

## THE INNOVATION OF CRIME: DEFINING CRIMINAL CULPABILITY IN THE DIGITAL AGE

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### ABSTRACT

*In 2016, the Supreme Judicial Court of Massachusetts set seemingly novel precedent in Commonwealth v. Carter by finding Michelle Carter guilty of involuntary manslaughter. Michelle Carter was a teenager and thousands of miles away from her boyfriend at the time of his suicide. In fact, the two only met a handful of times in person. Nevertheless, Michelle Carter was convicted of homicide for her boyfriend's death due to the wanton and reckless conduct executed through text messages. In response, critics and legal scholars denounced the ruling as a judicial overstep that raises policy and First Amendment concerns. This Note argues that while the ruling may have ignited public and legal outcry, the Court correctly applied the criminal elements of homicide to a case greatly influenced by technology. Additionally, this Note encourages other courts to take a similar approach to criminality that is primarily conducted through telecommunications. As evident from Commonwealth v. Carter, the judicial system should incorporate society's growing dependence on technology into the analysis of criminal culpability.*

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## I. INTRODUCTION

Technological advancements bring an increase in connectivity and exposure to contemporary life.<sup>1</sup> As a result, society has experienced a surge in criminal behavior that materializes online.<sup>2</sup> As technology rapidly integrates into daily life,<sup>3</sup> a need arises to account for online

1. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 627 (1994) (“Given the pace of technological advancement and the increasing convergence between cable and other electronic media . . . industr[ies] today stand[] at the center of an ongoing telecommunications revolution with still undefined potential to affect the way we communicate and develop our intellectual resources.”).

2. See Sead Fadilpašić, *2017 Sees Huge Increase in Bot Traffic and Crime*, IT PROPORTAL (Feb. 21, 2018), <https://www.itproportal.com/news/q4-saw-a-huge-increase-in-bot-traffic-and-crime>; Nadia Khomami, *NSPCC Records 88% Rise in Children Seeking Help for Online Abuse*, GUARDIAN (Nov. 13, 2016, 7:01 PM), <https://www.theguardian.com/society/2016/nov/14/nspcc-records-88-rise-in-children-seeking-help-for-online-abuse>; *Cyber Crime Statistics and Trends*, GO-GULF (May 17, 2013), <https://www.go-gulf.com/blog/cyber-crime/>.

3. *Number of Social Media Users Worldwide from 2010 to 2021 (in billions)*, STATISTA, <https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/> (last visited Mar. 9, 2019) (“In 2019, it is estimated that there will be around 2.77 billion

activity that evolves into criminal behavior.<sup>4</sup> Today, courts look to telecommunications, such as text messages and internet posts, to decipher whether such speech satisfies the elements of a crime.<sup>5</sup> Telecommunications are a central issue for criminal cases involving suicide and cyberbullying.<sup>6</sup> Additionally, telecommunications have increasingly impacted the resolution of criminal indictments, homicide trials, and the revocation of bail.<sup>7</sup>

While many recognize that perpetrators use technology as a tool to commit crimes, an unclear distinction remains between telecommunications that convey criminality and mere online banter.<sup>8</sup> For example, the bail for notorious pharmaceutical investor Martin Shkreli was recently revoked when he decided to threaten former presidential candidate Hillary Clinton.<sup>9</sup> In an online post, Shkreli offered a reward for anyone who was able to obtain a lock of the former presidential candidate's hair.<sup>10</sup> His counsel attempted to argue that while Shkreli is known for controversial social media postings, his telecommunication amounted to no more than a figure of speech.<sup>11</sup> However, the court found

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social media users around the globe, up from 2.46 billion in 2017. Social network penetration worldwide is ever-increasing.”).

4. Diane Dimond, *COURTS & CRIME: FBI Needs More Dedicated Digital Detectives*, STILLWATER NEWS PRESS (Mar. 3, 2018), [http://www.stwnnewspress.com/opinion/courts-crime-fbi-needs-more-dedicated-digital-detectives/article\\_fba45f4c-1e5b-11e8-8f25-e77f1cc4fc9e.html](http://www.stwnnewspress.com/opinion/courts-crime-fbi-needs-more-dedicated-digital-detectives/article_fba45f4c-1e5b-11e8-8f25-e77f1cc4fc9e.html) (“There is no denying that our internet driven society is ripe with clues the criminally minded have left behind. The question is when will law enforcement get the funds needed to regularly and thoroughly plumb this field of publicly available evidence [.]”).

5. Reply Brief for Petitioner at \*16–18, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-983), 2014 WL 5488911, at 8–9; *Commonwealth v. Carter*, 52 N.E.3d 1054, 1064—65 (Mass. 2016); *State v. Melchert-Dinkel*, 844 N.W.2d 13, 15 (Minn. 2014).

6. See, e.g., *Cyberbullying Is a Serious Issue*, QUESNEL CARIBOO OBSERVER (Mar. 1, 2018, 8:30 AM), <https://www.quesnelobserver.com/news/cyberbullying-is-a-serious-issue/>.

7. See Jeff Gray, *Judge Dismisses Text Messages, Double Murder Charges as Evidence in Aaron Hernandez Trial*, SBNATION (Dec. 12, 2014, 4:06 PM), <https://www.sbnation.com/nfl/2014/12/12/7384759/aaron-hernandez-trial-text-message-evidence-dismissed-odin-lloyd>; Associated Press, *‘Pharma Bro’ Martin Shkreli Has Bail Revoked, Headed to Jail Over Clinton Facebook Post*, NBC NEWS (last updated Sept. 13, 2017, 6:04 PM), <https://www.nbcnews.com/news/us-news/phrama-bro-martin-shkreli-ordered-jailed-online-bounty-hillary-clinton-n801141>.

8. Associated Press, *When Is an Online Threat Illegal and When Is It Free Speech*, CBS NEWS (Nov. 30, 2014, 8:52 PM), <https://www.cbsnews.com/news/when-is-an-online-threat-illegal-and-when-is-it-free-speech/>.

9. Dan Mangan & Meg Tirrell, *Judge Sends Martin Shkreli to Jail for Facebook Post Offering Bounty for Hillary Clinton’s Hair*, CNBC, <https://www.cnbc.com/2017/09/13/shkreli-bail-revoked-after-bounty-offered-for-hillary-clintons-hair.html> (last updated Sept. 14, 2017, 11:09 AM).

10. *Id.*

11. *Id.*

validity in his speech and held that his post threatened the wellbeing of a public figure.<sup>12</sup> Eventually, Shkreli's bail was revoked as the court set clear standards for lawful online behavior.<sup>13</sup>

In a similar case, Kentucky resident James Evans was arrested for a Facebook post that contained lyrics from heavy-metal band Exodus, which appeared to promote school violence.<sup>14</sup> Evans assured police that he did not intend to carry out the actions illustrated by the song lyrics.<sup>15</sup> However, Kentucky police arrested Evans for threatening to carry out a school shooting.<sup>16</sup> Due to the nature of the lyrics and growing efforts to prevent school shootings, law enforcement took proactive steps to combat potential criminal conduct.<sup>17</sup> While these results may be unsettling for those who nonchalantly post their thoughts, under the guise of free speech, on the internet or through text, prosecutors should pursue criminal charges based on the words and thoughts exchanged through telecommunications.<sup>18</sup>

Telecommunications evolved from mere evidentiary support in the court room to a sole basis for legal repercussions.<sup>19</sup> Recently, courts have interpreted telecommunications to meet the requisite elements of a crime itself, such as the elements of *mens rea* and, more controversially, *actus reus*.<sup>20</sup> In *Commonwealth v. Carter*, as discussed *infra*, elements such as *mens rea* and *actus reus* were satisfied through the defendant's telecommunications.<sup>21</sup> This case, while appearing novel in nature,<sup>22</sup>

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12. *Id.*

13. *Id.*

14. Harley Brown, *Update: Exclusive: Man Jailed for Posting Lyrics to Facebook Says 'It's Pretty Worrisome'*, BILLBOARD (Sept. 10, 2014), <https://www.billboard.com/articles/business/6244129/exclusive-james-evans-exodus-lyrics-facebook-jail>.

15. *Id.*

16. *See id.*

17. *See id.*

18. Samantha Schmidt, *He Said It Would Be 'Awesome' to Help a Friend Kill Herself. Now He'll Be Tried for Murder*, WASH. POST (Oct. 18, 2017), [https://www.washingtonpost.com/news/morning-mix/wp/2017/10/18/he-said-it-would-be-awesome-to-help-a-friend-kill-herself-now-hell-be-tried-for-murder/?utm\\_term=.73571ce1e60c](https://www.washingtonpost.com/news/morning-mix/wp/2017/10/18/he-said-it-would-be-awesome-to-help-a-friend-kill-herself-now-hell-be-tried-for-murder/?utm_term=.73571ce1e60c).

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

20. *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, 118–19 (2017).

21. *Carter*, 52 N.E.3d at 1063 (“[T]he particular circumstances of the defendant’s relationship with the victim may have caused her verbal communications . . . to carry more weight than mere words, overcoming any independent will to live he might have had.”).

22. Susan Zalkind, *Is Telling Someone to Commit Suicide a Crime?*, VICE (Sept. 2, 2015, 11:30 AM), [https://www.vice.com/en\\_us/article/wd7gx5/is-telling-someone-to-commit-suicide-a-crime-902](https://www.vice.com/en_us/article/wd7gx5/is-telling-someone-to-commit-suicide-a-crime-902).

illustrates the position that courts should assume in order to account for society's growing dependency on technology.

The attempt to incorporate telecommunications into the analysis of criminal culpability was met with wide criticism.<sup>23</sup> Critics have been quick to point out the untrustworthy nature of words exchanged over the internet.<sup>24</sup> Additionally, legal scholars contend that using telecommunications to measure criminal accountability will likely lead to constitutional infringements under the First Amendment.<sup>25</sup> First, this Note introduces the expanding role of technology in the courtroom. Second, this Note discusses how the criminal elements of *mens rea*, *actus reus*, and causation can be satisfied by omnipresent actors<sup>26</sup> and why this normative departure is necessary. Additionally, this Note considers the societal and constitutional consequences of criminalizing speech, which is exchanged through telecommunications.<sup>27</sup> Next, this Note proposes how courts should address telecommunications that give rise to criminal culpability, drawing from the analysis adopted in *Commonwealth v. Carter*.<sup>28</sup> Lastly, this Note argues that in light of evolving case law and society's growing dependency on technology,<sup>29</sup> the role of telecommunications should be given significant consideration throughout the analysis of criminal culpability.<sup>30</sup>

23. Brandon Griggs, *When Is Social-Media Use a Crime?*, CNN (Dec. 19, 2012, 5:42 AM), <https://www.cnn.com/2012/12/18/tech/social-media/newtown-social-media-crime/index.html>.

24. Issie Lapowsky, *The Texting Suicide Case Is About Crime, Not Tech*, WIRED (June 16, 2017, 4:29 PM), <https://www.wired.com/story/texting-suicide-crime/>.

25. See Ready, *supra* note 20, at 122–24; Griggs, *supra* note 23; see also Andrew Tarantola, *Death By Text: How the Michelle Carter Case Will Impact Free Speech*, ENGADGET (June 22, 2017), <https://www.engadget.com/2017/06/22/you-may-be-jailed-for-telling-someone-to-die-in-a-fire/>.

26. *Carter*, 52 N.E.3d at 1063–64; *State v. Pham*, 119 So.3d 202, 206 (La. Ct. App. 2013).

27. See Kalhan Rosenblatt, *Michelle Carter, Convicted in Texting-Suicide Case, Sentenced to 15 Months in Jail*, NBC NEWS (Aug. 23, 2017, 3:34 PM), <https://www.nbcnews.com/news/us-news/michelle-carter-convicted-texting-suicide-case-sentenced-15-months-jail-n789276>.

28. See *infra* Section VI.

29. Jon Capistrano, *Are We Too Dependent on Technology?*, XENLIFE (Apr. 23, 2016), <https://xenlife.com.au/are-we-being-too-dependent-on-technology/>.

30. *State v. Final Exit Network, Inc.*, 889 N.W.2d 296, 307 (Minn. Ct. App. 2016) (“As applied to Final Exit in this case, we conclude that the statute burdened no more speech than necessary to further the state’s compelling interest in preserving D.D.’s life.”). See also Tarantola, *supra* note 25 (“From the free-speech standpoint, the ACLU is concerned that if this conviction is upheld, it may lead to ‘all kinds of other prosecutions.’ Legal issues aside . . . prosecution may dissuade people from engaging in uncomfortable but necessary dialogues with their loved ones, such as discussions about end-of-life decisions.”).

## II. THE EVOLUTION OF TECHNOLOGY IN THE COURTROOM

Throughout the digital age, online, criminal behavior has weaved its way into the courtroom as a serious issue that plagues both virtual and actual communities.<sup>31</sup> While online communications can provide evidence of unlawful behavior,<sup>32</sup> there appears to be a disconnect between the perpetrator and the culpable act.<sup>33</sup> For example, in cases involving cyber bullying, perpetrators often express a lack of intent or even confusion that their words ultimately had a detrimental effect on their victims.<sup>34</sup> States, schools, and caregivers are forced to grapple with these issues<sup>35</sup> as they try to explain to children and young adults a concept that society has not completely come to terms with: our words online can constitute crimes.<sup>36</sup> In response to an influx of cyber-bullying cases, states have adopted cyber-bullying statutes.<sup>37</sup> While such statutes have proven to be successful deterrents, these laws have a limited applicability when it comes to online behavior that may constitute serious crimes, such as homicide.<sup>38</sup>

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31. Khomami, *supra* note 2.

32. United States v. Knope, 655 F.3d 647 (7th Cir. 2011).

33. Dominic Rushe, *When Is a Threat to Kill a Joke? Or Art? Supreme Court Weighs Online Abuse*, GUARDIAN (Nov. 30, 2014, 9:49 AM), <https://www.theguardian.com/law/2014/nov/30/threat-kill-joke-art-supreme-court-online-facebook-anthony-elonis> (“In reality prosecutors tend to use the criminal law against folks we think of as bad guys, people who are intending to do harm and who actually do harm . . . I don’t think many people are arguing that juries should have the right to put people in jail for making a mistake or for uttering something that’s out of context, or for making a statement that someone believes is threatening when it isn’t.”).

34. See Erin Peebles, *Cyberbullying: Hiding Behind the Screen*, 19 PAEDIATRICS & CHILD HEALTH 527 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4276384/> (“[C]yberbullies feel a lack of remorse and have more behavioural difficulties (police contact, property damage, school absenteeism, low grades) than children who are not involved in cyberbullying. One study has shown that children who act as cyberbullies are also at increased risk for suicide, although they score lower on measures of suicidal ideation than their victims.”); Rushe, *supra* note 33.

35. Mirah Riben, *Guilty of Manslaughter: Suicide by Bullying*, HUFFPOST (June 20, 2017, 12:28 AM), [https://www.huffingtonpost.com/entry/guilty-of-manslaughter-suicide-by-bullying\\_us\\_5948a142e4b0961faacbe661](https://www.huffingtonpost.com/entry/guilty-of-manslaughter-suicide-by-bullying_us_5948a142e4b0961faacbe661); *Prevention: Teach Kids How to Identify Bullying and How to Stand up to It Safely*, STOPBULLYING.GOV, <https://www.stopbullying.gov> (last visited Mar. 9, 2019).

36. Brianna Flavin, *Is Cyberbullying Illegal? When Comments Turn Criminal*, RASMUSSEN COLLEGE (Apr. 25, 2017), <http://www.rasmussen.edu/degrees/justice-studies/blog/is-cyberbullying-illegal/>.

37. Carla Zavala, Comment, *Manslaughter by Text: Is Encouraging Suicide Manslaughter?*, 47 SETON HALL L. REV. 297, 327 (2016) (“[A] specific statute that prohibits encouragement and assistance of suicide will better serve the goals of punishment and is preferable to the current approach.”).

38. See Ready, *supra* note 20, at 134 (“The majority of states issue statutes solely addressing assisted suicide and recognize it as a unique offense; however, there are eight states that include assisted suicide in their manslaughter or homicide statutes.”).

As states establish the legal significance of online communications through statute, telecommunications continue to have exponentially greater legal implications in the court room.<sup>39</sup> Not only have courts reached disparate outcomes for telecommunication cases, but also prosecutors have opted for different charges, varying in levels of offense.<sup>40</sup> For charges involving assisted suicide, some courts continue to rely on anti-bullying and suicide statutes for guidance.<sup>41</sup> However, adopting an assisted suicide theory for these cases is not an adequate response as many states broadly condemn assisted suicide, yet do not criminalize suicide or assisted suicide.<sup>42</sup> Additionally, assisted suicide theories often fail to satisfy the traditional, criminal elements as “causation and complicity are all-or-nothing, courts cannot invoke partial causation or complicity in a partial wrong.”<sup>43</sup> Categorizing telecommunications as “assistance” prompts partial culpability, leading to partial punishment, and leaving society with feelings of injustice.<sup>44</sup> In response to this dilemma, some courts boldly uphold manslaughter charges based on communications that have transpired online.<sup>45</sup> However, circuits remain divided as to the whether the elements of manslaughter can be satisfied by encouraging someone to take their own life.<sup>46</sup>

Telecommunications pose problems for prosecutors as technology transcends crime.<sup>47</sup> Prosecutors meet resistance when attempting to

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39. *See id.*

40. *Id.* at 120. *See* Commonwealth v. Carter, 52 N.E.3d 1054, 1064 (Mass. 2016).

41. Tarantola, *supra* note 25 (“[A]lthough we now have lots of very specific cyberbullying statutes in various states, there’s nothing in our homicide statutes, generally, which limits the crime to a particular way of causing death. You have to cause death and you have to cause it with a certain mental state in which, in this case, it’s a kind of version of recklessness.”).

42. Deborah F. Buckman, Annotation, *Validity of Criminalization of Urging or Assisting Suicide Under State Statutes and Common Law*, 96 A.L.R. 6th 475 (2014) (“Although no state currently has a law on its books criminalizing suicide or attempted suicide, the act of assisting another to commit suicide is broadly condemned. Except for fewer than a handful, all the states in the United States strongly disapprove of, and the majority outright criminalize, assisted suicide.”).

43. Guyora Binder & Luis Chiesa, *The Puzzle of Inciting Suicide*, 56 AM. CRIM. L. REV. 65, 83 (2019).

44. *See generally id.*

45. *See* Carter, 52 N.E.3d at 1064.

46. *See generally* Buckman, *supra* note 42.

47. *See* Roger A. Grimes, *Why It’s So Hard to Prosecute Cyber Criminals*, CSO (Dec. 6, 2016, 3:00 AM), <https://www.csoonline.com/article/3147398/data-protection/why-its-so-hard-to-prosecute-cyber-criminals.html> (“Our legal system, refined over centuries, was forged in the physical world for physical crimes. Internet crime is not even three decades old. Localities, cities, and states have had a hard time figuring out what is or isn’t illegal in the computer world

establish the elements of common law crimes, such as homicide, through telecommunications, as opposed to using state statutes, which are designed to address online behavior.<sup>48</sup> For example, courts hesitate to allow telecommunications to satisfy the *actus reus* element of a crime through the actions of a virtual actor.<sup>49</sup> As the *actus reus* element remains difficult to prove based on words alone, the causation requirement proves to be equally difficult to establish.<sup>50</sup> With other intervening acts at play in a given case, prosecutors find it difficult to prove that telecommunications were the proximate cause for the criminal behavior.<sup>51</sup> As society adopts a virtual reality, prosecutors are left to determine how telecommunications translate into criminal culpability by judicial and societal standards.<sup>52</sup>

### III. THE ROLE OF TELECOMMUNICATIONS IN ESTABLISHING THE MENS REA

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for a particular location, especially if that crime involves computers or people outside of their jurisdiction.”).

48. See *Cyberbullying: Law and Policy*, CONST. RTS. FOUND., <http://www.crfcap.org/images/pdf/cyberbullying.pdf> (last visited Mar. 9, 2019) (“Many existing laws already allow criminal prosecution for threats, stalking, identity theft, and many forms of harassment. Some argue that these existing laws are good enough to fight against cyberbullying. Others argue that specific laws making cyberbullying a crime are necessary.”).

49. See Ready, *supra* note 20, at 139–41 (“After analyzing Carter’s actions under various cyberbullying, assisted suicide, and involuntary manslaughter laws, it would be difficult to convict her of any crime in many states . . . Even if the legislatures create a more tightly drawn response to severe cases like Conrad’s by amending existing statutes, her text messages are still not enough to constitute an *actus reus* in a criminal conviction.”).

50. See *Commonwealth v. Bowen*, 13 Mass. 356, 359–61 (1816) (finding that the perpetrator did not cause the death of a fellow prisoner by the simple use of his words).

51. Tarantola, *supra* note 25 (“What Carter did was ‘inducing him to feel awful enough about himself to the point that he took his own life, that would be harm . . . [Roy] was harmed psychologically and emotionally based on those words. He did research the methods and made some sort of a plan, but at some point he also wanted to not kill himself and demonstrated that as well . . . So her words, not exclusively but maybe indirectly, led him to follow through with his plan.”).

52. Ephrat Livni, *A New Legal Precedent Means Americans Can Go to Jail for What They Say*, QUARTZ (June 20, 2017), <https://qz.com/1009681/a-new-legal-precedent-means-americans-can-go-to-jail-for-what-they-say/> (“Now, new technologies are reshaping what it means to create danger, and when you have to act. A recent state juvenile court decision found that sending text messages, in certain cases, can be enough to legally create danger and obligate action.”).



## ELEMENT OF HOMICIDE

Telecommunications pose legal implications for homicide cases.<sup>53</sup> Each state provides its own requirements for the crime of homicide.<sup>54</sup> However, many states follow the Model Penal Code as a guide for establishing this criminal conduct.<sup>55</sup> As such, we will use the Model Penal Code as a standard for the telecommunications analysis. Under the Model Penal Code, prosecutors must prove that the perpetrator had purpose or knowledge of their actions in order to prove the *mens rea* requirement for murder.<sup>56</sup> According to the Model Penal Code, “a criminal homicide constitutes murder when: (a) it is committed purposely or knowingly; or (b) it is committed recklessly under the circumstances manifesting extreme indifference to human life.”<sup>57</sup> When murder is based on a degree of recklessness, the perpetrator must have been grossly reckless, which can be construed as the perpetrator having cruel or wicked intent to be reckless, just for the fun of it.<sup>58</sup> Such a determination is subjective and left for the fact finder to decide.<sup>59</sup> In terms of telecommunications, this subjective consideration can lead to varying results as it may be difficult to construe the true intent of a perpetrator through a dry medium, such as text.<sup>60</sup>

When differentiating between the varying levels of homicide, courts consider intent as the line that divides murder from manslaughter.<sup>61</sup> States that follow the Model Penal Code adopt a standard of recklessness in order to establish the *mens rea* element for manslaughter.<sup>62</sup> Under Section 210.3 of the Model Penal Code, “[c]riminal homicide constitutes manslaughter when: (a) it is committed recklessly; or (b) a homicide which would otherwise be murder is committed under the influence of

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53. Michael E. Miller, *‘Manslaughter By Text’: Teen Faces Charges After Boyfriend Kills Himself*, SYDNEY MORNING HERALD (Sept. 25, 2015), <http://www.smh.com.au/world/manslaughter-by-text-teen-faces-charges-after-boyfriend-suicides-20150925-gjv9xk> (last updated Sept. 26, 2015).

54. Tarantola, *supra* note 25 (“According to Massachusetts state law, involuntary manslaughter is defined as ‘an unlawful killing that was unintentionally caused as the result of the defendant’s wanton or reckless conduct.’”).

55. SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 1232 (9th ed. 2012).

56. *See id.*

57. *Id.*

58. Commonwealth v. Malone, 47 A.2d 445, 447 (Pa. 1946).

59. Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 68 n.18 (2007) (“[C]riminal recklessness also requires subjective knowledge on the part of the offender.”); MODEL PENAL CODE § 2.02(2)(c) (AM. LAW INST. 2012).

60. Rushe, *supra* note 33.

61. MODEL PENAL CODE §§ 210.2, 210.3 (AM. LAW INST. 2012).

62. MODEL PENAL CODE § 210.3 (AM. LAW INST. 2012).

extreme mental or emotional disturbance.”<sup>63</sup> For extreme mental and emotional disturbance, there must be a “reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.”<sup>64</sup> A individual can be culpable for manslaughter under an objective standard, where the individual exercised regular recklessness and was unaware of the substantial, unjustifiable risk.<sup>65</sup> In establishing whether an individual’s actions amount to recklessness, courts may implement the recklessness test.<sup>66</sup> Under a recklessness test, the court first consider whether the offender created a substantial risk.<sup>67</sup> If the court finds that a substantial risk was created by the defendant, then the court can consider whether such risk was unjustifiable given the circumstances.<sup>68</sup> For telecommunications, perpetrators may claim that they were unaware of any substantial risk involved with their disclosure. As discussed *supra*, in the exchange of online communications, senders could argue that they were unaware that their telecommunications would have such a substantial effect as to result in death.<sup>69</sup> However, prosecutors can counter this defense with the reasonable person standard, as a reasonable person would have realized the risk involved in allowing dangerous telecommunications to transpire online.<sup>70</sup> The exponential rise in deaths associated with telecommunications today leaves little room for ignorance in terms of appreciating the weight words carry online.

In establishing the *mens rea* element for manslaughter, prosecutors can also point to case specific facts to show that the defendant was aware of the totality of the circumstances and that death was likely to occur as a result of the online conduct.<sup>71</sup> Prosecutors should then, as discussed

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63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. MODEL PENAL CODE § 2.02(c) (AM. LAW INST. 2012).

68. *Id.*

69. *See supra* Part II.

70. *Commonwealth v. Carter*, 52 N.E.3d 1054, 1063 (Mass. 2016) (“In sum, there was ample evidence to establish probable cause that the defendant’s conduct was wanton or reckless, under either a subjective or an objective standard. The grand jury could have found that an ordinary person under the circumstances would have realized the gravity of the danger posed . . .”).

71. *Id.* (“In our view, the coercive quality of that final directive was sufficient in the specific circumstances of this case to support a finding of probable cause. Those circumstances included the defendant’s virtual presence at the time of the suicide, the previous constant pressure the defendant had put on the victim, and his already delicate mental state.”).

*supra*, contend that the defendant's recklessness, which transpired through different technologies and channels of communication, reached the victim in the form of homicide.<sup>72</sup> While looking to the totality of the circumstances may prove effective for other manslaughter charges, reckless actions that materialize through telecommunications carry different weight with the jury. Prosecutors remain tasked with convincing the fact-finder that a reasonable person would believe that the totality of circumstances, surrounding and including the exchange of telecommunications, would be so reckless as to amount to death.<sup>73</sup> While the *mens rea* requirement may be easier to prove for murder, where the prosecution must show knowledge or purpose,<sup>74</sup> courts are increasingly recognizing that telecommunications can constitute reckless behavior and thus satisfy the *mens rea* requirement for manslaughter.<sup>75</sup>

#### IV. PUBLIC CONCERN AND LEGAL IMPLICATIONS FOR THE MENS REA ELEMENT OF HOMICIDE

While telecommunications have been used as supplemental evidence for intent or knowledge,<sup>76</sup> critics suggest that allowing telecommunications alone to satisfy *mens rea* leads courts down a slippery slope.<sup>77</sup> Some suggest that telecommunications that implicate an individual for serious crimes, such as homicide, impinges on an individual's right to freedom of expression on the internet.<sup>78</sup> As telecommunications add a new layer to the constitutional analysis, courts recognize that "First Amendment freedoms need breathing space to

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72. *Id.*

73. *Id.* at 1060 n.9 ("Whether conduct is wanton and reckless depends either on what the defendant knew or how a reasonable person would have acted knowing what the defendant knew.").

74. MODEL PENAL CODE § 210.2(a) (AM. LAW INST. 2012).

75. *See Carter*, 52 N.E.3d at 1064.

76. Reply Brief for Petitioner at 23–24, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-983), 2014 WL 5488911, at \*39–40.

77. *See Ready*, *supra* note 20, at 123–24; Julia Jacobo, *Can Words Kill? Guilty Verdict in Texting Suicide Trial Raises Questions*, ABC NEWS (June 21, 2017, 11:28 AM), <http://abcnews.go.com/US/words-kill-guilty-verdict-texting-suicide-trial-raises/story?id=48093522>.

78. *ACLU of Massachusetts Statement on Michelle Carter Guilty Verdict*, ACLU (June 16, 2017), [aclu.org/news/aclu-massachusetts-statement-michelle-carter-guilty-verdict](http://aclu.org/news/aclu-massachusetts-statement-michelle-carter-guilty-verdict) [hereinafter ACLU] (finding that using telecommunications to satisfy criminal elements "exceeds the limits of our criminal laws and violates free speech protections guaranteed by the Massachusetts and U.S. Constitutions.").

survive.”<sup>79</sup> Critics are concerned that expanding the scope of intent for telecommunications can constitute a vague and overbreadth application that infringes on freedoms of expression.<sup>80</sup> However, allowing telecommunications to satisfy elements of a crime do not necessarily have serious First Amendment implications.<sup>81</sup> Tele-communications that are used to prove intent are subject to a strict scrutiny analysis.<sup>82</sup> By setting a high standard of strict scrutiny, courts account for potential threats to individual expression exercised online. Scholars contend that under a strict scrutiny analysis, telecommunications should remain protected by the First Amendment unless there is clear, threatening intent conveyed by the sender.<sup>83</sup> Thus, if speech gives rise to criminal culpability, telecommunications can survive strict scrutiny under a First Amendment analysis.<sup>84</sup> If a court ultimately finds a defendant’s expression to be criminal, then the defendant should be deprived a “freedom of speech” defense.<sup>85</sup>

The American Civil Liberties Union (“ACLU”) argues that applying telecommunications to the criminal analysis, especially for homicide cases, would not only silence freedom of expression on the internet, but also discourage professionals from helping at-risk individuals who struggle with suicidal thoughts.<sup>86</sup> Admittedly, the approach could “chill important and worthwhile end-of-life discussions between loved ones . . . .”<sup>87</sup> The ACLU suggests that by stifling these important conversations, society will experience public policy implications that are not intended by courts.<sup>88</sup> By accounting for the expanding role telecommunications play in our criminal justice system, critics worry that rulings and convictions will have undesirable consequences outside

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79. Reply Brief for Petitioner at 2, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-983), 2014 WL 5488911, at \*8 (internal quotations omitted) (quoting *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 620 (2003)).

80. Ready, *supra* note 20, at 125–26.

81. See *Commonwealth v. Carter*, 52 N.E.3d 1054, 1064 n.17 (Mass. 2016) (explaining the lack of First Amendment protection for this type of speech, where the government’s interest in the preservation of human life is sufficiently compelling and narrowly drawn as to overcome the strict scrutiny of content restrictions).

82. See John Villasenor, *Technology and the Role of Intent in Constitutionally Protected Expression*, 39 HARV. J.L. & PUB. POL’Y 631, 658 (2016).

83. See *id.* at 642.

84. *Id.*

85. See *Carter*, 52 N.E.3d at 1060.

86. See Tarantola, *supra* note 25 (“[T]he ACLU is concerned that [criminalizing these sorts of communications] may dissuade people from engaging in uncomfortable but necessary dialogues with their loved ones, such as discussions about end-of-life decisions.”).

87. ACLU, *supra* note 78.

88. *Id.*

of the court room.<sup>89</sup> While these concerns are legitimate, the judiciary continues to account for telecommunications that facilitate unlawful behavior in order to prevent and deter crimes such as homicide.

#### V. TELECOMMUNICATIONS THAT CREATE VOLUNTARY ACTION

Physical acts, rather than speech, are usually used to describe voluntary action under the *actus reus* requirement.<sup>90</sup> Under the Model Penal Code, the *actus reus* element consists of a voluntary action that is prohibited by law.<sup>91</sup> *Actus reus* can also be satisfied by an omission coupled with a duty by the perpetrator.<sup>92</sup> Such a duty may be created by a special relationship between the perpetrator and the victim.<sup>93</sup> With the expansion of technology, the judicial system adopted the concept that an individual, in a foreign location, can be virtually present for a crime to satisfy these *actus reus* factors.<sup>94</sup> Through virtual representation, the *actus reus* requisite can be met as if the perpetrator is making physical contact with the victim.<sup>95</sup> As seen with conspiracy cases, courts have routinely found that speech can be used to prove the element of *actus reus*.<sup>96</sup> For a conspiracy charge, the unlawful agreement, which is used to complete the crime, constitutes an overt act.<sup>97</sup> Thus, precedent exists for applying communication to the *actus reus* analysis.<sup>98</sup>

As a response to technological innovation and dependence, courts have started to apply this principle to crimes other than conspiracies.<sup>99</sup> For example, courts have found that an individual can commit homicide through virtual representation.<sup>100</sup> Perpetrators who are not physically present for the crime can be convicted of involuntary manslaughter.<sup>101</sup> Although not physically present, a perpetrator can carry out an “unlawful

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89. Tarantola, *supra* note 25.

90. MODEL PENAL CODE § 2.01 (AM. LAW INST. 2012).

91. *See id.*

92. *Id.*

93. *Id.* at explanatory note.

94. Commonwealth v. Carter, 52 N.E.3d 1054, 1063 (Mass. 2016) (“[T]he coercive quality of that final directive was sufficient in the specific circumstances of this case to support a finding of probable cause. Those circumstances include the defendant’s virtual presence at the time . . .”).

95. *Id.*

96. Steven R. Morrison, *Conspiracy Law’s Threat to Free Speech*, 15 U. PA. J. CONST. L. 865, 892 (2013) (“An agreement to commit a crime lies at the heart of conspiracy law. It is a necessary *actus reus* and can also indicate the *mens rea* of the conspirators.”).

97. *Id.*

98. *Id.*

99. Carter, 52 N.E.3d at 1062.

100. *Id.* at 1063.

101. *Id.*

killing . . . caused by wanton reckless conduct. Wanton or reckless conduct is conduct that creates a high degree of likelihood that substantial harm will result to another.”<sup>102</sup> Therefore, if a court finds that the affirmative creation and transmission of text messages constitutes wanton reckless conduct, the *actus reus* element may be satisfied.<sup>103</sup>

#### VI. PUBLIC CONCERN AND LEGAL IMPLICATIONS FOR THE ACTUS REUS ELEMENT OF HOMICIDE

While the judicial system attempts to account for society’s online presence, critics warn that adopting such jurisprudence may lead to unfavorable consequences.<sup>104</sup> Some believe that we venture outside the realm of legality by allowing prosecutors to satisfy *actus reus* for the charge of homicide absent any direct, physical action.<sup>105</sup> For example, opponents argue that telecommunications encouraging death or killing should constitute cyberbullying instead.<sup>106</sup> Cyber-bullying statutes are specifically designed to combat online behavior that results in victimization.<sup>107</sup> Critics encourage courts to apply telecommunications, which facilitate reckless and intentional conduct, to statutes that address virtual behavior as opposed to the elements of homicide.<sup>108</sup> While cyberbullying provides its own consequences for defendants, this lesser offense does not carry the same weight as homicide in terms of severity and punishment.<sup>109</sup>

Opponents, however, point out that using typewritten telecommunications to satisfy the *actus reus* element is an extreme reaction to unfortunate circumstances.<sup>110</sup> Not every societal injustice can be remedied by the courts “[J]ust because something is repugnant does not automatically transform it into a criminal act.”<sup>111</sup> While it is

102. *Id.* at 1060 n.9 (internal quotations omitted) (citing THE MODEL JURY INSTRUCTIONS ON HOMICIDE 73, 76–79 (2013)).

103. *Id.*

104. See Kayla Kibbe, *Why the Michelle Carter Verdict Does More Damage than Justice*, STUDY BREAKS (June 30, 2017), <https://studybreaks.com/news-politics/michelle-carter/Tarantola>, *supra* note 25.

105. Lapowsky, *supra* note 24; Zalkind, *supra* note 22.

106. See Tarantola, *supra* note 25.

107. *Cyberbullying: Law and Policy*, *supra* note 48.

108. See generally Denise Lavoie, *Michelle Carter Case: Cyberbullying or Manslaughter?*, S. COAST TODAY (Sept. 9, 2015 4:57 PM), <http://www.southcoasttoday.com/article/20150909/NEWS/150909385> (“Some legal experts say it may have been a reach for prosecutors to charge Carter with manslaughter.”); Tarantola, *supra* note 25.

109. Tarantola, *supra* note 25.

110. See Ready, *supra* note 20, at 140.

111. *Id.* at 139.

meritorious to deter and punish immoral behavior, some are skeptical of allowing a virtual act to legally translate into murder.<sup>112</sup> Arguably, this knee-jerk reaction to the escalating problems associated with technology lacks apodictic legal justification.<sup>113</sup> Some critics question whether words alone may function as the weapon that led to the homicide at issue.<sup>114</sup> These concerns implore justices to grapple with the question of whether text messages can really constitute culpable action.<sup>115</sup>

## VII. TECHNOLOGY AND THE CAUSATION REQUIREMENT

Along with the actus reus requirement, telecommunications can also satisfy the causation element of homicide.<sup>116</sup> If using the Model Penal Code, “[c]onduct is the cause of a result when . . . it is an antecedent but for which the result in question would not have occurred; and the relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law. . . .”<sup>117</sup> The Code imposes additional specifications depending on the crime’s required mens rea.<sup>118</sup> For crimes that require knowledge or purpose from the perpetrator, such as murder, the perpetrator must have purposely or knowingly pursued the criminalized course of conduct.<sup>119</sup> Crimes that require mens rea of recklessness or negligence call for a result within risk of the perpetrator’s actions.<sup>120</sup> To satisfy a standard of recklessness, the offender *must* be aware of the risk that the action involves.<sup>121</sup> To satisfy a negligence standard, it is only necessary that the offender *should* have been aware of the involved risk.<sup>122</sup> While the Code requires actual causation, it makes no provision for proximate causation.<sup>123</sup>

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112. See Tarantola, *supra* note 25. For example, Legal Director Matthew Segal from the ACLU of Massachusetts argued, “[y]ou don’t have to believe that what Ms. Carter said is appropriate. In fact, you can believe that what she said was awful and still believe that it isn’t manslaughter.” *Id.*

113. See *id.*

114. See Ready, *supra* note 20, at 140.

115. Commonwealth v. Carter, 52 N.E.3d 1054, 1061–62 (Mass. 2016).

116. See *id.* at 1081 (“[Defendant] maintains that verbally encouraging someone to commit suicide, no matter how forcefully, cannot constitute wanton or reckless conduct. Effectively, the argument is that verbal conduct can never overcome a person’s willpower to live, and therefore cannot be the cause of a suicide. We disagree.”).

117. MODEL PENAL CODE § 2.03(1)(a), (b) (AM. LAW. INST. 2012).

118. *Id.* § 2.03(2)(a), (b).

119. *Id.* § 2.03(2).

120. *Id.* § 2.03(3).

121. *Id.*

122. *Id.*

123. See generally MODEL PENAL CODE § 2 (AM. LAW. INST. 2012).

Based on the guidelines provided by the Model Penal Code, prosecutors are faced with the challenge of establishing that telecommunications alone can be the actual cause of crimes.<sup>124</sup> Arguably, without a “but-for” requirement, prosecutors can successfully argue that telecommunications satisfy causation, even if the communication was not the sole factor contributing to the crime. Thus, prosecutors can seek a conviction for homicide when the death at issue may have been initially ruled a suicide.<sup>125</sup> Critics counter that other, contributing factors break any causal connection between the telecommunication and the resulting death.<sup>126</sup> For example, in the case of suicide, the act of taking one’s life may be an independent choice that constitutes an “intervening cause,” frustrating the causation requirement.<sup>127</sup> Additionally, when telecommunications are involved, one may insist that a legal line of demarcation must be drawn in order to distinguish criminal conduct from mere texting.<sup>128</sup> While prosecutors do not possess a wealth of case law or precedent to rely upon,<sup>129</sup> the provisos for causation set forth by the Model Penal Code afford prosecutors room for persuasion in determining whether telecommunications can cause the death of another, even if additional factors contribute to the homicide as well.<sup>130</sup>

#### VIII. ARGUMENT: PROSECUTORS SHOULD BE PERMITTED TO USE TELECOMMUNICATIONS TO SATISFY THE ELEMENTS OF HOMICIDE

##### A. *Commonwealth v. Carter*

In 2016, the Supreme Judicial Court of Massachusetts correctly found Michelle Carter guilty of involuntary manslaughter in

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124. *Commonwealth v. Carter*, 52 N.E.3d 1054, 1061—62 (Mass. 2016).

125. *Id.* at 636—37.

126. Danny Cevallos, Opinion, *Texting Suicide Trial Reveals Legal Shades of Gray*, CNN (June 8, 2017, 8:02 PM), <http://www.cnn.com/2017/06/08/opinions/massachusetts-manslaughter-opinion-cevallos/index.html>.

127. *See id.* (“Holding [Defendant] liable would continue a disturbing recent trend in the law looking to blame third parties in cases of suicide. In every suicide, there is ultimately only one actor causing death.”).

128. *Id.*

129. Melanie Eversley, *Girlfriend Suicide Texting Case Sets Wrong Precedent, Legal Experts Say*, USA TODAY (Aug. 3, 2017, 9:09 PM), <https://www.usatoday.com/story/news/2017/08/03/michelle-carter-texting-suicide-case-sets-bad-precedent-experts-say/538794001/> (“This idea that words can kill is a very controversial one because the criminal law typically punishes physical action.”).

130. Tarantola, *supra* note 25 (“Appellate-case law about causation makes it difficult to prove cause when there’s a suicide. There are cases where somebody commits a horrible assault on somebody else, like a sexual assault, and then the victim of the assault commits suicide. This is a different kind of case. This is kind of persuasion.”).



*Commonwealth v. Carter*, for the death of her then-boyfriend, Conrad Roy III.<sup>131</sup> Before Roy's death, the couple engaged in a long distance relationship beginning in 2011 and rarely met at all in person.<sup>132</sup> In fact, most of their interactions transpired through text messages and telephone conversations.<sup>133</sup> Evidence illustrated that throughout the relationship, Carter repeatedly pressured Roy to take his own life.<sup>134</sup> The couple's last telephone conversation occurred on July 12th, 2014, where Carter commanded Roy to get back into a carbon monoxide filled car, which resulted in Roy's death.<sup>135</sup>

The court in *Carter* properly held that the defendant's telecommunications satisfied the elements of homicide. Although Carter was not physically present for Roy's death, "the evidence was sufficient to warrant the return of an indictment for involuntary manslaughter where the defendant's conduct did not extend beyond words."<sup>136</sup> Each element for involuntary manslaughter materialized through Carter's telecommunications alone.<sup>137</sup> First, the *mens rea* element was satisfied by text messages that illustrated Carter's intent to convince Roy to commit suicide.<sup>138</sup> Second, the *actus reus* element was met based on the coercive quality of Carter's directives and the constant pressure she applied to Roy, which constituted wanton and reckless conduct.<sup>139</sup> Lastly, Carter's wanton and reckless conduct eventually overcame Roy's willpower, causing the victim's death.<sup>140</sup> Through *Carter*, the court adopted an accurate analysis that accounts for the active role telecommunications played throughout the criminal case.

#### *B. The Intent Behind Telecommunications*

For the *mens rea* element of homicide, courts should constantly consider how telecommunications can portray the purpose, knowledge, or

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131. *Carter*, 52 N.E.3d at 1064–65.

132. *Id.* at 1057.

133. *Id.*

134. *Id.* at 1057–59 ("[T]he defendant encouraged the victim to kill himself, instructed him as to when and how he should kill himself, assuaged his concerns over killing himself, and chastised him when he delayed doing so.").

135. *Id.* at 1063.

136. *Id.* at 1056.

137. *Id.* at 1062.

138. *Id.* at 1059.

139. *Id.* at 1061.

140. *Id.* at 1063 ("Because there was evidence that the defendant's actions overbore the victim's willpower, there was probable cause to believe that the victim's return to the truck after the defendant told him to do so was not 'an independent or intervening act' that, as a matter of law, would preclude his action from being imputable to her.").

state of mind of the perpetrator in relation to the crime.<sup>141</sup> Telecommunications can prove *mens rea* with the same effectiveness as spoken words,<sup>142</sup> if not more so. For example, in *State v. Pham*, the defendant was convicted of manslaughter for fatally shooting his victim nine times.<sup>143</sup> While the defendant argued that he acted in self-defense, the court considered text messages that illustrated the defendant's state of mind.<sup>144</sup> The court accepted the prosecution's argument that text messages sent by the defendant displayed a lack of appreciation for the gravity of the situation.<sup>145</sup> Additionally, the court reasoned that "[d]efendant's lack of remorse was evidenced through a text message . . . [which] suggest[ed] that Defendant was upset with the victim. . . ."<sup>146</sup> Thus, the Prosecution was able to establish the *mens rea* of intent and a lack of repentance through the Defendant's telecommunications alone.<sup>147</sup>

While a suspect may argue that their comments amount to nothing more than a "figure of speech," courts must consider the subjective, as well as the objective, intent of the sender.<sup>148</sup> In *Elonis v. United States*, the Supreme Court held that "true threats," which are criminal under 18 U.S.C. § 875(c), require a showing that the individual sender intended the communications to constitute threats.<sup>149</sup> There, the defendant, after losing his wife and his job, made various Facebook posts that recited the song lyrics of a third-party.<sup>150</sup> The posts were interpreted as threats against a kindergarten class, co-workers, and law enforcement.<sup>151</sup> In reversing the lower court's finding, which required only objective intent to prove *mens rea* under the statute, the court reasoned that subjective intent must be considered in order to avoid punishing a naïve, yet innocent, individual who was merely posting on the internet without the crucial element of an intent to threaten.<sup>152</sup>

Subjective intent requires the jury to consider the specific intent of the sender as opposed to whether a reasonable person would interpret

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141. *State v. Pham*, 119 So. 3d 202, 206 (La. Ct. App. 2013).

142. *People v. Ackerman*, Nos. C065484, C067078, 2016 WL 6610303 at \*163–64 (Cal. Ct. App. Nov. 9, 2016).

143. *Pham*, 119 So. 3d at 205–06.

144. *Id.* at 210.

145. *Id.* at 214.

146. *Id.*

147. *Id.*

148. Reply Brief for Petitioner at 1, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-983), 2014 WL 5488911, at \*7–8.

149. *Id.* at \*10.

150. *Elonis v. United States*, 135 S. Ct. 2001, 2004–05 (2015).

151. *Id.*

152. *Id.* at 2012–13.

the telecommunication to convey threatening language.<sup>153</sup> In *Elonis*, the Court emphasized that the defendant went to great lengths to express that his posts should not be taken literally.<sup>154</sup> While his words may appear threatening to a reasonable person, his subjective intent was expressly made clear.<sup>155</sup> By relying on the subjective intent of the sender, the petitioner attempted to distinguish between criminal behavior that is threatening and behavior that constitutes innocent posting.<sup>156</sup> While the Supreme Court did not specify the level of subjective intent needed in this particular case,<sup>157</sup> the Court did embrace a standard that uses telecommunications to satisfy the element of *mens rea*.<sup>158</sup>

Coupled with additional evidence, telecommunications should be used to corroborate the prosecution's theory regarding intent. However, as expressed in *Elonis*, it is important to consider the context, and other circumstantial evidence, in which the telecommunication transpired.<sup>159</sup> As discussed, technology complicates the already complex issue of the sender's subjective intent.<sup>160</sup> However, technology can also provide an accurate view into the mind of a suspect.<sup>161</sup> By considering context and circumstantial evidence, prosecutors can effectively decipher intent through telecommunications.

As noted *infra*, some critics argue that applying criminal culpability to telecommunications impedes on the right to freedom of speech under the First Amendment.<sup>162</sup> While this is a legitimate concern, the *mens rea* expressed through technology should not be ignored simply based on the medium in which it is transmitted. When interpreting whether

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153. Villasenor, *supra* note 82, at 652–53 (“A subjective standard requires a jury to get inside the mind of a defendant and evaluate intent. By contrast, under an objective standard the speaker’s intent is irrelevant. Instead, what matters is whether a reasonable person would understand the statement to convey an intent to inflict bodily harm, regardless of whether or not such an intent is actually present in the mind of the speaker.”).

154. Reply Brief for Petitioner at 21, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-983), 2014 WL 5488911, at \*37.

155. *Id.*

156. *Id.*

157. Villasenor, *supra* note 82, at 633–34 (“[W]hile the Supreme Court’s June 2015 ruling in *Elonis* confirmed the importance of intent with respect to the federal criminal statute in question, it did not clarify the specific *level* of intent required for conviction under that statute. More fundamentally, the Court did not reach the broader constitutional question regarding the role of intent with respect to the scope of First Amendment protections.”).

158. *Elonis v. United States*, 135 S. Ct. 2001, 2010 (2015).

159. Villasenor, *supra* note 82, at 631.

160. *See id.* at 634 (“[T]echnological changes including the Internet, social networking, and smartphones are complicating the relationship between intent and communication.”).

161. *Id.* at 633.

162. *See generally* Brown, *supra* note 14.

legislation impinges upon a fundamental right, including expression protected by the First Amendment, courts usually apply a strict scrutiny standard, requiring the government to demonstrate a compelling state interest, making restrictions on expressive conduct necessary in order to achieve those ends.<sup>163</sup> While the Supreme Court has yet to resolve the constitutional issue as to whether relying on technology to interpret intent violates the First Amendment,<sup>164</sup> this approach should be deemed constitutional as the purpose of the First Amendment is not to protect criminality or the intent to commit crimes.<sup>165</sup> A perpetrator's blatant intent should not be shielded by a computer screen, simply because the individual uses telecommunications, instead of spoken words, to conduct their criminal behavior. As face-to-face interaction becomes inferior to telecommunication,<sup>166</sup> it is imperative that courts re-shape the overarching concept of "intent" to accommodate the manner in which individuals communicate."

Under a strict scrutiny analysis, the state has a compelling interest in protecting individuals from telecommunications that invoke criminality. As noted in *Commonwealth v. Carter*, the defendant's text messages were not protected by the First Amendment as the state had a compelling interest in deterring behavior that would lead to the death of another.<sup>167</sup> The court correctly determined that encouraging an individual to commit suicide is not the type of language that should be guaranteed constitutional protections.<sup>168</sup> As courts have affirmed, the First Amendment was not intended to protect speech that leads to criminal culpability.<sup>169</sup> The manner in which such language is expressed, whether vocalized, written, or transmitted through technology, should not alter the constitutional analysis. Thus, the First Amendment should not restrict prosecutors from utilizing telecommunications to establish *mens rea*.

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163. See *Heller v. District of Columbia*, 670 F.3d 1244, 1256 (D.C. Cir. 2011) ("[T]he Supreme Court often applies strict scrutiny to legislation that impinges upon a fundamental right.>").

164. Villasenor, *supra* note 82, at 666–67. ("[I]ntent, technology, and the First Amendment create a three-way intersection that individual Supreme Court rulings to date have considered only in part.>").

165. Dave Roos, *10 Rights the First Amendment Absolutely Does Not Grant*, HOW STUFF WORKS, <https://people.howstuffworks.com/10-rights-first-amendment-does-not-grant.htm> (last visited Mar. 9, 2019).

166. Emily Drago, *The Effect of Technology on Face-to-Face Communication*, 6 ELON J. UNDERGRADUATE RES. COMMS. 13 (2015).

167. *Commonwealth v. Carter*, 52 N.E.3d 1054, 1064 n.17 (Mass. 2016).

168. *Id.*

169. See *id.*; see also *Elonis v. United States*, 135 S. Ct. 2001, 2016 (Alito, J., dissenting); Villasenor, *supra* note 82, at 642.

*C. Telecommunication as Action*

Technology's expansive role in criminal law and society calls for permitting prosecutors to satisfy the element of *actus reus* through telecommunications. From a legal perspective, districts remain divided as to whether telecommunications can constitute a criminal act.<sup>170</sup> However, in cases involving telecommunications, courts should apply the same reasoning that is used for perpetrators who physically engage victims in the commission of a crime.<sup>171</sup> As seen in *Atencio*, the court upheld involuntary manslaughter charges for defendants who engaged in a game of "Russian Roulette" with the now-deceased.<sup>172</sup> While defendants argued that the act of pulling the trigger was the victim's action alone, the court found that the *actus reus* requirement could be satisfied by mere encouragement on the part of the defendants.<sup>173</sup> Given that a perpetrator can satisfy the *actus reus* element through spoken encouragement,<sup>174</sup> this same reasoning should be applied to telecommunications that do the same.

In *Carter*, the defense contended that the prosecution failed to meet its burden for the *actus reus* element.<sup>175</sup> The defense stressed that Carter was not physically present when the victim died, nor did she provide the instrument that was used to kill the victim.<sup>176</sup> During the trial, Carter argued that "verbally encouraging someone to commit suicide, no matter how forcefully, cannot constitute wanton or reckless conduct."<sup>177</sup> However, *Carter* accurately applied *Atencio* in finding that the court has never required that a "defendant commit a physical act in perpetrating a victim's death."<sup>178</sup> In *Persampieri*, defendant husband was convicted of involuntary manslaughter after convincing his wife to kill herself.<sup>179</sup> Similar to *Carter*, the *Persampieri* court found that "instead of [bringing

170. *State v. Sabato*, 138 A.3d 895, 897 (Conn. 2016) (finding the Appellate Court correctly determined the text message evidence was insufficient to convict the defendant of interfering with an officer); *Johnson v. State*, 390 P.3d 1212, 1221 (Alaska Ct. App. 2017) (finding that the State's evidence of a single text message "was not legally sufficient to establish the *actus reus* of stalking"); *People v. Ackerman*, Nos. C065484, C067078, 2016 WL 6610303, at \*45 (Cal. Ct. App. Nov. 9, 2016) (finding that a string of text messages would be used to prove that the perpetrator was an active participant in the murder).

171. *Commonwealth v. Atencio*, 189 N.E.2d 223, 224–25 (Mass. 1963).

172. *Id.* at 628.

173. *See id.* at 630 ("There could be found to be a mutual encouragement in a joint enterprise.").

174. *Id.*

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

176. *Id.*

177. *Id.*

178. *Id.*

179. *Persampieri v. Commonwealth*, 175 N.E.2d 387, 390 (Mass. 1961).

the victim] to her senses, [he] taunted her . . . . He thus showed a reckless disregard for his wife's safety and the possible consequences of his conduct."<sup>180</sup> While the perpetrator in *Persampieri* was physically present for the death of his victim,<sup>181</sup> the court correctly applied the same interpretation to *Carter*, notwithstanding the defendant's virtual presence and telecommunications used to perpetrate the crime.<sup>182</sup>

While *Carter* appears to take a novel approach to the *actus reus* element,<sup>183</sup> the reasoning in *Carter* mirrors the position adopted by other jurisdictions.<sup>184</sup> For example, in *State v. Melchert-Dinkel*, the Supreme Court of Minnesota found that the defendant contributed to the victim's suicide through a series of online conversations.<sup>185</sup> Defendant was not present for the victim's death;<sup>186</sup> however, defendant did describe and explain methods of suicide to the victim.<sup>187</sup> In its analysis, the court reasoned that defendant, although not present, helped carry out the act.<sup>188</sup> While the court did differentiate between "assisting" and "encouraging" the death of another,<sup>189</sup> the court ultimately found that telecommunications can survive strict scrutiny and pierce constitutional shields.<sup>190</sup>

While courts should allow telecommunications to satisfy the *actus reus* element,<sup>191</sup> skeptics refute the notion that virtual action can substitute the act of physically participating in a crime.<sup>192</sup> Under a

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180. *Id.*

181. *See id.*

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

183. See Kristine Phillips, *Her Texts Pushed Him to Suicide, Prosecutors Say. But Does that Mean She Killed Him?*, WASH. POST (June 6, 2017), [https://www.washingtonpost.com/news/morning-mix/wp/2017/06/06/just-do-it-babe-woman-accused-of-pushing-her-boyfriend-to-kill-himself-is-on-trial-this-week/?utm\\_term=.4dbd2dbbcal](https://www.washingtonpost.com/news/morning-mix/wp/2017/06/06/just-do-it-babe-woman-accused-of-pushing-her-boyfriend-to-kill-himself-is-on-trial-this-week/?utm_term=.4dbd2dbbcal).

184. *See, e.g., State v. Melchert-Dinkel*, 844 N.W.2d 13, 23 (Minn. 2014) (finding that assisting an individual to commit suicide violates the statute and that "[w]hile enablement perhaps most obviously occurs in the context of physical assistance, speech alone may also enable a person to commit suicide.").

185. *State v. Melchert-Dinkel*, No. A15-0073, 2015 WL 9437531, at \*7 (Minn. Ct. App. Dec. 28, 2015) ("On remand, the district court determined that [the defendant] enabled [the victim] to commit suicide and therefore assisted him in violation of [the aiding suicide statute].").

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

187. *Id.* at 16.

188. *See Melchert-Dinkel*, 2015 WL 9437531, at \*7–8.

189. *Melchert-Dinkel*, 844 N.W.2d at 23–24.

190. *Id.* at 23.

191. *See id.* ("Prohibiting only speech that assists suicide, combined with the statutory limitation that such enablement must be targeted at a specific individual, narrows the reach to only the most direct, causal links between speech and the suicide.").

192. Ready, *supra* note 20, at 140 ("[T]ext messages are still not enough to constitute an *actus reus* in a criminal conviction."); Kibbe, *supra* note 104 ("Carter played no physical

conduct-based theory, words alone cannot trigger criminal guilt.<sup>193</sup> As Joseph Caltado, Carter's attorney, argued: "These text messages Michelle Carter sent to Conrad Roy are speech. There's no action, . . . [h]e took all the actions necessary to cause his own death."<sup>194</sup> Admittedly, permitting telecommunications to qualify as a voluntary action does introduce a virtual, omnipresent factor into the *actus reus* analysis.<sup>195</sup> However, a virtual presence should not negate criminal culpability.<sup>196</sup> Additionally, when applied to a given statute, physical acts are not always necessary to commit a crime.<sup>197</sup> Regardless of the perpetrator's physical presence, "when a person places another in danger, fails to safeguard or rescue him and he dies, such omission is sufficient to support criminal liability."<sup>198</sup> Thus, the law should not allow criminal conduct to go unchecked based on the medium over which the crime is accomplished.

Notwithstanding the legal basis for applying telecommunications to the *actus reus* analysis,<sup>199</sup> adopting such an approach may create undesirable consequences outside of the courtroom.<sup>200</sup> In response to the

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role in Roy's suicide. Carter provided neither a place nor instrument of death, nor was she even present at the time of the suicide."); Miller, *supra* note 53 ("It's a sad story, a tragedy, but it's not manslaughter . . . where a person who is 30 miles away is charged with committing manslaughter by text.") (internal quotations omitted).

193. *Criminal Law—Liability for Physical Harm—Trial Court Convicts Defendant of Involuntary Manslaughter Based on Encouragement of Suicide—Commonwealth v. Carter*, No. 15YO0001NE (Mass. Juv. Ct. June 16, 2017), 131 HARV. L. REV. 918, 925 (2018).

194. Lapowsky, *supra* note 24.

195. Phillips, *supra* note 183.

196. *Commonwealth v. Carter*, 52 N.E.3d 1054, 1063 (Mass. 2016) ("[T]he coercive quality of that final directive was sufficient in the specific circumstances of this case to support a finding of probable cause. Those circumstances included the defendant's virtual presence at the time of the suicide . . . there was ample evidence to establish probable cause that the defendant's conduct was wanton or reckless, under either a subjective or an objective standard.").

197. *United States v. Tykarsky*, 446 F.3d 458, 469 (3d Cir. 2006) ("The instant messages also provide sufficient evidence that [the defendant] took substantial steps . . . . Accordingly, we will affirm his conviction."); *Persampieri v. Commonwealth*, 175 N.E.2d 387, 389 (Mass. 1961) (finding the manslaughter conviction proper when the Defendant encouraged his wife to kill herself, knowing that she was intoxicated and emotionally unstable); *People v. Ackerman*, Nos. C065484, C067078, 2016 WL 6610303, at \*45 (Cal. Ct. App. Nov. 9, 2016) (holding that text messages provided sufficient evidence that Defendant acted with reckless indifference toward the victim's life).

198. *United States v. Hatatley*, 130 F.3d 1399, 1406 (10th Cir. 1997).

199. Shaune Towne, *ACLU: Carter Conviction Violates Free Speech Protections*, 22 NEWS (June 16, 2017), <http://wwlp.com/2017/06/16/aclu-carter-conviction-violates-free-speech-protections/> ("The verdict represents the application of centuries old common law principles and the interplay with today's wide spread use of communication through social media.").

200. *ACLU supra* note 78; Ready, *supra* note 20 at 140; Kibbe, *supra* note 104; Tarantola, *supra* note 25.

guilty verdict reached in *Carter*, the chief legal counsel to the Massachusetts Bar Association warned that the case involving “seemingly remote and distant communications” will have national implications.<sup>201</sup> However, as the frequency of “real-time” and expanding virtual presence becomes more commonplace, telecommunications should no longer be viewed as “remote” or lacking influence. In fact, failure to account for society’s online participation as legitimate action will promote criminality. Despite its disapproval, the Massachusetts Bar admitted that the “defendant’s fate was sealed through the use of her own words. The communications illustrated a deeply troubled defendant whose actions rose to the level of wanton and reckless disregard for the life of the victim.”<sup>202</sup> As in *Carter*’s case, both applicable law and consequential concerns advance the notion that using words to perpetrate crime does not negate criminal culpability.

Although there is an inclination to avoid any possibility of a “slippery slope” when it comes to grave, criminal charges such as homicide,<sup>203</sup> there must be accountability for wanton and reckless actions. *Carter* avoided a potential “slippery slope” by stressing that cases of this nature should be dealt with on a case-by-case basis given the factual circumstances at issue.<sup>204</sup> Such a fact-sensitive analysis should ease critics’ fears of heading down a “slippery slope.” Courts are expected to distinguish between criminal behavior and distant, immoral behavior, regardless of the relevant technology involved.<sup>205</sup> Such an expectation should not alter, but extend, to telecommunications. Given that individuals should be held accountable for behavior that rises to the level of criminal conduct, courts must adopt an approach that will have favorable consequences both inside and outside of the courtroom.

Similar to the *mens rea* element, allowing telecommunications to satisfy the element of *actus reus* also raises constitutional concerns.<sup>206</sup> Critics worry that accepting speech as a satisfactory alternative for action will infringe on First Amendment protections.<sup>207</sup> For example, in response to Michelle Carter’s conviction in *Carter*, the ACLU contended that Carter’s “conviction exceeds the limits of our criminal laws and

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201. Towne, *supra* note 199.

202. *Id.*

203. See Ready, *supra* note 20, at 140; Jacobo, *supra* note 77.

204. Commonwealth v. Carter, 52 N.E.3d 1054, 1062–63 (Mass. 2016) (finding that “because wanton or reckless conduct requires a consideration of the likelihood of a result occurring, the inquiry is by its nature entirely fact-specific . . . the inquiry must be made on a case-by-case basis.”).

205. Lapowsky, *supra* note 24.

206. ACLU, *supra* note 78.

207. *Id.*



violates free speech protections guaranteed by the Massachusetts and U.S. Constitutions.”<sup>208</sup> It came as no surprise that defendant raised affirmative defenses under the First Amendment and Article XVI of the Massachusetts Constitution Declaration of Rights.<sup>209</sup> However, in *Carter*, the court addressed these concerns by finding that the government satisfied the “strict scrutiny” standard applied to content-based restrictions that are placed on otherwise protected, expressive conduct.<sup>210</sup> In its reasoning, the court explained that the state had a compelling interest to deter speech that constituted a direct link to the crime and the victim.<sup>211</sup> As explained in *Melchert-Dinkel*, the United States Supreme Court has long prohibited speech that is integral to criminal conduct.<sup>212</sup> While suicide may not be illegal, third-party conduct that contributes to the death of another can qualify as criminal action.<sup>213</sup> Therefore, *Carter* properly recognized that tele-communications, which cause the death of another person,<sup>214</sup> should constitute wanton and reckless conduct that is not be protected by the First Amendment.<sup>215</sup>

#### *D. Telecommunications that Cause Crime*

Finally, we should permit telecommunication to satisfy the causation element for crimes, such as homicide. Critics posit that “encouragement does not seem a sufficiently physical act to count as killing.”<sup>216</sup> However, in an increasing number of circumstances, courts have located a casual link between communications and criminal behavior.<sup>217</sup> Courts have often found that the actions of the victim, which may have contributed to the death, do not constitute an intervening act that would relieve participants of their involvement in the crime.<sup>218</sup> For example, in *Atencio*, the court found that under a joint enterprise theory, participants caused

208. See *id.* (arguing that “[t]here is no law in Massachusetts making it a crime to encourage someone, or even to persuade someone, to commit suicide.”).

209. Ready, *supra* note 20 at 131 (citation omitted).

210. *Carter v. Commonwealth*, 52 N.E.3d 1054, 1085 n.17 (Mass. 2016).

211. *Id.* at 1062 (quoting *Commonwealth v. Atencio*, 189 N.E.2d 223, 224 (Mass. 1963) (stating the state “had an interest that the deceased should not be killed by the wanton or reckless conduct of *himself and others*.”)).

212. *Carter*, 52 N.E.3d at 1062.

213. *Id.*

214. *Id.*

215. *Id.*

216. Binder & Chiesa, *supra* note 43, at 84.

217. See *Carter*, 52 N.E.3d at 1059; *Commonwealth v. Atencio*, 189 N.E.2d 223, 225 (Mass. 1963); *Persampieri v. Commonwealth*, 175 N.E. 2d 387, 389 (Mass. 1961).

218. See generally *Nelson v. Nason*, 177 N.E.2d 887, 888 (Mass. 1961); *Thacker v. State*, 117 S.E.2d 913, 915 (Ga. Ct. App. 1961).

the death of the victim through mutual encouragement.<sup>219</sup> In criminal law, joint enterprise describes the coordination of two individuals in pursuit of a criminal end.<sup>220</sup> The joint enterprise theory focuses on the actions of both individuals in their common purpose, regardless of subsequent physical acts that may have contributed to the commission of the crime.<sup>221</sup>

In support of its finding that the participants caused the victim's death, the *Atencio* court reasoned that defendants participated in the death by encouraging the victim to pull the trigger.<sup>222</sup> Although the victim exclusively pulled the trigger, this act did not rid the participants of their criminal culpability.<sup>223</sup> While the participants were present to witness the death,<sup>224</sup> the court emphasized that the actors caused the homicide through their speech and persuasion, leading the court to believe that "defendants were much more than merely present at a crime."<sup>225</sup> Since individuals can cause the death of another through encouragement or participating in a joint enterprise,<sup>226</sup> the same reasoning should apply to telecommunications that facilitate such encouragement.

In *Carter*, the element of causation was established by the defendant's constant pressuring of the victim, to the point of overcoming Roy's individual will to live.<sup>227</sup> The casual link was established at "the moment Carter assumed responsibility for Roy's life and engaged in 'wanton and reckless behavior,' knowing it could cause Roy 'substantial harm.'"<sup>228</sup> Particularly, Carter's command to Roy to get back in the car caused Roy's death.<sup>229</sup> While Carter argued that the causation requirement could not be satisfied as she was thousands of miles away at the time of Roy's death and Roy made the decision to get back inside

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219. *Atencio*, 189 N.E.2d at 225.

220. Dennis J. Baker, *Reinterpreting the Mental Element in Criminal Complicity: Change of Normative Position Theory Cannot Rationalize the Current Law*, 40 L. & PSYCHOL. REV. 119, 132 (2016).

221. *Id.* at 132–33.

222. *Atencio*, 189 N.E.2d at 224–25 ("We are of opinion that the defendants could properly have been found guilty of manslaughter. . . . Here the Commonwealth had an interest that the deceased should not be killed by the wanton or reckless conduct of himself and others. Such conduct could be found in the concerted action and cooperation of the defendants in helping to bring about the deceased's foolish act.") (internal citation omitted).

223. *Id.*

224. *Id.* at 224.

225. *Id.* at 225.

226. *See id.*

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

228. Lapowsky, *supra* note 24.

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

the truck on his own,<sup>230</sup> the court amply reasoned that “there was sufficient evidence to support a probable cause finding that the Defendant’s command to the victim in the final moments of his life to follow through on his suicide attempt was a direct, casual link to his death.”<sup>231</sup> In support of its reasoning, the court pointed to evidence “suggesting a systematic campaign of coercion on which the virtually present defendant embarked—captured and preserved through her text messages—that targeted the equivocating young victim’s insecurities and acted to subvert his willpower in favor of her own.”<sup>232</sup> As a result, the court correctly concluded that Carter overcame her victim’s willpower and essentially caused his death through tele-communications.

#### IX. CONCLUSION

The innovation of technology and telecommunications has permanently transformed our legal landscape. As society evolves, so does our perception of criminal culpability. As a result, our traditional concepts of *actus reus* and *mens rea* are evolving to account for the digital age. Courts have a duty to account for the expanding role telecommunications play in the execution of crimes. After first experiencing an influx in statutes addressing crimes that are primarily perpetrated online, the judicial system should now recognize how telecommunications can satisfy the elements of common law crimes, such as homicide.

Based on our growing dependence on technology and expanding case law, it is rational to criminalize behavior that is conducted over telecommunications. Telecommunications can supply prosecutors with not only circumstantial evidence, but also the elements of a crime itself. While public policy and constitutional concerns remain, courts need to advance with technology in order to account for the growing criminal conduct transmitted online. As illustrated in *Commonwealth v. Carter*, courts can no longer separate an online, virtual presence from criminal actualities. The reasoning in *Carter* supports the notion that telecommunications have become an integral part of our reality, and must be taken into consideration by courts in the future. Criminal culpability based solely on telecommunications coincides with not only our modern-day realities, but our legal doctrine as well.

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230. *Id.* at 1063 (“The defendant argues that, even if she was wanton or reckless, her words (spoken when she was miles away from the victim) could not be the cause of the victim’s death.”).

231. *Id.* at 1064.

232. *Id.*