Court on July 8, 2019, but the certiorari petition was denied.[34]

25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *See* Commonwealth v. Carter, 115 N.E.3d 559 (Mass. 2019).
34. Petition for Writ of Certiorari, Carter v. Commonwealth, No. 19-62 (U.S. July 8, 2019); *see also* Doha Madani, *Michelle Carter, Who Encouraged Boyfriend's Suicide, Appeals to*

This Note argues that the Massachusetts court overreached to criminalize Michelle Carter's conduct. The court based its decision solely on her words of encouragement and enticement to commit a suicide, despite her physical absence and lack of action. It is possible that the court in Massachusetts reached the correct outcome for Michelle Carter's case. But absent legislative guidance on this issue, the court's decision to innovate the law of suicide in *Carter* exhibited a troubling display of judicial activism and was an improper means to achieve such a result. If a state like Massachusetts desires to penalize suicide encouragement, especially encouragement through electronic communications, this legal standard should be articulated clearly and carefully by statute. This would put citizens like Michelle Carter on fair notice of the criminality of such behavior. It would also more accurately reflect the will of the people through their elected representatives, rather than encouraging legislating from the bench.

This Note will proceed as follows: Part I steps back to analyze the historical and current legal landscape of the criminality of both assisting and encouraging suicide. This Part delves into the different categories of culpability within suicide law, concluding that the guilty verdict in *Carter,* based on words alone, was an atypical outcome under the majority of state suicide laws within the United States. Part II examines the outcome in Michelle Carter's specific case, particularly focusing on the court's reasoning in reaching its verdict. This examination argues that the court's decision, in the absence of statutory guidance, demonstrated judicial overreaching. Part III finds that the environment surrounding the issue of encouraging suicide has altered in recent years, particularly exploring the effects of modern developments in technology on criminal suicide law. Due to these changes, this Part argues that updated guidance from legislators is necessary to reflect these changes. Part IV then explores the potential ramifications of the Michelle Carter conviction. The argument in this Part asserts that her conviction will have a major impact on future actions against those who are charged for words that may have swayed another's suicidal thoughts into action. Part V

Supreme Court, NBC NEWS (July 8, 2019), http://www.nbcnews.com/news/us-news/michelle-carter-who-encouraged-boyfriend-s-suicide-appeals-supreme-court-n1027601.

recommends how cases like *Carter* should be approached as digital communications and modern technology continue to advance.

Ultimately, this Note contends that the most suitable way to criminalize suicide encouragement is through clear, carefully written statutory law that is careful to take evolving technology into account and to avoid treading on the First Amendment's protection of speech.

I. THE LEGAL LANDSCAPE OF ENCOURAGING SUICIDE

To better understand the outcome of Michelle Carter's case, it is necessary to first examine the historical and modern perspectives toward those who commit suicide and those who assist the commission of suicide within the scope of criminal law. The following discussion will begin by analyzing the history of suicide in the legal context, followed by an overview of the modern legal approach to suicide, including an explanation of the laws governing suicide assistance, suicide pacts, and suicide encouragement. This landscape of suicide law revealed in the following discussion will clarify that Carter's conviction was an incorrect exercise of judicial activism.

A. A History of Suicide in the Context of Criminal Law

The history of suicide as a punishable action stretches back at least to the ancient Greek era.[35] Speaking on the subject of suicide, Plato said that "[t]hey who meet their death in this way shall be buried alone, and none shall be laid by their side; they shall be buried ingloriously . . . in such places as are uncultivated and nameless, and no column or inscription shall mark the place of their interment."[36]

Similarly, in England, beginning in the mid-thirteenth century, suicide was a felony; if a man ended his own life, he was denied a Christian burial.[37] Instead, his body would be dumped in a pit at a crossroads.[38] Further, his family would be deprived of all its

35. *See* PLATO, LAWS 220 (Benjamin Jowett trans., Prometheus Books 2000) (1892).

36. *Id.*

37. Gerry Holt, *When Suicide Was Illegal*, BBC NEWS (Aug. 3, 2011), http://www.bbc.com/news/magazine-14374296.

38. *Id.*; *see also* Commonwealth v. Mink, 123 Mass. 422, 425 (1877).

belongings, which would instead be turned over to the Crown.[39] Up until 1961, those in England or Wales were still subject to criminal prosecution for merely *attempting* suicide.[40]

The laws in the United States originally followed this same societal condemnation of suicide.[41] Under the common law, the commission of suicide was considered "an unlawful act."[42] During this era, "[i]n the eye of the law, self-destruction . . . [wa]s an offense," and any individual committing suicide would be in violation of the law.[43] As such, suicide under common law was punishable by forfeiture of the offender's property and an ignominious burial of the decedent's body.[44] This practice was similar to the old philosophies and attitudes toward suicide in Greece and England.[45] However, the laws have adjusted as society's general attitude toward suicide has softened. While some jurisdictions in the United States still consider suicide a common-law crime,[46] no states currently maintain any statute criminalizing the commission of suicide. The modern view is that suicide is no longer punishable under American law.[47]

This raises the central question as to whether the assistance or encouragement of suicide should remain illegal. It seems inequitable for courts to punish a defendant who helps a victim

39. *See* Burnett v. People, 68 N.E. 505, 510 (Ill. 1903) ("By the English common law suicide was a felony, and the punishment for him who committed it was interment in the highway with a stake driven through the body, and the forfeiture of his lands, goods, and chattels to the king."); *see also Mink*, 123 Mass. at 425.

40. Holt, *supra* note 37. In fact, in 1956, 613 failed suicide attempts were prosecuted under English law. *Id.* Although most of these individuals were discharged, fined, or put on probation for their actions, thirty-three of these attempts resulted in imprisonment. *Id.*

41. *See* Washington v. Glucksberg, 521 U.S. 702, 711 (1997) ("[F]or over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide.").

42. 83 C.J.S. *Suicide* § 5 (2017); *see also* State v. Reese, 633 S.E.2d 898, 900 (S.C. 2006) *overruled on other grounds by* State v. Belcher, 685 S.E.2d 802 (S.C. 2009).

43. State v. Levelle, 13 S.E. 319, 321 (S.C. 1891).

44. *Suicide*, *supra* note 41.

45. *See supra* notes 35–40 and accompanying text.

46. *Suicide*, *supra* note 42; *see also* Hill v. Nicodemus, 755 F. Supp. 692, 693 (W.D. Va. 1991) ("[A]lthough the state cannot punish a suicide, it in fact remains a common law crime.").

47. *In re* Joseph G., 667 P.2d 1176, 1178 (Cal. 1983) ("[P]unishing suicide is contrary to modern penal and psychological theory." (quoting VICTOR M. VICTOROFF, THE SUICIDAL PATIENT: RECOGNITION, INTERVENTION, MANAGEMENT 173–74 (1982))).

accomplish a perfectly legal act.[48] In fact, there is a modern crusade, known as the Right-to-Die Movement, which actively supports the legalization of physician-assisted suicide.[49] This movement began in the 1970s.[50] Since that time, the issue of whether the terminally ill should have a right to die peacefully on their own terms has been intensely debated.[51] The majority of states have not adopted laws permitting any form of assisted-suicide. But the movement reflects a shift over the last several decades in the overall attitude toward suicide. Thus far, eight jurisdictions have legalized physician-assisted suicide, with nineteen additional states currently considering a physician-assisted suicide statute.[52]

Nevertheless, the taking of one's life is still highly discouraged and disapproved of generally throughout the United States. Most citizens consider the prevention of suicide to be "a legitimate and compelling interest" because "[t]he preservation of life has a high social value in our culture and suicide is deemed 'a grave public wrong.'"[53] Because of this reverence for life and moral aversion to suicide in American society, the majority of states have elected to preserve at least some form of liability in suicides—most notably for those who either assist in or encourage suicide.[54]

48. *See* Brittani Ready, *Words as Weapons: Electronic Communications That Result in Suicide and the Uncomfortable Truth with Criminal Culpability Based on Words Alone*, 36 ST. LOUIS U. PUB. L. REV. 113, 133 (2017).

49. *See* Sarah Childress, *The Evolution of America's Right-to-Die Movement*, FRONTLINE (Nov. 13, 2012), https://www.pbs.org/wgbh/frontline/article/the-evolution-of-americas-right-to-die-movement/.

50. *Id.*

51. *Id.*

52. *Take Action: Death with Dignity Around the U.S.*, DEATH WITH DIGNITY, https://www.deathwithdignity.org/take-action/ (last updated Oct. 10, 2019) [hereinafter *Take Action*]. Nine jurisdictions—California, Colorado, District of Columbia, Hawaii, Maine, New Jersey, Oregon, Vermont, and Washington—have passed Death with Dignity statutes, while Montana has legalized physician-assisted suicide by court decision. *Id.*

53. Von Holden v. Chapman, 450 N.Y.S.2d 623, 625–26 (N.Y. App. Div. 1982); *see also* Wyckoff v. Mutual Life Ins. Co. of New York, 147 P.2d 227, 229 (Or. 1944) ("[S]elf destruction ordinarily involves moral turpitude and is undoubtedly regarded as being wrong."); Bisenius v. Karns, 165 N.W.2d 377, 382 (Wis. 1969) ("There is in the law no sanction for self-destruction . . . .").

54. *See generally* 96 Am. L. Rep. 6th 475 (2014); *see also* ROBERT RIVAS, FINAL EXIT NETWORK, INC., SURVEY OF STATE LAWS AGAINST ASSISTING IN A SUICIDE (2017), http://www.finalexitnetwork.org/Survey_of_State_Laws_Against_Assisting_in_a_Suicide_2017_update.pdf.

B. The Modern Approach to Suicide-Related Crimes

In the context of those who influence the commission of a suicide, it is difficult to draw a line between innocent and culpable conduct.[55] "The boundaries between general advocacy for the right to suicide, encouraging suicide, and assisting suicide are extremely blurred, and conduct often does not fit neatly into just one category."[56] The following discussion will focus on potential classifications that suicide-related behaviors may fall into, including the encouragement of suicide.

1. Assisting suicide

The United States Supreme Court has held that "the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest" under the Constitution.[57] Thus, it is left to the states to decide whether to permit or prohibit an individual from assisting someone who wishes to die. On the whole, although there is dissonance as to what exactly qualifies as criminal "assistance," most state laws explicitly forbid the act of assisting another individual in the commission of suicide.[58]

a. Causing the suicide. Of all offenses pertaining to a person who has involved herself in another's suicide, the highest degree of culpability lies with those who are found to have *caused* the suicide. The principal drafter of the Model Penal Code, Professor Herbert Wechsler, viewed the notion of causing suicide as "a pretty clever way to commit murder."[59] In fact, the Model Penal Code provides that "[a] person may be convicted of criminal homicide for causing

55. *See* Sean Sweeney, Note, *Deadly Speech: Encouraging Suicide and Problematic Prosecutions*, 67 CASE W. RES. L. REV. 941, 948 (2017).

56. *Id.*

57. Washington v. Glucksberg, 521 U.S. 702, 728 (1997) ("The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it.").

58. 96 Am. L. Rep. 6th 475 (2014). Forty states currently have assisted-suicide laws, although it is important to note, for purposes of this Note, that Massachusetts does not have any current legislation prohibiting the assistance or encouragement of suicide. *See* Susan Zalkind, *Is Telling Someone to Commit Suicide a Crime?*, VICE (Sep. 2, 2015), https://www.vice.com/en_us/article/wd7gx5/is-telling-someone-to-commit-suicide-a-crime-902.

59. Catherine D. Shaffer, *Criminal Liability for Assisting Suicide*, 86 COLUM. L. REV. 348, 364 (1986) (quoting *Continuation of Discussion of Model Penal Code*, 36 A.L.I. PROC. 137 (1959)).

another to commit suicide . . . if he purposely causes such suicide by force, duress or deception."[60]

There are many cases where a defendant is charged with murder after physically killing the suicidal victim at the request of the decedent.[61] But the law does not necessarily require that the defendant commit the actual act in order to find that the defendant is guilty as the *cause* of the suicide. In *State v. Lassiter*,[62] the victim worked as a prostitute for the defendant who had physically abused her on multiple occasions.[63] During one such incident, the defendant savagely beat the victim, despite her screams for help.[64] Eventually, she cried out that "she was going to jump," because she could not take any more abuse.[65] The defendant allegedly told her to "go ahead and jump."[66] The victim responded by throwing herself out the window of the apartment building, falling to her death.[67]

The court affirmed the defendant's conviction of murder.[68] The court found that the victim's response to the defendant's actions was reasonably foreseeable, and that the defendant was certainly the but-for cause of the victim's death.[69] "[I]n [the victim's] despair and pain the only visible choices were between being beaten to death and a swifter, more merciful demise at her own hands."[70] The court also found that the defendant's actions constituted causing suicide, rather than the less culpable offense of aiding suicide: the victim's suicide "was provoked entirely by abuse and coercion on the part of the defendant," and was not the result of a "suicidal plan originated with the victim."[71]

60. MODEL PENAL CODE § 210.5 (AM. LAW INST. 1962).

61. *See, e.g.*, People v. Matlock, 336 P.2d 505, 507–08, 513 (Cal. 1959) (holding that the evidence strongly supported that the defendant was guilty of second degree murder where the defendant strangled a man to death allegedly at the decedent's request, but remanding for a new trial on other grounds).

62. *See generally* State v. Lassiter, 484 A.2d 13 (N.J. Super. Ct. App. Div. 1984).

63. *Id.* at 15–16.

64. *Id.* at 16.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 18–19.

69. *Id.*

70. *Id.* at 19.

71. *Id.*

(1) Causation based on non-physical influence. This Note focuses more on the potential criminality of causing suicide through words or psychological distress, as the court in *Carter* found that Michelle Carter did, rather than causing suicide through physical force or duress.

In theory, it is possible for causation of suicide to be established based on such psychological harm. One of the closest cases to this kind of causation is *Kimberlin v. DeLong*.[72] In this case, the defendant placed a homemade explosive device in an abandoned gym bag.[73] The explosive detonated and severely injured a man walking by, resulting in the amputation of his leg.[74] Over time, the victim became depressed and, more than four years after the explosion, committed suicide.[75] Despite the fact that it had been years since the defendant's criminal act, the court held that the suicide was *not* an intervening cause.[76] The defendant remained liable for the wrongful death of the victim.[77] Specifically, the court found that a defendant may be held responsible for any injury or death resulting from a suicide or suicide attempt "where a defendant's willful tortious conduct was intended to cause a victim physical harm and where the intentional tort is a substantial factor in bringing about the suicide."[78]

Thus, *Kimberlin* illustrates that a defendant who is responsible for substantial psychological distress to a victim can be the cause of that victim's suicide. However, *Kimberlin* also indicates that some physical action, like the bombing, is likely still needed to reach this conclusion. In fact, many similar suicide cases illustrate that mere psychological compulsion of a victim to commit suicide, without more, does not qualify as causation.[79] For instance, in *Turcios v. Debruler Co.*, the defendant forced the victim and the victim's family out of their apartment and demolished the building.[80] The court found that the resulting suicide was not foreseeable as a likely

72. *See generally* Kimberlin v. DeLong, 637 N.E.2d 121 (Ind. 1994).
73. *Id.* at 123.
74. *Id.* at 123, 128.
75. *Id.* at 121.
76. *Id.* at 128.
77. *Id.*
78. *Id.*
79. *See, e.g.*, Turcios v. Debruler Co., 32 N.E.3d 1117, 1128 (Ill. 2015).
80. *Id.* at 1121, 1128.

result of the eviction, because "suicide may result from a complex combination of psychological, psychiatric, chemical, emotional, and environmental factors."[81] Overall, it is a "rare case in which the decedent's suicide would not break the chain of causation," even under circumstances where a defendant causes severe emotional or psychological distress.[82]

Additionally, the aforementioned cases were civil claims, demonstrating that causing psychological distress which results in a suicide is not generally criminally punishable. Courts are not likely to establish that a defendant has caused a suicide without some element of physical coercion or actual action on the part of the defendant.

b. Active facilitation of the suicide. Physically assisting a suicide can result in a criminal conviction, depending on the jurisdiction. Criminal assistance charges range from actions as involved as strangling a victim to death at the victim's own request,[83] to more trivial forms of help, such as addressing the envelopes for the victim's suicide notes.[84]

Many courts have also found it to be a crime when the defendant simply provided the means for a victim to commit suicide.[85] On the other hand, some courts have reached the opposite conclusion.[86] For example, one defendant in Michigan encouraged a suicidal acquaintance to purchase a gun, drove the victim to retrieve a weapon and shells from another home, and then left the victim alone with the gun to kill himself.[87] The court found that "the

81. *Id.* at 1128.

82. *Id.* In *Turcios*, it is also significant that the victim's psychological distress resulted from the defendant's *physical action* of demolishing the victim's home, which was still not enough to establish causation of the suicide. *Id.*

83. *See* People v. Matlock, 336 P.2d 505 (Cal. 1959).

84. A grand jury in Texas indicted a teenage girl for aiding her boyfriend's suicide simply because she addressed the envelopes for his suicide notes. AP, *Texan Accused of Aiding Boyfriend's Suicide*, N.Y. TIMES (Nov. 27, 1983), http://www.nytimes.com/1983/11/27/us/texan-accused-of-aiding-boyfriend-s-suicide.html.

85. *See* State v. Marti, 290 N.W.2d 570, 583 (Iowa 1980) (holding that "preparing and providing a weapon for one who is unable to do so and is known to be intoxicated and probably suicidal" constitute actions that support the defendant's conviction of involuntary manslaughter); *see also* State v. Bier, 591 P.2d 1115, 1120 (Mont. 1979) (affirming a judgment of negligent homicide for a defendant's wife's suicide, where the defendant "threw [a] cocked, loaded firearm within reach of his intoxicated wife, challenged her to use it, and allowed her to take the gun off the bed").

86. *See, e.g.*, People v. Campbell, 335 N.W.2d 27 (Mich. Ct. App. 1983).

87. *Id.* at 28–29.

conduct of the defendant [was] morally reprehensible," but, even with the additional action of providing the suicide victim with a weapon, inciting someone to commit suicide was not in itself a crime.[88]

c. Passive assistance of the suicide. In theory, a defendant can be convicted for assisting a suicide after simply standing by and failing to prevent it.[89] This is particularly true where the defendant owes the victim a special duty, such as in a spousal relationship.[90] However, this seems to be a predominately hypothetical view on suicide liability. More relevant for purposes of this Note is that mere verbal communication can establish criminal liability for passive suicidal assistance, so long as those words offer material assistance specific to the suicide in question.[91] Minnesota in particular has dealt with this issue. Its courts have interpreted statutory criminal assistance of suicide to include "either physical conduct *or words* . . . specifically directed at [the victim]," so long as "the conduct or words enabled [the victim] to take her own life."[92] In fact, a Minnesota defendant was recently found guilty of assisting a suicide after providing detailed instructions for a particular method of hanging oneself to a suicidal internet correspondent.[93]

d. Physician-assisted suicide. One topic that has gained particular prevalence and notoriety in the media and within the field of law is that of physician-assisted suicide. Dr. Jack Kevorkian, the pathologist also known as "Dr. Death,"[94] was perhaps the most famous influence behind the movement endorsing the right for the

88. *Id.* at 31.

89. Shaffer, *supra* note 59, at 358–59.

90. *Id.*

91. The Minnesota Supreme Court has found that speech that goes "beyond merely expressing a moral viewpoint or providing a general comfort or support" for suicide and instead "enabl[es] the person to commit suicide" qualifies as criminal assistance of suicide. State v. Melchert-Dinkel, 844 N.W.2d 13, 23 (Minn. 2014); *see also infra* Section III.A.3.

92. State v. Final Exit Network, Inc., 889 N.W.2d 296, 304 (Minn. Ct. App. 2016) (holding that the district court's jury instructions were proper when the instructions defined the assisting of suicide to include words) (emphasis added); *see also Melchert-Dinkel*, 844 N.W.2d at 23.

93. State v. Melchert-Dinkel, No. A15-0073, 2015 WL 9437531, at *5–9 (Minn. Ct. App. Dec. 28, 2015).

94. Dominic Rushe, *'Dr Death' Jack Kevorkian, Advocate of Assisted Suicide, Dies in Hospital*, GUARDIAN (June 3, 2011), https://www.theguardian.com/world/2011/jun/04/dr-death-jack-kevorkian-suicide.

terminally ill to plan their own suicides through medical means. Dr. Kevorkian built a machine, which he operated out of a Volkswagen van, that injected a lethal dose of medication to those who wished to die.[95] He helped end the lives of approximately 130 ill patients.[96] After broadcasting one such death on 60 Minutes, one of the most popular programs on American television, Dr. Kevorkian was convicted of second-degree murder and spent eight years in prison.[97]

While Dr. Kevorkian's story and methods were controversial,[98] his actions sparked a national debate about what kind of death suffering humans are entitled to receive. In the last twenty years, nine states, as well as the District of Columbia, have approved of physician-assisted suicide through either statutory law or court decision.[99] There are also nineteen additional states currently considering such a statute.[100] The vast majority of jurisdictions still hold all forms of assisted suicide to be illegal. But the ongoing physician-assisted suicide debate reflects a modern shift in attitudes toward suicide,[101] as well as toward those who aid suffering individuals with a legitimate desire to initiate their own deaths.

2. Suicide pacts

Another area of suicide law revolves around the curious phenomenon of the suicide pact, defined as a mutual agreement

95. *Id.*

96. Keith Schneider, *Dr. Jack Kevorkian Dies at 83; A Doctor Who Helped End Lives*, N.Y. TIMES (June 3, 2011), http://www.nytimes.com/2011/06/04/us/04kevorkian.html.

97. Rushe, *supra* note 94.

98. For instance, the American Medical Association publicly labeled Jack Kevorkian "a reckless instrument of death," who "pervert[ed] the idea of the caring and committed physician," and whose ideologies and actions "pose[d] a great threat to the public." Kevorkian v. Am. Med. Ass'n, 602 N.W. 233, 235 (Mich. Ct. App. 1999).

99. *See Take Action, supra* note 52. Apart from the District of Columbia, the nine U.S. jurisdictions that have enacted Death with Dignity laws through statute or by court decision include California, Colorado, Hawaii, Maine, Montana, New Jersey, Oregon, Vermont, and Washington. *Id.*

100. *Id.* The following states are considering the enactment of a Death with Dignity law this year or session: Arizona, Arkansas, Connecticut, Delaware, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Michigan, Nevada, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, Rhode Island, Utah, Virginia, and Wisconsin.

101. *See generally supra* Section I.A.

among two or more people to commit suicide together.[102] Participating in a suicide pact creates a tricky question of culpability in the United States. In part, such participation is suicide, which is not illegal; nevertheless, the participation is also partially assisting suicide, which many jurisdictions deem criminal.[103] Thus, the defendant seems both simultaneously guilty as a potential cause of suicide, and innocent as a potential victim of suicide.

Under traditional common law, a survivor of a suicide pact was held to be guilty of murder.[104] However, the modern trend recognizes that criminal punishment does not offer solutions for those in the frame of mind to attempt suicide.[105] Some jurisdictions have abolished liability entirely for survivors of suicide pacts.[106] Others have elected to lessen the criminal culpability for participants in suicide pacts "in which one party provides the means but each individual kills himself independently pursuant to the agreement, or where the pact envisions both parties killing themselves simultaneously with a single instrumentality," finding the survivors liable as mere aiders and abettors to the suicide.[107]

3. Encouraging suicide

This final category presents the overarching question that resides at the heart of this Note—whether the mere encouragement of suicide is illegal. For purposes of this Note, "encouraging"

102. *Suicide Pact*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969).

103. *See* Diana M. Keating, *Existence of a Suicide Pact as a Complete Defense to a Survivor's Criminal Liability*, 21 AKRON L. REV. 245, 250 (1987).

104. 83 C.J.S. *Suicide* § 14 (2018).

105. *See* David S. Markson, *The Punishment of Suicide – A Need for Change*, 14 VILL. L. REV. 463, 473 (1969) ("All modern research points to one conclusion about the problem of suicide—the irrelevance of the criminal law to its solution.").

106. *See* State v. Sage, 510 N.E.2d 343, 345–48 (Ohio 1987) (finding that "if the trier of fact believe[s] defendant's version of the facts . . . [t]he assertion that a death was the result of a mutual suicide pact is a *complete defense* to any crime by the survivor to the pact" (emphasis added)).

107. 83 C.J.S. *Suicide* § 14 (2018); *see also In re* Joseph G., 667 P.2d 1176 (Cal. 1983). In this case, a sixteen-year-old and his friend agreed to drive off a cliff together in an attempt to kill themselves. *Id.* at 1177. While the passenger died, the driver of the car survived with severe injuries. *Id.* at 1177–78. The court found that the survivor was only guilty under the felony of aiding suicide, and not under the traditional charge of murder associated with suicide pacts, because both the victim and the survivor had "commit[ted] their suicidal acts simultaneously and were subject to identical risks of death." *Id.* at 1182–83.

suicide pertains to verbal or written statements made with the intent to persuade or embolden another individual to commit suicide.[108] There are jurisdictions that specifically criminalize the encouragement of suicide.[109] However, those states are relatively few in number, and "many states have moved away from broad prohibitions on 'encouraging' or 'advising' someone to commit suicide and now explicitly require some physical act beyond pure speech."[110]

Overall, the vast majority of jurisdictions are uncomfortable with actually prosecuting the encouragement of suicide.[111] The modern trend is that, in most cases, courts generally look for some form of assistance to accompany the defendant's encouragement of the suicide in order to convict that individual.[112] This is perhaps why Michelle Carter's story is of such particular fascination to the public. Carter's case exhibits a conviction based on a seemingly archaic and outdated rule—guilt for mere suicide encouragement—which resulted from the use of very modern technology—Carter's mobile phone.

II. MICHELLE CARTER'S CURIOUS VERDICT

This Part examines how the assistance or encouragement of suicide fits within the scope of Massachusetts criminal law. The discussion then moves on to examine the court's reasoning in Michelle Carter's case. It concludes that in the absence of statutory guidance the court overstepped its boundaries by finding Michelle Carter guilty of involuntary manslaughter.

108. *See* State v. Melchert-Dinkel, 844 N.W.2d 13, 23 (Minn. 2014) (finding that "the common definitions of 'advise' and 'encourage' broadly include speech that provides support or rallies courage").

109. *See* CAL. PENAL CODE § 401 (West 2010); LA. STAT. ANN. § 14:32.12 (2016); MISS. CODE ANN. § 97-3-49 (West 2014); OKLA. STAT. tit. 21, § 813 (2011); S.D. CODIFIED LAWS § 22-16-37 (2006). These statutes are all similarly worded, broadly making it a crime to in any way "advise" or "encourage" another to commit suicide.

110. Ready, *supra* note 48, at 130.

111. This is evidenced by the fact that only five states have enacted statutes prohibiting suicide encouragement. *See* Markson, *supra* note 109.

112. *See Assisted Suicide Laws in the United States*, PATIENTS RIGHTS COUNCIL, http://www.patientsrightscouncil.org/site/assisted-suicide-state-laws/ (last updated Jan. 6, 2017); *see, e.g.*, People v. Duffy, 595 N.E.2d 814 (N.Y. 1992). The court in this case found the defendant guilty for bringing out a gun and handing the weapon to a suicidal minor, challenging the youth to shoot himself, because it is reckless for "a person who, knowing

A. Involuntary Manslaughter Under Massachusetts Law

Because Massachusetts has no statute criminalizing the assistance or encouragement of suicide, the state's courts generally choose to analyze cases such as Michelle Carter's under a theory of involuntary manslaughter. Under Massachusetts common law,[113] "[i]nvoluntary manslaughter is 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."[114] Conduct is wanton or reckless when it is intentional and highly likely to result in substantial harm to another.[115] Culpable conduct stems from what the defendant knew, or what a reasonable person should have known, under the same circumstances.[116] Wantonness or recklessness can be established by either an intentional act or an intentional omission where the defendant has a duty to act.[117] While, generally, "one does not have a duty to take affirmative action, . . . a duty to prevent harm . . . arises when one *creates a dangerous situation*."[118] Thus, in Michelle Carter's case, the prosecution bore the burden of proving

that another is contemplating immediate suicide, deliberately prods that person to go forward *and* furnishes the means of bringing about death." *Id.* at 815. While assisted suicide statutes are more common, it should also be noted that many governments "appear to be reluctant" to prosecute suicide *assistance*, not just cases of suicide encouragement, and "assistance statutes are seldom enforced." Shaffer, *supra* note 59, at 370–71. Despite high numbers of annual suicides in America, only a handful of cases involving assisted suicide are nationally reported each year. *Id.*

113. Massachusetts has no statute addressing involuntary manslaughter. *See* Commonwealth v. Godin, 371 N.E.2d 438, 442 (Mass. 1975) ("There is no statutory definition of manslaughter. The elements of the crime are derived from the common law.").

114. Commonwealth v. Vanderpool, 328 N.E.2d 833, 836 (Mass. 1975).

115. Commonwealth v. Welansky, 55 N.E.2d 902, 910 (Mass. 1944).

116. Commonwealth v. Carter, 52 N.E.3d 1054, 1060 (Mass. 2016) (citing Commonwealth v. Pugh, 969 N.E.2d 672, 672 (Mass. 2012)).

117. *Pugh*, 969 N.E.2d at 685. For an example of an intentional act resulting in involuntary manslaughter, see Commonwealth v. Walker, 812 N.E.2d 262, 270–71 (Mass. 2004), where the court affirmed a conviction of involuntary manslaughter against a defendant who attempted to drug a victim by providing the victim with an alcoholic drink mixed with sleeping pills. For an example of a conviction of involuntary manslaughter for an omission to act, see Commonwealth v. Levesque, 766 N.E.2d 50 (Mass. 2002). In this case, the court found that defendants who started a fire and simply allowed it to burn may have had a duty to "tak[e] adequate steps either to control [the fire] or to report it to the proper authorities." *Id.* at 57.

118. *Levesque,* 766 N.E.2d at 56 (emphasis added).

that Carter's conduct "(1) was intentional; (2) was wanton or reckless; and (3) caused the victim's death."[119]

B. The Court's Reasoning in Carter

In Michelle Carter's case, the Supreme Court of Massachusetts identified the principal question to be whether an individual can be found guilty of involuntary manslaughter "where the defendant's conduct did not extend beyond words."[120] Carter asserted that her conduct could not be wanton or reckless because she was not physically present at Roy's suicide and the fact that she provided no physical assistance whatsoever.[121] In other words, Carter argued "that verbal conduct can never overcome a person's willpower to live, and therefore cannot be the cause of a suicide."[122] The court disagreed, finding that no cases in Massachusetts explicitly require physical action to indict someone for involuntary manslaughter.[123] Further, the court found that Carter's constant communication with the victim through text messages and phone conversations constituted a "virtual" presence.[124] Ultimately, the Massachusetts Supreme Court affirmed Michelle Carter's indictment for involuntary manslaughter.[125]

Perhaps the most curious aspect of the 2016 *Carter* holding, as well as the later verdict by Judge Moniz in 2017, is the emphasis placed on three words uttered by Carter over the phone before Roy died: "*Get back in*."[126] The court found that the "coercive quality of that final directive" overcame the victim's willpower, which led to Roy "obey[ing] [Carter], returning to the truck, closing the door, and succumbing to the carbon monoxide."[127]

In fact, the court found that there was sufficient evidence of probable cause that Carter *caused* Roy's death because "but for the defendant's admonishments, pressure, and instructions, the victim would not have gotten back into the truck and poisoned himself to

119. *Carter*, 52 N.E.3d at 1061 (footnote omitted).
120. *Id.* at 1056.
121. *Id.* at 1061.
122. *Id.*
123. *Id.*
124. *Id.* at 1061 n.13.
125. *Id.* at 1056 (emphasis added).
126. *Id.* at 1063; Glaun, *supra* note 22.
127. *Carter*, 52 N.E.3d at 1063.

death."[128] Similarly, in the 2017 verdict, Judge Moniz found that Carter's command to return to the truck created the circumstances that led to Roy's death.[129] Because of this, Carter owed her dying boyfriend a duty to at least attempt to save his life.[130] Specifically, "[Carter's] failure to act, where she had a self-created duty to Mr. Roy since she had put him into that toxic environment, constituted . . . wanton and reckless conduct" under Massachusetts' involuntary manslaughter law.[131]

In these rulings, no mention is made of Carter potentially assisting Roy's suicide—only that she encouraged and caused it.[132] It is troubling that three words spoken over the phone, combined with a bundle of text messages, are enough to establish causation on par with other suicide cases, such as when causation was established after a man physically beat his victim to the point that she threw herself out of a window.[133] These other cases indicate that the focus of criminal liability within suicide law leans more heavily on whether mens rea exists, rather than looking to the actus reus of the crime. In Michelle Carter's case, the court seems to reason that Carter's instruction to "get back in" the truck established elements of the crime of involuntary manslaughter. Specifically, Carter's conduct was intentional, was wanton or reckless, and caused Roy's death.[134]

However, these three words alone still seem to be feeble grounds upon which to base a finding that a defendant created the circumstances for a suicide. This contention is bolstered by the fact that Michelle Carter's communications with Roy leading up to his death came only by faceless, electronic means.[135] Without any statutory law to support a criminal conviction for Carter, the court's decision exhibits a form of lawmaking from the bench that exceeds the judiciary's role in American democracy.

128. *Id.* at 1064.
129. Glaun, *supra* note 22.
130. *Id.*
131. *Id.*
132. *See generally Carter*, 52 N.E.3d; Glaun, *supra* note 22.
133. *See generally* State v. Lassiter, 484 A.2d 13 (N.J. Super. Ct. App. Div. 1984); *see also supra* notes 62–71 and accompanying text.
134. Glaun, *supra* note 22.
135. *See Carter*, 52 N.E.3d at 1057.

III. HOW TECHNOLOGY HAS IMPACTED SUICIDE LAW

This Part explores how, if at all, modern technology has transformed the way the law treats both suicide and those who assist or encourage its commission. Since the advent of mobile telephones and the World Wide Web, digital technology has been a pervasive and omnipresent part of life in the United States. Recent studies show that roughly nine out of ten Americans use the Internet, which is a significant increase from the five out of ten Americans who were online in 2000.[136] Going further, more than seventy percent of the American public use at least one social media site.[137] As far as mobile phone usage is concerned, ninety-six percent of the United States population owns a cellphone of some kind.[138] Eighty-one percent of Americans own a smartphone.[139] Of that number, ninety-seven percent of smartphone owners text on a regular basis.[140]

In other words, the Internet and mobile technology dominate the average American's day-to-day life. The following discussion examines current case law and legislation, arguing that the criminal potential for encouraging suicide has changed with the development of new technologies.

A. Modern Cases Similar in Nature to Commonwealth v. Carter

1. United States v. Drew

United States v. Drew is one of the most notorious cases relating to suicide and modern technology.[141] This case began in Missouri with a mother, Lori Drew, who set up a fake profile on MySpace.[142] Drew impersonated a sixteen-year-old boy in order to target thirteen-year-old Megan Meier, who was a classmate of Drew's

136. *Internet/Broadband Fact Sheet*, PEW RESEARCH CENTER, http://www.pewinternet.org/fact-sheet/internet-broadband/ (last updated June 12, 2019).

137. *Social Media Fact Sheet*, PEW RESEARCH CENTER (Jan. 12, 2017), http://www.pewinternet.org/fact-sheet/social-media/ (last updated June 12, 2019).

138. *Mobile Fact Sheet*, PEW RESEARCH CENTER, http://www.pewinternet.org/fact-sheet/mobile/ (last updated June 12, 2019).

139. *Id.*

140. *See U.S. Smartphone Use in 2015*, PEW RESEARCH CENTER (Apr. 2015) http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/.

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

142. *Id.* at 452.

daughter.[143] Masquerading as a teenager, Drew began to flirt with Megan on MySpace and then turned against her, eventually telling Megan that "the world would be a better place without her in it."[144] That same day, Megan ended her own life.[145]

The interesting aspect of this case is that the prosecution did not charge Drew under any kind of bullying, harassment, or suicide laws. This is, in large part, because no Missouri law substantially addressed this kind of online conduct.[146] In fact, Missouri prosecutors refused to file charges against Lori Drew because "the case did not fit into any law."[147] Instead, the federal government rather unconventionally pursued claims alleging that Drew had violated the Computer Fraud and Abuse Act (CFAA).[148] Drew was ultimately not convicted under the CFAA.[149] This rendered *Drew* a prime example of attorneys admirably, but futilely, attempting to conform a law to the facts of a case in the absence of an appropriate statute. In response to *Drew*, Missouri legislators amended the state's laws to include penalties for bullying and harassment specifically through electronic communications.[150]

Applying this case to *Carter*, it is unprogressive for Massachusetts to continue relying on common law involuntary manslaughter theories to convict defendants for another's suicide.[151] In the wake of *Drew*, the Missouri legislators promptly responded to address the criminality of certain behaviors conducted through electronic communications. Likewise, the lawmakers in Massachusetts should also break the silence as to whether encouraging or assisting suicide through electronic communications can be illegal. The legislature should not leave the

143. *Id.*

144. *Id.*

145. *Id.*

146. *Prosecutor: No Criminal Charges in MySpace Suicide*, FOX NEWS (Dec. 3, 2007), http://www.foxnews.com/story/2007/12/03/prosecutor-no-criminal-charges-in-myspace-suicide.html.

147. *Id.*

148. *Drew*, 259 F.R.D. at 451.

149. *See id.* at 468.

150. *See* S.B. 818, 94th Gen. Assemb., 2d Reg. Sess. (Mo. 2008), http://www.senate.mo.gov/08info/BTS_Web/Bill.aspx?SessionType=R&BillID=147; *see also* Associated Press, *Missouri Passes Cyber-Bullying Bill*, L.A. TIMES (May 17, 2008), http://articles.latimes.com/2008/may/17/nation/na-suicide17.

151. While Massachusetts has no statutory suicide laws, it does have a cyberbullying statute. *See* S.B. 2323, 186th Gen. Court, Reg. Sess. (Mass. 2009).

courts to work this out on their own without any guidance. Doing so forces the courts to inappropriately stretch potentially outdated common law to fit this modern scenario.

As a side note, the *Drew* case brings the issue of cyberbullying into the discussion of suicide law. While this Note does not focus on cyberbullying, it should be noted that, since the advent of the Internet, cell phones, and social media networks, cyberbullying has become a growing concern, particularly for minors.[152] However, Michelle Carter's conduct does not fall under the umbrella of typical cyberbullying. While cyberbullying is important in the context of technology and suicide, it does not speak to the narrower issue of suicide encouragement that surrounds Michelle Carter, other than to raise potential concerns as to whether the outcome of *Carter* could create higher culpability for cyberbullies who cruelly, but likely not in actual seriousness, instruct their victims to "kill themselves" or "jump off a bridge."[153]

2. Suzanne Gonzales

While cyberbullying is perhaps the most obvious problem that encompasses technology and suicide, web-assisted suicides are also a troubling concept. Web-assisted suicides result from online forums that encourage suicide and share tips on how to kill oneself. Unsurprisingly, websites like this lend themselves to tragic results, such as in the case of Suzanne Gonzales.[154] Gonzales was a college student who discovered a popular online suicide newsgroup called Alt.Suicide.Holiday, or ASH.[155] After finding this website, Gonzales posted more than 100 messages in the weeks leading up

152. Studies conducted by the Cyberbullying Research Center indicate that cyberbullying victims in middle and high schools have been increasing in numbers over the past decade across the United States. *See* Justin W. Patchin, *Summary of Our Cyberbullying Research (2004–2016)*, CYBERBULLYING RES. CTR. (Nov. 26, 2016), https://cyberbullying.org/summary-of-our-cyberbullying-research.

153. *See infra* Part IV for a discussion of these concerns and other potential ramifications of *Carter*.

154. *See generally* Thelma Gutierrez & Kim McCabe, *Parents: Online Newsgroup Helped Daughter Commit Suicide*, CNN (Nov. 11, 2005), http://www.cnn.com/2005/US/11/04/suicide.internet/index.html.

155. *Id.*

to her death.[156] She gathered information from the site on how to illegally obtain potassium cyanide and how to mix it into a lethal poison.[157] A member of ASH even helped Gonzales write her suicide note.[158]

Gonzales's story is certainly not the first of its kind,[159] but her particular death inspired a reaction on a federal level.[160] Suzy's Law was proposed after Gonzales's suicide as legislation that would prohibit groups like ASH from advising or teaching people how to commit suicide.[161] However, Suzy's Law has been introduced no less than three times since Gonzales's death and has never passed.[162] This failure to enact such legislation indicates that the federal government does not ultimately desire to ban discussion, encouragement, or instruction on suicide, either in person or through electronic communications. Applying this to the *Carter* case, it is evident that America's federal lawmakers would rather preserve the freedom of speech and expression through electronic communications, than make conduct such as Michelle Carter's into a federal crime.[163]

3. State v. Melchert-Dinkel

In one recent and particularly relevant case, the Minnesota Supreme Court found that a state statute prohibiting the

156. Julia Scheeres, *A Virtual Path to Suicide / Depressed Student Killed Herself with Help from Online Discussion Group*, SFGATE (June 8, 2003), http://www.sfgate.com/news/article/A-VIRTUAL-PATH-TO-SUICIDE-Depressed-student-2611315.php.

157. *Id.*

158. *Id.*

159. *See, e.g.*, *Point, Click and Die*, NEWSWEEK (June 29, 2003), http://www.newsweek.com/point-click-and-die-138301 (detailing two stories—first, of a young woman who hung herself after finding detailed information about suicide by hanging online; and second, of a fifty-two-year-old woman who used helium gas to overdose after viewing a website that provided instructions on an effective method of suicide by helium); Ian Cobain, *Clampdown on Chatrooms After Two Strangers Die in First Internet Death Pact,* GUARDIAN (Oct. 11, 2005), https://www.theguardian.com/uk/2005/oct/11/socialcare.technology (discussing the new trend of "suicide chat rooms," which allow users to encourage and even instruct other users on suicide methods); Jonathan Owen, *Teens Die After Logging into 'Suicide Chat Rooms'*, INDEPENDENT (Sep. 10, 2006), http://www.independent.co.uk/news/uk/this-britain/teens-die-after-logging-into-suicide-chat-rooms-415386.html ("Pro-suicide websites and chat rooms have been implicated in the deaths of at least 16 young people in the UK in the past few years.").

160. *See* Sweeney, *supra* note 55, at 968.

161. *Id.*

162. *Id.* at 968–69.

163. *See also infra* Section V.A.

encouragement of suicide was unconstitutional under the First Amendment.[164] In *State v. Melchert-Dinkel*, the defendant posed online as a nurse.[165] He responded to various posts on suicide websites.[166] He eventually succeeded in persuading two individuals to kill themselves.[167] Melchert-Dinkel offered his victims sympathy and reassurance in their online conversations, while also describing methods of how to commit suicide by hanging.[168] After his actions were discovered, Melchert-Dinkel was initially convicted on two counts of encouraging suicide under a Minnesota statute.[169] The statute provided that anyone who "intentionally advises, encourages, or assists another in taking the other's own life" was subject to criminal punishment.[170]

On appeal, the court found that the inclusion of both "advises" and "encourages" in the statute was unconstitutional under the First Amendment because this language "broadly include[s] speech that provides support or rallies courage," and neither advising nor encouraging suicide automatically carries a causal connection with the suicide.[171] However, the court also held that the statute was severable and that *assisting* a suicide was still illegal under Minnesota law.[172] Further, the court found that, while encouraging and advising suicide is protected by the First Amendment, mere words could still constitute criminal assistance under the Minnesota statute if a direct, causal link existed between the speech and the suicide.[173] The court reasoned:

164. *See generally* State v. Melchert-Dinkel, 844 N.W.2d 13 (Minn. 2014).
165. *Id.* at 16–17.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.* at 17–19.
170. MINN. STAT. ANN. § 609.215 (West 1998); *see also Melchert-Dinkel,* 844 N.W.2d at 17–19.
171. *Melchert-Dinkel,* 844 N.W.2d at 23.
172. *Id.* at 23–24.
173. *Id.* at 23.

> [Assistance] . . . proscribes speech or conduct that provides another person with what is needed for the person to commit suicide. This signifies a level of involvement in the suicide beyond merely expressing a moral viewpoint or providing general comfort or support. Rather, "assist," by its plain meaning, involves enabling the person to commit suicide. While enablement perhaps most obviously occurs in the context of physical assistance, *speech alone may also enable a person to commit suicide*. Here, we need only note that speech instructing another on suicide methods falls within the ambit of constitutional limitations on speech that assists another in committing suicide.[174]

The court ultimately reversed and remanded Melchert-Dinkel's case to be viewed in light of Minnesota's revised statute with the words "advis[ing]" and "encourag[ing]" removed.[175] Interestingly, Melchert-Dinkel was still convicted on remand for one count of "assisting" suicide because Melchert-Dinkel provided very specific instructions for a hanging method.[176] The court found this qualified as "assistance" because one of his victims chose to hang himself.[177]

Applying this case to the issues raised by *Carter* leads to some compelling discussion. The holding in *Melchert-Dinkel* indicates that the court's reasoning for convicting Michelle Carter of manslaughter—Carter's insistence that her boyfriend "get back in" the truck—would be a violation of the First Amendment because those three words merely constituted encouragement. On the other hand, if Massachusetts were to enact an assisted suicide statute, Michelle Carter's text messages and phone conversations with Roy could, under the court's analysis in *Melchert-Dinkel*, make her liable for *assisting* Roy's suicide: Carter gave Roy advice about committing suicide through carbon monoxide poisoning.[178] Thus,

174. *Id.* (emphasis added).

175. *Id.* at 24–25.

176. State v. Melchert-Dinkel, No. A15-0073, 2015 WL 9437531, at *5–9 (Minn. Ct. App. 2015).

177. *Id.*

178. *See Read Text Messages, Other Evidence from the Trial of Michelle Carter,* WCVB (June 13, 2017), http://www.wcvb.com/article/evidence-from-the-trial-of-michelle-carter/10011731 [https://htv-prod-media.s3.amazonaws.com/files/carter-exhibit-30-1497356322.pdf]. For instance, in planning the suicide via text together, Carter texted Roy that, "generators produce a lot of CO, so if you just turn it on in your car, take some beneryls [sic] before just incase, [sic] and then you'll breathe it in and pass out and die very quickly and peacefully with no pain at all." *Id.* However, while there are numerous instances of Carter

Carter's words may actually have crossed the bridge from mere encouragement to assistance under the *Melchert-Dinkel* standard because she gave her boyfriend significant advice pertaining to carbon monoxide poisoning. However, in the absence of statutory law, the *Carter* court overreached in using common law to hold Michelle Carter guilty based on words alone.

B. Physical Versus Virtual Presence

One of Michelle Carter's main arguments was that her conduct could not qualify as involuntary manslaughter because she was not "physically present when the victim killed himself."[179] The court responded that nothing in Massachusetts' case law requires that the defendant be physically present in order to establish involuntary manslaughter.[180] However, the court also neglected to mention that all similar suicide cases in Massachusetts involved a defendant who was physically present at the time of the victim's death.

1. Examples in Massachusetts case law of encouraging suicide

The laws behind the encouragement of suicide in Massachusetts stretch back more than 200 years to the 1816 case of *Commonwealth v. Bowen*.[181] George Bowen was a prisoner on trial for murder after successfully encouraging Jonathan Jewett, a fellow inmate, to hang himself the night before Jewett's scheduled execution.[182] The court held that the most vital fact to examine was whether Bowen was "instrumental in the death of *Jewett*, by advice or otherwise."[183] The central question for the jury was: "Did [Bowen's] advice *procure* the death of *Jewett*?"[184] The Commonwealth presented evidence that Bowen had consistently

giving Roy such general advice, it would be difficult to prove that she assisted Roy's suicide because her texts arguably did not give Roy specific or detailed instructions as to how to commit suicide. *Id.*

179. Commonwealth v. Carter, 52 N.E.3d 1054, 1061 (Mass. 2016).

180. *Id.*

181. *See generally* Commonwealth v. Bowen, 13 Mass. 356 (1816).

182. *Id.* at 356.

183. *Id.* at 359.

184. *Id.* (emphasis added).

urged Jewett to take his death into his own hands.[185] Speaking to the jury, the court stated:

> [I]t is in man's nature to revolt at the idea of self-destruction. Where a person is predetermined upon the commission of this crime, the seasonable admonitions of a discreet and respected friend would probably tend to overthrow his determination. On the other hand, the counsel of an unprincipled wretch, stating the heroism and courage the self-murderer displays, might induce, encourage, and fix the intention, and ultimately procure the perpetration of the dreadful deed. And, if other men would be influenced by such advice, the presumption is, that *Jewett* was so influenced. He might have been influenced by many powerful motives to destroy himself. Still, the inducements might have been insufficient to procure the actual commission of the act, and one word of additional advice might have turned the scale.
>
> If you are satisfied that *Jewett,* previously to any acquaintance or conversation with the prisoner, had determined within himself that his own hand should terminate his existence, and that he esteemed the conversation with the prisoner, so far as it affected himself, as mere idle talk, let your verdict say so. But, if you find the prisoner encouraged and kept alive motives previously existing in *Jewett's* mind, and suggested others to augment their influence, you will decide accordingly.
>
> . . . [T]here is no period of human life which is not precious as a season of repentance. The culprit, though under sentence of death, is cheered by hope to the last moment of his existence.[186]

Ultimately, the jury in *Bowen* returned a verdict of not guilty.[187] The jury found that Bowen's encouragement was not the *procuring cause* of Jewett's suicide.[188] This case set a significant precedent in Massachusetts that "the state must prove beyond a reasonable doubt that the suicide counselor actually 'procured' or was responsible for the act itself."[189] Additionally, it is of import to note that Bowen's cell was directly adjacent to Jewett's cell, which placed the two men "in such a situation that they could freely

185. Jack Tager, "*Murder by Counseling": The 1816 Case of George Bowen (Northampton)*, 38 HIST. J. MASS. 102, 104 (2010).

186. *Bowen,* 13 Mass. at 359–60.

187. *Id.* at 360–61.

188. *Id.*

189. Tager, *supra* note 185.

converse together" and where Bowen was able to "repeatedly and frequently advise[] and urge[] Jewett to destroy himself."[190] Nevertheless, in spite of Bowen's physical presence and proximity to the victim prior to Jewett's suicide, the jury still refused to impose a guilty verdict.

In *Commonwealth v. Atencio*, two defendants were found guilty of involuntary manslaughter under Massachusetts law after playing a game of "Russian roulette."[191] The two defendants had both taken turns pulling the trigger on a revolver containing only one cartridge, with no result.[192] However, the game came to a tragic end when the third member of their party took his turn in the game, dying from a self-inflicted gunshot wound to the head.[193] The court found that "the concerted action and cooperation of the defendants in helping to bring about the deceased's foolish act" qualified as wanton or reckless conduct.[194] Notably, the court found that no duty existed for the defendants to *prevent* the third party from playing Russian roulette; however, the defendants' "mutual encouragement in a joint enterprise" breached a duty "not to cooperate or join with him in the 'game.'"[195]

Similarly, in the case of *Persampieri v. Commonwealth,* the court affirmed a man's involuntary manslaughter indictment for his wife's self-induced death.[196] The defendant had told his wife that he wished for a divorce.[197] She responded by threatening to commit suicide.[198] At this point, her husband claimed that she was too cowardly to go through with such an endeavor.[199] He reminded her that she had failed to complete her attempted suicides on no less than two previous occasions.[200] The defendant then instructed his wife to retrieve the rifle in the kitchen.[201] She did so, and at her request, the defendant loaded the weapon for her, since she

190. *Bowen,* 13 Mass. at 356.
191. *See generally* Commonwealth v. Atencio, 189 N.E.2d 223 (Mass. 1963).
192. *Id.* at 224.
193. *Id.*
194. *Id.* at 225.
195. *Id.*
196. *See generally* Persampieri v. Commonwealth, 175 N.E.2d 387 (Mass. 1961).
197. *Id.* at 389.
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*

struggled to load it herself.[202] He then *handed the rifle to his wife*, noting that the safety was off.[203] She placed the weapon on the floor between her legs, with the muzzle against her forehead, but was unable to reach the trigger in such a position.[204] The defendant suggested that she remove her shoes in order to reach the trigger.[205] After removing one of her shoes, the rifle went off, and the defendant's wife died.[206]

The court found that the defendant's conduct was sufficiently wanton or reckless to satisfy a conviction of involuntary manslaughter because:

> [I]nstead of trying to bring [his wife] to her senses, [the defendant] taunted her, told her where the gun was, loaded it for her, saw that the safety was off, and told her the means by which she could pull the trigger . . . thus show[ing] a reckless disregard of his wife's safety and the possible consequences of his conduct.[207]

The cases of *Bowen, Atencio,* and *Persampieri* all have one crucial element in common. In these three cases, all of which were relied on by the court in *Carter* or by the court in Michelle Carter's 2017 verdict, the defendants had some kind of physical presence at the time of each respective decedents' suicides. What is more, the defendant in *Persampieri* actually physically assisted his wife with her suicide. Thus, while the *Carter* court was correct that Massachusetts common law for involuntary manslaughter does not explicitly require a physical presence, the cases where a Massachusetts defendant was convicted for involuntary manslaughter after encouraging or assisting a suicide all strongly imply a physical presence requirement.

2. Virtual presence

One could argue that if a physical presence was necessary to convict Michelle Carter, she still qualifies due to her *virtual* presence. Indeed, the court in *Carter* held that, "[a]lthough not physically present when the victim committed suicide, the constant

202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.* at 390.

communication with him by text message and by telephone leading up to and during the suicide made the defendant's presence at least virtual."[208]

This raises the key question as to whether such a virtual presence can be equated with an actual presence. On the one hand, courts have held that, for purposes of the Confrontation Clause, a virtual presence is not equivalent to a physical presence.[209] On the other hand, in the context of defamation, courts have found that an online presence is just as important, or "perhaps more important," than a person's physical presence.[210]

Even more concerning than the finding that virtual presence can be more important than physical presence is the line-drawing issue. This issue may come into play when courts consider whether all virtual presences are equal for suicide encouragement, or if some virtual presences should be labeled as more culpable than others. For instance, it is unclear where the greatest liability lies for an individual having a conversation with a suicidal acquaintance. There are myriad ways to communicate with others in the digital age. It will be left to the courts to decide whether texts, phone calls, Skype conversations, tweets, and YouTube comments will weigh equally on the scale of blameworthiness under modern suicide law. Overall, this area of the law is ambiguous. For that reason, in the context of suicide law, the court's decision in *Carter* to offhandedly equate a virtual presence with a physical presence lacks any settled precedent.

IV. FUTURE IMPLICATIONS

While Michelle Carter's case is certainly not binding in federal court or in other state jurisdictions, it has been widely publicized on a national level.[211] If other courts find this case persuasive in the future, it could have troubling ramifications in the realm of suicide

208. Commonwealth v. Carter, 52 N.E.3d 1054, 1061 n.13 (Mass. 2016).

209. State v. Rogerson, 855 N.W.2d 495, 504 (Iowa 2014) (finding that two-way videoconferencing technology does not satisfy the Sixth Amendment because "[t]echnology has changed since the late eighteenth century, but human nature has not," and "no form of virtual testimony can fully satisfy" the experience of in-person encounters).

210. Bouveng v. NYG Capital LLC, 175 F. Supp. 3d 280, 343 (S.D.N.Y. 2016).

211. *See, e.g.*, Kalhan Rosenblatt, *Suicide Case, Sentenced to 15 Months in Jail,* NBC NEWS (Aug. 3, 2017), https://www.nbcnews.com/news/us-news/michelle-carter-convicted-texting-suicide-case-sentenced-15-months-jail-n789276.

litigation. In particular, the fact that this case hinges on Carter's simple instruction to her boyfriend to "get back in" his car has the potential to open a Pandora's Box of criminal liability. The following discussion will examine the possible ramifications of the *Carter* holding, particularly focusing on concerns regarding the First Amendment's protection of speech.

A. Freedom of Speech and Expression

The First Amendment provides that, "Congress shall make no law . . . abridging the freedom of speech."[212] This constitutional protection extends to spoken and written words, as well as expressive conduct.[213] However, the First Amendment does not provide an unrestrained right to speech. Forms of criminal speech falling outside the shelter of the First Amendment include, but are not limited to, obscenity, true threats, defamation, fighting words, and speech inciting or integral to criminal conduct.[214] Of course, the encouragement of suicide does not fall under any of those categories—not even incitement or speech integral to criminal behavior, since suicide is no longer a crime in the United States.[215]

In the wake of *Melchert-Dinkel*,[216] the constitutionality of any statutory law prohibiting the encouragement of suicide may potentially be called into question, particularly because these laws are worded similarly and in broad terms.[217] If statutes of this type continue to be found in violation of the First Amendment, they must pass a strict scrutiny test.[218] Under this test, a content-based

212. U.S. CONST. amend. I.

213. David L. Hudson, *Expressive Conduct and Symbolic Speech*, LEGAL ALMANAC: THE FIRST AMENDMENT: FREEDOM OF SPEECH § 2:9 (2012).

214. *See* Brent Christensen, *Sacrifice, Lies, and the First Amendment: How the Supreme Court Struck Down the Stolen Valor Act*, 25 DCBA BRIEF 32, 33 (2012).

215. *See* State v. Melchert-Dinkel, 844 N.W.2d 13, 19–20 (Minn. 2014) (finding that the encouragement of suicide does not fall under the scope of incitement or speech integral to criminal conduct because suicide was "not illegal in any of the jurisdictions at issue"). Although speech encouraging suicide can result in harm, "the Supreme Court has never recognized an exception to the First Amendment for speech that is integral to merely harmful conduct, as opposed to illegal conduct." *Id.*

216. *See supra* Section III.A.3.

217. *See supra* note 109. These statutes all tend to contain broad wording similar to the Minnesota statute at issue in *Melchert-Dinkel*, imposing criminal liability for anyone who willfully advises or encourages another to commit suicide. *See supra* note 105.; *see also Melchert-Dinkel*, 844 N.W.2d at 16.

218. *See* Brown v. Entm't Merch. Ass'n, 564 U.S. 786, 799 (2011).

restriction of protected speech is only permitted if the restriction: "[(1)] is justified by a compelling government interest and [(2)] is narrowly drawn to serve that interest."[219]

While many courts would agree that preventing suicide is a compelling interest,[220] legislators face the lofty challenge of narrowly tailoring the language of the statute to serve the interest of preventing suicide. This is where the Minnesota statute failed in *Melchert-Dinkel*.[221] The United States Supreme Court has emphasized that "a law rarely survives such scrutiny."[222]

1. Where do we draw the line?

As with many controversial holdings, a concern at the heart of the Michelle Carter case is where exactly citizens should expect the future line to be drawn between innocent and guilty conduct in electronic suicide discussions. Theoretically, this could be a slippery slope for courts to tread down.

For instance, in response to a particularly obnoxious YouTube video or controversial blog post, it certainly would not be uncommon to see a slew of comments encouraging the posters of such content to "do the world a favor" and kill themselves. While comments like this, whether made in seriousness or jest, are truly unkind and can end in tragedy,[223] it is likely not in the country's best interest to censor online and electronic speech encouraging suicide because of the line-drawing confusion such laws would elicit. As another example, it is possible that a well-meaning telephone operator offering comfort and sympathy on a suicide hotline could face criminal charges for encouraging suicide if the individual on the other end of the phone actually killed herself after listening to the operator's particular words.

219. *Id.*

220. *E.g.*, *Melchert-Dinkel*, 844 N.W.2d at 22 (holding that the government "has a compelling interest in preserving human life"). It should be noted, of course, that preventing suicide may not always remain quite as compelling of an interest as it is today, especially as societal attitudes condemning suicide continue to shift, and more physician-assisted suicide statutes are enacted. *See supra* notes 49–52 and accompanying text.

221. *Melchert-Dinkel*, 844 N.W.2d at 24.

222. Burson v. Freeman, 504 U.S. 191, 200 (1992).

223. *See* Michael E. Miller, '*Killed Myself. Sorry.': Transgender Game Developer Jumps Off Bridge After Online Abuse*, WASH. POST (Apr. 28, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/04/28/killed-myself-sorry-transgender-game-developer-jumps-off-bridge-after-online-abuse/?utm_term=.595e77a1ef9e.

These hypothetical illustrations are admittedly distinguishable from the specific situation in *Carter* of a defendant personally urging their long-term boyfriend to get back in a vehicle filled with carbon monoxide and complete his attempted suicide. But the outcome in *Carter* undoubtedly sets a troubling precedent for electronic speech. The holding indicates that words alone, even uttered by a faraway speaker over the phone or transmitted from a long distance through text messages, may qualify as direct causation of a suicide.

The court in *Carter* refused to draw any kind of line between speech and physical action under the involuntary manslaughter criteria.[224] This is problematic. As discussed earlier,[225] the attitude toward suicide has shifted for many citizens in the last few decades. Based on society's softened attitude toward suicide, the state legislature should respond by creating some kind of explicit boundaries between culpable and non-culpable conduct in order to clarify what that state's attitude is toward suicide. If not, there is danger that the common law or poorly-worded encouragement statutes will ensnare innocent people and innocent conduct in their widely cast net.

2. The chilling effect

In particular, even if conduct encouraging suicide is not criminalized, the confusion and outrage that many have expressed regarding Michelle Carter's case[226] could create unintended consequences. The holding could discourage people from engaging in perfectly lawful discussions and conduct for fear of being punished, effectively chilling speech surrounding suicide.[227] Even if preventing suicide is a compelling government interest, it cannot reasonably be any state's intent to discourage all open discussions and conversations relating to suicide and end-of-life

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

225. *See supra* Section I.A.

226. *See, e.g.*, Robby Soave, Opinion, *Michelle Carter Didn't Kill with a Text*, N.Y. TIMES (June 16, 2017), https://www.nytimes.com/2017/06/16/opinion/michelle-carter-didnt-kill-with-a-text.html (raising concerns that in Carter's case, "the court . . . dealt a blow to the constitutionally enshrined idea that speech is not, itself, violence").

227. *See* Sweeney, *supra* note 55, at 973.

decisions. Suicide is certainly a heavy and often disturbing topic of discussion, but "[i]f there be time to expose . . . [and] avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[228]

B. The Future of Assisted Suicide Groups

Another potential dilemma involves whether the court's reasoning in *Carter* will affect the future of assisted suicide for the terminally ill. For example, "can a doctor (or close friend or loved one) talk to a terminally ill patient (or friend) if that mentally capable person has made the decision to end their life? Dare they agree in writing . . . with the loved one's decision?"[229] Of course, in *Carter,* the court takes care to state that Michelle Carter's case "is not about a person seeking to ameliorate the anguish of someone coping with a terminal illness and questioning the value of life" nor "about a person offering support, comfort, and even assistance to a mature adult who . . . has decided to end his or her life."[230] However, this is dicta.[231] Thus, theoretically, those offering advice or encouragement on end-of-life decisions, whether in-person or through more remote forms of communication like text messages, may be subject to criminal prosecution in any jurisdiction that finds the reasoning in *Carter* to be persuasive. This notion becomes particularly unsettling in the context of online groups, such as suicide chat rooms or forums.[232] How far does the liability for suicide encouragement extend? Could every member of such groups who dares to submit a comment that casts suicide in a positive light be charged with criminal conduct?

228. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

229. Philip Nitschke, Opinion, *Euthanasia by Text? Michelle Carter Case Impacts More Than Just Free Speech*, SYDNEY MORNING HERALD (June 20, 2017, 12:15 AM), http://www.smh.com.au/comment/euthanasia-by-text-lessons-from-the-michelle-carter-case-20170625-gwxzoo.html.

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

231. *Id.* "A statement is dictum if it could have been deleted without seriously impairing the analytical foundations of the holding and—being peripheral—may not have received the full and careful consideration of the court that uttered it," and therefore is not binding. 21 C.J.S. *Courts* § 223 (2019). Because they would not impair the foundations of the court's holding, the statements made in *Carter* describing what the case "is not about" fit within this definition of dictum.

232. *See supra* notes 159–163 and accompanying text.

Such a broad and uncertain scope of liability for suicide encouragement flies in the face of the First Amendment, particularly for those who frequently discuss the issue of suicide in group settings. While most would agree that romanticizing suicide is a disturbing use of one's right to freedom of speech, suicide is also an important area of discussion and debate. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[233]

V. SOLUTIONS

"The remedy for this situation is in the Legislature."[234] The underlying argument in this Note is that current statutory laws prohibiting the encouragement of suicide and common law suicide principles such as those detailed in Michelle Carter's case are potentially outdated. There is no settled precedent for words or psychological coercion alone qualifying as the cause for suicide.[235] And now, modern technology has enabled people to interact and communicate with each other with an ease and at a magnitude that would have been incomprehensible to lawmakers in the earlier days of suicide litigation. It is reasonable to assume that as time goes on, technology will only become a more inescapable part of life, and cases like Michelle Carter's will not be uncommon.

A. The Need to Address Encouragement of Suicide in Statutory Suicide Laws

Because of the concerns of modern technology implicating the rights of free speech, this Note agrees with the *Melchert-Dinkel* standard that penalizing someone for another's suicide based broadly on encouragement, without more, is a violation of the First

233. Texas v. Johnson, 491 U.S. 397, 414 (1989). This First Amendment protection covers even words that may cause psychological and emotional pain. *See* Snyder v. Phelps, 562 U.S. 443 (2011). "Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and . . . inflict great pain. . . . As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Id.* at 460–61.

234. People v. Campbell, 335 N.W.2d 27, 31 (Mich. Ct. App. 1983). Prefacing the suggestion of legislative remediation in this case, the court found that "[w]hat conduct constitutes the crime of incitement to suicide is vague, and undefined and no reasonably ascertainable standard of guilt has been set forth." *Id.*

235. *See supra* Section I.B.1.a.(1).

Amendment.[236] This standard strikes the right balance because, while criminalizing words encouraging suicide, it still requires the words to actually enable the suicide through specific instructions or other verbal aid.

This Note acknowledges, of course, that some states desire to maintain their traditional suicide encouragement provisions; however, every state should closely examine such provisions to ensure that they are not overly inclusive. Any law criminalizing the encouragement of suicide must likely pass strict scrutiny, requiring the states to narrowly tailor the statute's language to the compelling government interest of preventing suicide.[237] In addition, it is important for states to make clarifications in all assisted-suicide laws whether words alone can qualify as assistance, or if physical action or presence is required. One suitable example of this is the Illinois statutory law on suicide inducement, which provides:

> (a) A person commits inducement to commit suicide when he or she does either of the following:
>
> > (1) Knowingly coerces another to commit suicide and the other person commits or attempts to commit suicide as a direct result of the coercion, and he or she exercises substantial control over the other person through (i) control of the other person's physical location or circumstances; (ii) use of psychological pressure; or (iii) use of actual or ostensible religious, political, social, philosophical or other principles.
> >
> > (2) With knowledge that another person intends to commit or attempt to commit suicide, intentionally (i) offers and provides the physical means by which another person commits or attempts to commit suicide, or (ii) participates in a physical act by which another person commits or attempts to commit suicide.[238]

236. *See supra* notes 164–177 and accompanying text.

237. *See* Sweeney, *supra* note 55, at 974–75. Sweeney offers several recommendations for how to narrowly tailor a statute prohibiting the encouragement of suicide. *Id.* These include: (1) explicitly including a high mens rea requirement, such as "knowingly"; (2) requiring some degree of interaction between the defendant and the victim; and (3) requiring prosecutors to show both a subjective and objective component to prove culpability in the defendant's conduct. *Id.*

238. 720 ILL. COMP. STAT. 5/12-34.5 (2011).

While this statute is not perfect, the Illinois legislature has done an admirable job in attempting to establish more definitive and straightforward protocols for which kinds of behavior lead to suicide liability. In particular, Illinois law indicates that words alone may be enough to criminalize suicide encouragement *if* the suicide is a "direct result" of the inducement, and *if* the encourager has "substantial control" over the victim, such as through the power of "psychological pressure."[239] The language of the statute narrows the scope of criminal behavior. It reduces the line-drawing problems[240] of common-law jurisdictions like Massachusetts, or of states with overly broad statutes prohibiting all forms of suicide encouragement. Thus, if states desire to punish suicide encouragement, the legislature should follow the example of Illinois. It should enact statutes with clear-cut suicide encouragement guidelines, dictating when one's words of support or reassurance become criminal.

B. The Need to Address Electronic Communications in Statutory Suicide Laws

Many states, of course, have already enacted suicide legislation, but they should take the influence of cyberspace into account. They should consider whether that realm is pervasive enough to necessitate amendments. Specifically, state legislatures should consider enacting or revising their statutes to explain where electronic communications fit within the context of encouraging or assisting suicide. If the act of encouraging suicide by electronic means will constitute a crime, then statutory law should be clear on that point in order to provide fair notice.[241] Suicide should not be litigated under a theory of common law involuntary manslaughter, like it was in Michelle Carter's case. Instead, states should specifically create legislation pertaining to suicide assistance and possibly suicide encouragement. Within these statutes, states should address whether physical action or a physical presence is

239. *Id.*

240. *See supra* Section IV.A.1.

241. McBoyle v. U.S., 283 U.S. 25, 27 (1931) ("[I]t is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.").

needed, or if a virtual presence can be sufficient in the context of modern technology. Above all, states should enact careful legislation to provide clear guidelines on exactly what conduct, virtual or not, is lethal within suicide law.

Some observers have argued that legislatures do not need to make special statutes just to incorporate electronic communications into current law. During a 1996 presentation, Judge Frank H. Easterbrook described leaders at the University of Chicago Law School as "proud" that the school did not offer a course covering "The Law of the Horse."[242] Obviously, Easterbrook did not say this to insult those who specialize in legal battles surrounding livestock; instead, his remark reflected the opinion that legal areas of study "should be limited to subjects that c[an] illuminate the entire law. . . . Only by putting the law of the horse in the context of broader rules about commercial endeavors c[an] one really understand the law about horses."[243] Easterbrook applied this principle to the Internet, implying that most conduct in cyberspace is easily classifiable under already-existing legal principles.[244]

One could argue that the law of the horse applies to statutory law as well. In other words, perhaps no statutes at all should specifically address digital behavior. Instead, maybe all actions conducted electronically should be examined within the scope of more general, existing laws. On the other hand, it is evident that Judge Easterbrook, speaking at a conference in 1996, simply could not have foreseen the way that technology and the Internet would come to pervade every corner of the modern world in such a brief span of time. Thus, it is reasonable to argue that his point comparing the legal issues surrounding technology and cyberspace to "the law of the horse" is rather antiquated.

While maintaining the rigidity of certain laws, constitutions, and statutes within the United States is an imperative duty of the legislature, no one can deny that emerging technologies can

242. Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, U. CHI. LEGAL F. 207, 207 (1996).

243. *Id.* at 207–08.

244. *Id.*; *see also* JAMES GRIMMELMANN, INTERNET LAW: CASES & PROBLEMS 9 (7th ed. 2017) ("To this day, 'the law of the horse' is a code phrase among scholars for the idea that there's nothing new here, that studying Internet law is nothing more than an exercise in applying unrelated bodies of law to the Internet, with no unifying doctrines or truly distinctive insights.").

sometimes, and perhaps often do, change the rules of the game. That is the biggest concern about Michelle Carter's case. The judicial branch took it upon itself to expand the state's common law suicide theories to include culpability for words alone. It did so without seriously considering the difference between a virtual and physical presence. It arguably did so without any valid precedent or statute to justify such a holding under the specific circumstances. If the state of Massachusetts wishes to criminalize behavior like Carter's, then the legislature should enact a clear and narrowly-tailored statute. The statute should address the criminality of both suicide assistance and suicide encouragement, as well as where electronic communications fall within the scope of culpability for such behavior.

Ultimately, the decision to expand the law under these circumstances should not have been left in judicial hands. The Constitution of the United States vests specific governmental powers in three branches of government, which are each meant to remain distinct and separate.[245] Generally speaking, the judiciary's role is to apply and interpret laws created by the people's elected representatives, not to legislate from the bench. Thus, it is essential that "judges resist the temptation to become politicians in robes."[246] The Founders of this nation recognized that, "[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator."[247] While it is important to most states, including Massachusetts, to deter any kind of suicide-enabling behavior, this endeavor should begin with the legislature.

As for other jurisdictions that already have such suicide statutes, these laws should potentially be amended to narrow any overly inclusive language that could violate the First Amendment. They should address the issues of electronic communications and virtual presence. Such laws cannot remain generalized. Stretching current law in order to hold an individual accountable for another person's suicide is an ill-advised endeavor for courts to pursue.[248]

245. *See* U.S. CONST. art. I, § 1; *id*. art. II, § 1, cl. 1; *id.* art. III, § 1.

246. Diarmuid F. O'Scannlain, Lecture, *Politicians in Robes: The Separation of Powers and the Problem of Judicial Legislation*, 101 VA. L. REV. ONLINE 31, 49 (2015).

247. THE FEDERALIST NO. 47, at 302–03 (James Madison) (Henry Cabot Lodge ed., 1904).

248. *See generally supra* Section III.A.1.

In the case of *Drew,* the Missouri lawmakers understood that the state's harassment laws needed amendments to compensate for changing technologies.[249] Likewise, states should amend or enact suicide laws to meet the needs of the digital era.

CONCLUSION

The purpose of this Note is not to defend Michelle Carter. Suicide remains a devastating problem in the United States,[250] and Carter's conduct is undoubtedly "morally reprehensible" to many American citizens.[251] Indeed, perhaps a carefully constructed suicide statute could have led a court to reach the same conclusion as to Michelle Carter's guilt under the law. However, in the absence of such a statute, Michelle Carter's verbal advisement and encouragement of her boyfriend's suicide solely through electronic communications, without anything more, should not have resulted in a guilty verdict under Massachusetts common law.

It is particularly telling that in reaching Michelle Carter's guilty verdict, Judge Moniz had to rely on a *200-year-old case*,[252] instead of on any modern law that reflects new technologies and the current attitudes toward suicide. Ultimately, Carter's conviction represents a judicial decision to expand the state's suicide law by not requiring physical presence or assistance to find the defendant guilty without going through the proper means—the legislature.

Thomas Jefferson once asserted that,

> laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of

249. *See supra* notes 147–150 and accompanying text.

250. Suicide is the tenth leading cause of death for Americans in general, and it is the second leading cause of death for individuals specifically between ages ten and thirty-four. *See 10 Leading Causes of Death by Age Group, United States – 2014*, NAT'L CTR. FOR INJURY PREVENTION & CONTROL, https://www.cdc.gov/injury/images/lc-charts/leading_causes_of_death_age_group_2014_1050w760h.gif (last visited Mar. 1, 2019).

251. Veronika Bondarenko, *20-Year-Old Who Repeatedly Urged Friend to Commit Suicide Found Guilty of Involuntary Manslaughter*, BUS. INSIDER (June 16, 2017, 11:36 AM), http://www.businessinsider.com/michelle-carter-texting-suicide-guilty-conrad-roy-2017-6.

252. Glaun, *supra* note 22; *see also* Commonwealth v. Bowen, 13 Mass. 356 (1816).

> circumstances, institutions must advance also, and keep pace with the times.[253]

The digital world continues to change the way that people interact and communicate with each other. Lawmakers should recognize that there is a difference between a defendant who loads a gun and physically places it in his suicidal wife's hands,[254] and a defendant who is miles away, merely encouraging her boyfriend through text messages and phone conversations to follow through with a suicide plan the victim devised himself.

Overall, if an individual's electronic communications may implicate her as blameworthy for another's suicide, this should be clearly codified into law. The digital world is moving relentlessly fast, and our legislation must strive to keep up. However, it is not the role of the judiciary to set the pace.

Sierra Taylor[*]

253. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *in* TEACHINGAMERICANHISTORY.ORG, http://teachingamericanhistory.org/library/document/letter-to-samuel-kercheval/ (last visited Mar. 15, 2019).

254. *See* Persampieri v. Commonwealth, 175 N.E.2d 387 (Mass. 1961).

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