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The Mundane Tasks of Any Legal System and the Vanishing Promise of Legal Certainty

> Do not accuse injustice of usurping the place of the law, but the law of permitting that usurpation.[1]

The Case of Michelle Carter and Conrad Roy

In *Commonwealth v. Carter* (2016), a Massachusetts Juvenile Court found Michelle Carter guilty of involuntary manslaughter for encouraging her boyfriend, Conrad Roy, to commit suicide. The case garnered scholarly attention and has also been turned into a successful true crime show (Netflix, *The Girl from Plainville*). In 2014, 18-year-old Conrad Roy committed suicide by carbon monoxide asphyxiation. Michelle Carter described Conrad Roy as her boyfriend, although their relationship existed mainly through the exchange of hundreds of text messages in which they discussed their lives and struggles. Conrad frequently expressed his desire to commit suicide — something he had attempted before. Initially, Carter had tried to talk Conrad out of it, but she changed her mind after he convinced her that nothing else could relieve his suffering. She then urged him to go through with his plan. One night, Conrad drove his truck to a parking lot and started a gas-powered pump with the intent to kill himself. At one point, he exited the vehicle and called Michelle.

1 Rudolph von Jhering (1915), 76.

She asked him to get back into the car. Conrad did and then died. Michelle was charged with and convicted of involuntary — wanton and reckless — manslaughter. She received a sentence of fifteen months in prison.

This case stands out not only because it was the first time a court had found that words alone are sufficient to constitute a charge of manslaughter. Legal commentators also argued that the court had gone beyond established legal doctrines. Taken together, these alterations in legal practice render this case an example for a larger issue that permeates the U.S. American justice system: the erosion of legal certainty. To make that comprehensible, I need to address a doctrinal problem in the *Commonwealth v. Carter* decision, the question of whether Michelle Carter caused Conrads's death in the legal sense. Typically, a (criminal) actor is responsible for their own behavior, like taking a gun and killing someone) but not for someone else's. If A puts a gun on the kitchen counter and B takes it and kills C, A cannot be charged with a homicide because "proximate" cause is missing. The same would be true if B committed suicide. Based on this doctrine, Michelle cannot be considered accountable for Conrad's suicide. If a state wants to make helping someone to commit suicide a crime, they need to enact an assisted suicide law. Such a law did not exist in Massachusetts. The judge in *Carter,* however, found that "where one's actions created a life-threatening risk to another, there would be a duty to take reasonable steps to alleviate the risk," meaning that once Conrad had exited the car, Michelle Carter had a "self-created duty" to help, which she recklessly failed to fulfill. No other U.S. American case[2] exists in which the

2 Other legal systems, like the German one, have established doctrine that attaches a duty to help in certain previous behaviors ("*Ingerenz*"). In the United States, an omission can be the basis for criminal liability when there is a statutory duty, a special relationship, a contractual duty, or a voluntary assumption of care that secludes the person, thereby preventing others from rendering aid. None of these apply here.

victim committed suicide, and the defendant was convicted of homicide on the basis of only verbal encouragement.

The court did not provide much legal support for its decision and may have been motivated more by the case narrative and Michelle's presumed character than establishing a new doctrine. Michelle Carter is described as a young woman who "badgered [Conrad] back into the gas-infused truck." The Massachusetts Supreme Court stated that she was not a "person offering support, comfort, and even assistance to a mature adult who … has decided to end his or her life," rather, Michelle is portrayed as being on a "systematic campaign of coercion on which the virtually present defendant embarked […] that targeted the equivocating young victim's insecurities and acted to subvert his willpower in favor of her own."[3] The state stressed that Michelle had callously violated not only Conrad's trust but also that of his parents. During sentencing, Conrad's family explained that Michelle "has not shown any remorse. The fact that he was convinced to […] kill himself is unimaginable. Where was her humanity?"[4]

As a matter of law, none of these considerations should have substantively mattered. What becomes clear is that common law judges are much freer than their civil law counterparts to create new laws by changing the understanding of existing ones. Presumably referring to the common law system, Stanley Fish defines legal interpretation as "what happens when the meanings embedded in an object or text are set aside in favor of the meanings demanded by some angled, partisan object."[5] Civil law systems reduce these risks by using a more formalistic approach to the letter of law, providing it with a "more palpable manifestation of its basic claim to be perdurable and general […] standing as a point of reference in relation which change can be assessed and

3 *Commonwealth v. Carter*, 474 Mass.624, 639 (2016).
4 Rosenblatt (2017).
5 Fish (1994), 142.

controlled."[6] Michelle, arguably, had no point of reference and no way of knowing that she had a legal (and not only a social and moral) obligation to help.

Legal Certainty as Fair Warning

The principle that a penal statute must define punishable conduct and the penalty with sufficient precision is commonly accepted as a basic requirement of the rule of law — regardless of the respective legal tradition in civil or common law. The U.S. Supreme Court has repeatedly stated that the Fifth Amendment's Due Process Clause requires the law to provide notice of what it prohibits and what punishment it prescribes for violations. The law must provide "fair warning [...] 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."[7] People of "common intelligence" should not need to "guess at its meaning."[8] The law and not some person's individual moral compass must provide that direction.[9]

At least in theory, fair notice empowers individuals to shape their actions according to (or against) the law. Of course, "it is not likely that a criminal will carefully consider the text of the law before he murders or steals [but] a fair warning should be given to the world in language that the common world will understand."[10] This serves the prohibition of vague or unknowable requirements and the prohibition of ex post facto laws.[11] Due process also precludes the "novel construction" of statutes — otherwise known

6 Fish (1994), 143.
7 *McBoyle v. United States*, 283 U.S. 25, 27 (1931).
8 *Bouie v. City of Columbia*, 378 U.S. 347, 350–51 (1964).
9 See Fish (1994), 142.
10 *McBoyle v. United States*, 283 U.S. 25, 27 (1931).
11 *United States v. Lanier*, 520 U.S. 259, 266–67 (1997).

as the anti-retroactivity doctrine — which expands the scope of conduct that can be prosecuted under a statute if "neither the statute nor any prior judicial decision ha[d] fairly disclosed [the defendant's conduct] to be within its scope."[12] Was the law as it existed at the time of Michelle Carter's conduct clear enough for her to know that telling someone who wants to commit suicide to go through with it would be considered unintentional homicide? Could she have known that what she did was wanton and reckless — not at the moment, when she initially convinced Conrad to get in the car with a gas-powered engine running, but when she sent him *back* to the vehicle? Would anyone (lawyer or not) be able to deduce from the Massachusetts homicide laws that Michelle's conduct is in violation of that law? If not, the law's reach would be unknowable.[13] To argue that for the sake of justice, wrongdoers like Michelle Cater must be punished turns the idea of justice on its head, because it is a requirement of justice that the "law be certain and sure, that it not be interpreted and applied one way here and now, another way elsewhere and tomorrow."[14]

As mundane as this sounds, a judge's everyday task is to give an existing law its shape. Law cannot uphold itself. It needs agents that have internalized a duty to the law and nothing else, not punitive desires, bias, or pressure from the executive.

The Struggle for Law

The question of how law is afforded its own right to exist and how it comes to life is as timely as it is old. In 1872, the German legal scholar Rudolf von Jhering gave a talk with the title "Der Kampf ums Recht" (The Struggle [or better: the Fight or Battle]

12 *United States v. Lanier*, 520 U.S. 259, 266 (1997).
13 See *United States v. Jackson*, 55 F.4th 846 (11th Cir. 2022).
14 Radbruch (2006), 6.

for Law) to practicing lawyers for whom the struggle for law was not a philosophical, abstract question but rather a daily task. In everyday trials concerning individual, private rights, von Jhering saw the "grand and the sublime in the moral order of the world,"[15] asserting that the "law is not mere theory, but living force."[16] The mundane case stands for the larger system:

> Concrete law not only receives life and strength from abstract law, but gives it back, in turn, the life it has received. It is of the nature of the law to be realized in practice. A principle of law never applied in practice, or which has lost its force, no longer deserves the name.[17]

Regardless of what brings someone to court, the struggle for law has one goal: the "opposition to arbitrariness."[18] But what is arbitrary? In von Jhering's view, it is the dissonance of the existing law and the "sentiment of legal right"[19] (the *Rechtsgefühl*.)[20] "When the imperfection of legal institutions refuses him satisfaction […], the struggle for law becomes a struggle against the law."[21]

The concept of *Rechtsgefühl* does not propose vigilante justice, a revolt against existing law when an individual feels the law is not correct. Rather, it is "a catalyst for legal reform when it functions to disturb and challenge existing legal norms,"[22] it is "understood within inner-juristic discourse."[23] *Rechtsgefühl* is what must motivate the individual to bring their case to court.

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15 Rudolph von Jhering (1915), 78.
16 Rudolph von Jhering (1915), 2.
17 Rudolph von Jhering (1915), 70. Although von Jhering was a private law scholar, his main arguments, as expressed in this text, are universally applicable.
18 Rudolph von Jhering (1915),79.
19 Rudolph von Jhering (1915),72.
20 A better translation would be the "feeling for law and justice." Olson (2023), 23.
21 Rudolph von Jhering (1915), 94.
22 Olson (2023), 25.
23 Olson (2023), 26.

It should also motivate reform, but it is not reform in itself or a justification for lawlessness.[24] In that sense, it almost seems foreboding (of the near and more distant future) when von Jhering warns that the law

> must be defended, if the law itself is not to become a mockery and a word without meaning. When the legal right of the individual is sacrificed, the law is sacrificed likewise. Law must be considered and upheld free of the individual's evil intent or motivation.[25]

Shylock, the moneylender in Shakespeare's *Merchant of Venice*, is mentioned by von Jhering as an example. Although it was "hatred and revenge" that initiated Shylock's suit, he must be judged in accordance with the law. If he were denied the law, this would be a denial of the law itself:

> It is no longer the Jew demanding his pound of flesh; it is the law of Venice itself knocking at the door of Justice; for his rights and the law of Venice are one and the same; they both stand or fall together.[26]

The problem here is bias, not in the law but in those who apply it and the ways in which bias can be legalized. In a different text, von Jhering imagines a "dialectical-hydraulic interpretation press [through which] one extracts from each passage what is necessary. [And through] the dialectical infiltration apparatus […] thoughts, presuppositions, and limitations that were completely foreign to the writer of the [law] are forced into it."[27] Law, any law, can become pretext for an agenda. Shylock and Michelle Carter may have had despicable motives, but in the application of law

24 There are certainly exceptions, where, for instance, "there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then [a law] is not merely 'flawed law', it lacks completely the very nature of law." Radbruch (2006), 7.

25 Rudolph von Jhering (1915), 85.

26 Rudolph von Jhering (1915), 87.

27 Von Jhering (1884), 262. Translation my own.

their motivations should not matter, especially since they both had outsider status. Laws must serve those on the fringes because they have no clout, no leverage, or anything else that gives their status stability. They cannot rely on a powerful community that shares their values or understands them. Law is what allows them to anticipate the consequences of their actions.

The Mundane Task of Maintaining Predictability

Predictability and consistency in the application of law lend legal systems legitimacy, because they signal a nation's commitment to the rule of law. This is true for our lowest and highest courts. In the controversial decision *Planned Parenthood v. Casey* (1992), the Supreme Court decided not to overrule *Roe v. Wade* (1973) — not because the Justices supported abortion but because they found that the "promise of constancy once given binds the Court for as long as the power to standby the decision survives and the understanding of the issue has not changed so fundamentally as to render that commitment obsolete."[28] For some Justices, like Souter, legal certainty was more important than personal conviction. Much in line with von Jhering, Souter said that a

> presumption in favor of stare decisis of standing by the resolution of an issue reached in a prior case is necessary not only to accomplish the mundane tasks of any legal system but to realize our hope for a stable society aspiring to the rule of law.[29]

As much as all of the Justices agreed that legal change is and should be possible, such change needs process and the consideration of the voices of those who are affected. Courts are the wrong places to initiate such broad sweeping changes.

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28 *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 868 (1992).

29 Announcement of the decision, available at "Planned Parenthood of Southeastern Pennsylvania v. Casey" (n.d.), https://www.oyez.org/cases/1991/91-744.

In *Casey*, the Justices were explicit in sending out a warning "to all who have tried to turn this Court into yet another political branch."[30] A little over thirty years later, the line between politics and the rule of law is much less sharp. During the beginning of 2025, Deputy Attorney General Emil Bove directed Danielle Sassoon (United States Attorney for the Southern District of New York) to dismiss the indictment against the Mayor of New York City, Eric Adams. Bove stressed that prosecutors have a duty to make good-faith arguments in support of the Executive Branch's positions. Sassoon could not see any good-faith basis for Bove's position and argued that impartial enforcement of the law is the bedrock of federal prosecutions, and that the rule of law depends upon the evenhanded administration of justice, insulated from political influence. This is probably what von Jhering meant when he wrote that "without resistance to what is unjust, the law would deny itself."[31]

Commonwealth v. Carter is not an isolated case in which legal certainty was insufficiently considered. In March 2024, James and Jennifer Crumbley were convicted of involuntary manslaughter over their failure to prevent their teenage son from killing four fellow students and wounding seven others in a school shooting in Michigan. The element of causation was again interpreted broadly and against established doctrine. In Georgia, in September 2024, Colin Gray, the father of the suspected Apalachee High School shooter, was charged with second-degree murder and other crimes. Since Michigan case law does not bind Georgia courts, Colin Gray did not get a "fair warning." The way all of these cases have been handled is indicative of a tendency in the United States to treat certain public health issues with the instruments of criminal justice, i.e., to find someone who is "accountable,"

30 *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 924 (1992) (Blackmun dissent).

31 Rudolf von Jhering (1872), 2 (not translated in the English version).

when the underlying issue is more complex and requires a more tailored solution.[32] That is arguably true for the Court's decision *in Dobbs v. Jackson Women's Health Organization* (2022), the case that overruled *Roe v. Wade*. The majority did not feel bound by the "promise of constancy once given" (see above) and deferred to state legislatures for how abortion should be handled. The effect was that the moment *Dobbs* became law, certainty for women vanished. For instance, the state of Wisconsin has had a law against abortion since 1849.[33] This statute could not be enforced under *Roe*. To regulate abortions after *Roe*, Wisconsin enacted multiple statutes to govern the "who, what, where, when, and how" of abortion.[34] As *Dobbs* took effect in 2022, Wisconsin's old law prohibiting abortions was "triggered" back into action,[35] but stood in conflict with all the statutes that were enacted with the implicit understanding of abortion being legal. So, there is a law that says that "destroy[ing] the life of an unborn child is a felony," and there is a law that, for example, says that an "abortion may not be performed … unless the woman … has given voluntary and informed written consent."[36] In that situation of legal limbo, some district attorneys pledged not to enforce the old prohibition — others said they would. This only increased uncertainty because of the discretionary nature of the decision to prosecute or not and the difficulty in predicting in what county what kind of law would be enforced. In July 2025, the Wisconsin Supreme Court took up a case in which the Attorney General of Wisconsin (and others) sought declaratory judgment that the old Wisconsin law does not in fact ban abortions. In a 4–3 decision, the court held

32 According to the Center for Disease Control, suicide is a serious public health problem. The same is true for gun violence, see Villarreal et al. (2022).

33 WIS. STAT. § 940.04(1).

34 *Kaul v. Urmanski*, 2025 WI 32, p. 3.

35 Thirteen states enacted so called "trigger laws" that would automatically ban abortion if *Roe v. Wade* were overturned. Eight states still have their pre-*Roe v. Wade* abortion bans on the books.

36 WIS. STAT. § 253.10(3)(a).

that the many statutes enacted over the last fifty years "impliedly repealed" Wisconsin's abortion ban and that therefore the old law cannot be enforced.[37] That provides some (ostensibly temporary) clarity, yet the issue of an implied repeal is a question of statutory interpretation and not legislation and can easily swing the other way as soon as the composition of the court changes. Regardless of where one stands in the matter of choice, everyone involved in that legal process must "lend each other a hand in the common work, opposition to arbitrariness."[38]

Power can assert a "must of compulsion, it never serves as a basis for the ought of obligation for legal validity."[39] It is a particular deficit of the common law model that notions of popular justice can seep into the foundations of courts when they should be the one place in which the duty is to due process and nothing else.

The responsibility for this state of affairs falls not only on those who transgress the law, but also on those who do not have the courage to assert legal validity and the rule of law.[40]

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37 Kaul v. Urmanski, 2025 WI 32, p. 2.
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