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Exploring the Legality of Dangerous Instagram Therapy

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EXPLORING THE LEGALITY OF DANGEROUS INSTAGRAM THERAPY

By Alexis Page[†]

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INTRODUCTION

“It started with a couple of therapists during the pandemic. Then the clever Instagram algorithm started giving me more of what I wanted. And now, I’m concerned about my inner child, my attachment style, and my clear lack of boundaries.”¹

At the start of the COVID-19 pandemic, “Jane,” a young mother from Texas, was diagnosed with obsessive-compulsive disorder (OCD) and Attention Deficient Hyperactive Disorder (ADHD).² However, when Jane began looking for a mental health professional, she was told

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1. Krista Bennett DeMaio, *Rise of the Instagram Therapist: Should You Follow?*, CLUB MENTAL. (Nov. 17, 2022), <https://clubmental.com/pros-and-cons-of-mental-health-on-social-media/> [https://perma.cc/GF3A-F83J].
2. Amanda Montell & Isabela Medina-Maté, *The Cult of Instagram Therapists*, SOUNDS LIKE A CULT (Feb. 8, 2022) (accessed using Spotify).

she must join a six-month-long waitlist before being assigned one.³ Jane felt helpless that she could not find a therapist in an accessible amount of time, so she turned to Instagram.⁴ The “therapist”⁵ on Instagram spoke of attachment theory, a topic that resonated with her, and Jane began following the Instagram therapist’s social media account.⁶ Jane continued to resonate with what the “therapist” on Instagram said, and she recommended the account to her brother and sister-in-law, who also lived in Texas.⁷ Jane’s brother and sister-in-law were struggling with their marriage and finances, so Jane thought that this free online “therapy” would be an ideal option for them.⁸

With four children under ten and a struggling marriage, Jane’s brother and his family were financially and emotionally vulnerable.⁹ After some time following the account, Jane’s brother and sister-in-law became obsessed with it and cut off all communication with Jane.¹⁰ Jane’s brother admitted that he had cut Jane out of his life because “she didn’t have a high enough vibration.”¹¹ During this time, Jane’s brother stopped taking his medication and attempted suicide.¹² Jane’s sister-in-law now leads a small, in-person “therapy” offshoot based on the Instagram account and has established a following of her own.¹³

This story does not stand alone; it is merely one family impacted by the unregulated, new age “therapy” available with just a few taps of a screen or clicks of a keyboard. Instagram therapists have begun giving serious and often personal therapeutic advice to the individuals who access their Instagram profiles. The advice is often general and takes a one-size-fits-all approach,¹⁴ and some question whether effective,

3. *Id.*

4. *Id.*

5. The word “therapist” is in quotation marks because, in this paper, the “therapist” is presumed to be unlicensed.

6. Montell & Medina-Maté, *supra* note 2.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*; see Aletheia, *Do You Have a “Low” or “High” Vibration? Read These 61 Signs*, LONERWOLF (Sept. 4, 2023), <https://lonerwolf.com/low-or-high-vibration-signs/> [<https://perma.cc/84YT-8DN3>] (defining “high” and “low” vibrations and using the term “low vibrations” to refer to “darker qualities such as hatred, fear, greed, and depression.”).

12. Montell & Medina-Maté, *supra* note 2.

13. *Id.*

14. Elly Belle, *Instagram Accounts Are Providing Secondhand Therapy – Here’s Why You Should be Careful*, GREATIST (Sept. 10, 2020), <https://greatist.com/connect/instagram-therapists-and-second-hand-therapy> [<https://perma.cc/XU3N-VPVD>] (medically reviewed by Marney

ethical therapy can exist in such a general format.¹⁵ Moreover, many “Instagram therapists” do not explicitly urge their followers to seek professional help. Instead, they imply that they *are* the professional help by listing their credentials in their bios. The most widely addressed topics on Instagram therapy accounts include, but are not limited to, recommendations on how to recognize gaslighting, set boundaries, forgive yourself, differentiate between kindness and pleasing others, support friends during hard times, and identify anxiety triggers.¹⁶ This article aims to find a solution to the problem of Instagram therapy by combining new ideas with existing laws and regulations to ultimately create a safer online experience in an age where technology is ever-influential in our lives.

First, this article will define Instagram therapy, discuss what makes it such a potential risk to mental health, and explain how capitalism could make it a necessary evil.¹⁷ Then, the article will examine current laws, review boards, and company policies relating to Instagram therapy. Finally, this article will discuss possible solutions to the problems associated with Instagram therapy. The primary goal of this article is to open the door for new legal research on Instagram therapy, a topic that desperately needs it.

I. WHAT IS INSTAGRAM THERAPY?

In 2020, the COVID-19 pandemic impacted the entire world and drastically changed the way people interacted with one another.

A. White, Ph.D., MS, Psychology) (“Cassie, a recent graduate, says that before she was diagnosed with Bipolar Disorder and in therapy, she allowed herself to justify toxic behaviors by picking and choosing advice from mental health pages on Instagram and other sites. ‘When I spent hours a day admiring myself in front of the mirror to the extent that I was avoiding social and academic responsibilities, I was ‘practicing healthy self-love.’ When I lashed out at friends and family for perceived slights, I was ‘expressing my feelings.’ Basically, it bothers me how a lot of the mental health advice given out online is presented as one-size-fits-all, without any nuance,’ says Cassie.”).

15. See Vicky Spratt, *The Danger of Instagram Therapists (& What Real Therapists Think of Them)*, REFINERY29 <https://www.refinery29.com/en-gb/2021/01/10237732/mental-health-therapy-instagram-accounts> [https://perma.cc/E9JH-U7NK] (last updated Apr. 20, 2022).
16. Alannah Tjhatra, *Instagram Therapy*, STUDENT MOVEMENT (Oct. 6, 2022), <https://www.andrews.edu/life/student-movement/issues/2022-10-06/marvels-storyingtelling-why-we-need-to-ask-for-better.html> [https://perma.cc/KA4V-RE2Y].
17. In the capitalist society that is America, there are some benefits to Instagram therapy. However, the damages that result from these accounts are far too significant to ignore, and social media requires legal guidelines for this practice to continue. The propositions presented in this analysis are not meant to ignore capitalism’s influence on the need for these free and often generalized social media therapy posts.

Because of the pandemic, the world shut down for months, leaving many people isolated in their homes. At the time, this isolation was their only defense mechanism against a virus that has since killed over a million people in the United States.¹⁸ When no place outside the home felt safe, social media became a retreat for many people seeking comfort and community, causing platforms like Instagram, X (formerly “Twitter”), Facebook, and TikTok to become safe spaces to socialize, solicit advice, and give advice on topics like vaccine information and mental health.¹⁹

This rise in social media usage spawned a new obsession with Instagram therapists. In short, an “Instagram therapist” is an individual who offers therapy and mental health-related guidance via social media platforms, particularly Instagram.²⁰ “Instagram therapists” create Instagram accounts to share mental health therapy in an accessible and digestible way.²¹ Since the start of the pandemic, the number of Instagram therapy posts covering a plethora of topics has been rapidly rising.²² While Instagram therapists can be helpful to some, their accounts target a vulnerable group: people seeking free therapy to help with their suffering mental health. Instagram therapy cannot replace licensed therapy, but it has benefits.²³ For one, it works to shrink the knowledge gaps regarding mental and emotional health in society.²⁴ Furthermore, it has played a role in the general destigmatization of mental health therapy.²⁵ However, behind the screen of social media, it is easy to forget that there is a difference between a licensed, vetted professional and an Instagrammer who is

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18. *COVID Data Tracker*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> [<https://perma.cc/W8EX-HV63>].
 19. See generally Nickolas A. Jordan et al., *The Ethical Use of Social Media in Marriage and Family Therapy: Recommendations and Future Directions*, 22 FAM. J. 105, 105 (2015) (defining social media or social networks as “Internet-based applications used in direct and indirect social interactions”).
 20. This article uses the term “Instagram therapist” interchangeably, primarily referring to therapists on Instagram but sometimes to social media therapists more generally.
 21. Spratt, *supra* note 15; see Sarah Fielding, *The Rise of Social Media Therapy*, VERYWELL MIND, <https://www.verywellmind.com/the-rise-of-the-mental-health-influencer-5198751> [<https://perma.cc/HGC5-SXAE>] (last updated Sept. 29, 2021).
 22. Tjhatra, *supra* note 16.
 23. Belle, *supra* note 14.
 24. *Id.*
 25. *Id.*

capitalizing on their own experience with mental health issues.²⁶ Furthermore, it may not matter if the Instagram therapist is licensed, as many factors make Instagram therapy far different and less effective than professional therapy.²⁷

Instagram therapy posts are “often manifested in the form of pastel backgrounds with calming flower doodles and affirming funky fonts”²⁸ and “filled with tips and advice addressing self-discovery and mental health.”²⁹ With this aesthetic, these therapy posts actively target the primary generation present on Instagram: young people.³⁰ A child can join Instagram at only thirteen,³¹ creating another vulnerable group targeted by Instagram therapists. Several studies suggest that teenage and young adult users who spend more time on social media, like Instagram, have a substantially higher rate of reported depression than people in that age group who spend less time on social media.³²

A. Instagram therapy is different from telehealth mental health services.

Instagram therapy is unlike other telehealth mental health services methods. For example, BetterHelp, a website designed to make “professional therapy accessible, affordable, and convenient,” vets the therapists.³³ Telehealth mental health services, like BetterHelp, offer licensed and trained professionals who provide treatments for various mental health issues. Research supports this claim, showing that telehealth services, such as videoconferencing and phone consultations, can effectively treat a range of mental health issues, including

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26. DeMaio, *supra* note 1 (“It may be a person who experienced depression, and now they have this big platform to talk about depression . . . They may be an expert on their depression, but they’re not an expert in mental health.”).
27. *Id.*
28. Tjhatra, *supra* note 16.
29. *Id.*
30. *Id.*
31. *Introducing New Ways to Verify Age on Instagram*, INSTAGRAM (June 23, 2022), <https://about.instagram.com/blog/announcements/new-ways-to-verify-age-on-instagram> [<https://perma.cc/E3BU-3S3N>].
32. Caroline Miller, *Does Social Media Use Cause Depression?*, CHILD MIND INST., <https://childmind.org/article/is-social-media-use-causing-depression/> [<https://perma.cc/47PR-XSVX>] (last updated Aug. 8, 2023).
33. *About*, BETTERHELP, <https://www.betterhelp.com/about/> [<https://perma.cc/VY8B-FBBC>] (BetterHelp’s therapists are, “licensed, trained, experienced, and accredited psychologists (Ph.D. / PsyD), marriage family therapists (LMFT), clinical social workers (LCSW / LMSW), and board licensed professional counselors (LPC).”).

depression, anxiety, and PTSD.³⁴ Telehealth mental health providers must adhere to the same professional and ethical standards as in-person providers.³⁵ Utilizing Telehealth service providers, patients can choose a therapist who best suits their needs, and providers conduct appointments through secure video conferencing or phone calls.³⁶ In contrast, anyone can create an Instagram account and portray themselves as a mental health professional without undergoing vetting or accreditation. When seeking mental health support, it is crucial to be mindful of the source and credibility of information on social media platforms like Instagram. However, with telehealth services, there are laws establishing credibility.³⁷ Therefore, there are crucial differences between telehealth services and Instagram therapy.³⁸

B. Instagram therapy exists as a direct result of capitalism.

The mental health crisis in America is at least in part due to capitalism.³⁹ There are two main ways that capitalism interacts with mental health treatment: (1) through non-salaried mental health professionals and (2) through salaried mental health professionals.⁴⁰

Capitalism forces non-salaried mental health professionals to participate if they want to make enough money to make a living in a country where the basis for livelihood is supply and demand.⁴¹ Dr. Eric R. Maisel, Ph.D., wrote, “[non-salaried] mental health professional[s] need patients or clients the way that fire [fighters] do not need fires.”⁴² In other words, both non-salaried mental health professionals and fight fighters are paid to intervene in the event of a disaster, respectively, a mental health crisis, or a fire.⁴³ The difference is that the government pays firefighters irrespective of whether there is a fire, and the patient

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34. *Guidelines for the Practice of Telepsychology*, AM. PSYCH. ASS'N., <https://www.apa.org/practice/guidelines/telepsychology> [https://perma.cc/7KZA-54BF] (last updated Aug. 2023).
35. *Id.*
36. *Id.*
37. See OHIO ADMIN. CODE 4731.37 (2023).
38. DeMaio, *supra* note 1.
39. David Matthews, *Capitalism and Mental Health*, MONTHLY REV. (Jan. 1, 2019), <https://monthlyreview.org/2019/01/01/capitalism-and-mental-health/> [https://perma.cc/8LPM-V76Z].
40. See *id.*; Eric R. Maisel, *Capitalism and Crazyness: The Relationship Between Mental Health Disorders and the Profit Motive*, PSYCH. TODAY (May 12, 2012), <https://www.psychologytoday.com/us/blog/rethinking-mental-health/201205/capitalism-and-crazyness> [https://perma.cc/PHB3-PX9H].
41. Maisel, *supra* note 40.
42. *Id.*
43. *Id.*

pays non-salaried mental health professionals.⁴⁴ Therefore, non-salaried mental health workers rely on new mental health crises to make money.⁴⁵

Non-salaried mental health professionals *must* acquire clients because “[w]ithout clients or patients, there is no roof, no clothes, no food.”⁴⁶ This means that non-salaried mental health professionals must participate in, and even support, “a system that helpfully creates mental disorders and clients or patients.” The grim reality under capitalism is that even those undertaking careers to help treat mental illness must hope for an endless supply of those needing mental health intervention. Without this supply, non-salaried mental health professionals do not receive a paycheck.

Employing companies and organizations, such as private therapy groups and hospitals, pay salaried mental health professionals.⁴⁷ Therefore, salaried mental health professionals work for their employers, and their employers have a financial “bottom line” for income that they must reach to keep their doors open.⁴⁸ This system motivates hospitals and other facilities that provide mental health treatment to see clients “fast and infrequently,” resulting in salaried mental health providers “treating” their clients in just a few sessions or with medication.⁴⁹ With salaried mental health professionals operating in the constraints of capitalism, patients are often dropped by their in-person or telehealth therapist prematurely, creating a perfect pool of candidates for Instagram therapy.⁵⁰

This business model creates a mental health pipeline that rarely results in a complete cure. First, the patient is diagnosed with a mental disorder and then “treated” in approximately six therapy sessions and prescribed medication.⁵¹ This pipeline, combined with the sheer cost of healthcare⁵² in America and under capitalism more generally, leads to a need for alternative options that are free, accessible, and hopeful on

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *See High Prices, Low Value – Two New Composite Scores From West Health and Gallup Illustrate America’s Healthcare Cost Crisis*, WEST HEALTH (Mar. 31, 2022), <https://www.westhealth.org/press-release/112-million-americans-struggle-to-afford-healthcare/> [<https://perma.cc/X267-GDGB>] (“An estimated 112 million (44%) American adults are struggling to pay for healthcare, and more than double that number (93%) feel that what they do pay is not worth the cost.”).

their face. After paying for therapy, being “treated,” and sent on their way, clients cling to Instagram therapists as their last hope.

II. LITERATURE REVIEW

A. *What have scholars said?*

Editorial articles and podcasts explore Instagram therapy; however, there is a limited range of legal scholarship on the issue. There is currently no legal scholarship about sanctioning those who facilitate social media therapy. Furthermore, there is no legal scholarship about requirements for Instagram therapists to validate their licenses on the social media platform. Dr. Nickolas Jordan of Application State University writes: “no definitive ethical guidelines seem to exist, and we found more questions than answers” and “with communication technology continually advancing, there is a need for the accompanying legal standards and ethic codes to develop at a similar pace.”⁵³ These are the gaps the present research seeks to fill.

Many licensed therapists have spoken out on the dangers that Instagram therapy poses. One therapist warns users: “it’s important not to automatically internalize [Instagram therapy] posts as personal advice or solutions specific to their situation,” but to “instead [use it] as education and food for thought.”⁵⁴ The general idea amongst licensed therapists is that Instagram therapy is not actual therapy, nor should it be a substitute for “real therapy.”⁵⁵ Unlike in “real therapy,” licensed therapists have found that advice for dealing with depression, navigating rough relationship patches, or coping with trauma is broader in Instagram therapy posts.⁵⁶ These licensed therapists found that therapy is not supposed to be “one size fits all,” but Instagram therapy is often limited to that style of presenting information.⁵⁷

Furthermore, several Instagram therapists themselves have voiced their opinions on the topic. Dr. Rachel Goldman, also known as @drachelnyc, has over 22 thousand Instagram followers on her therapy account.⁵⁸ However, she still feels that the specific and detailed information given online may work for some people but not everyone.⁵⁹ Dr. Goldman further expresses that she will not give out specific mental health advice online; instead, she will encourage people to seek therapy

53. Jordan et al., *supra* note 19, at 106.

54. Belle, *supra* note 14.

55. Tjhatra, *supra* note 16.

56. *Id.*

57. *Id.*

58. DeMaio, *supra* note 1.

59. *Id.*

and make referrals.⁶⁰ Dr. Goldman is an example of how an ideal Instagram therapist would act: only encouraging people to seek individual help.

Several other professionals in the mental health field have expressed their concerns about the lack of regulation and guidelines for social media therapy. One of these professionals is Dr. Aaron Weiner, a board-certified psychologist.⁶¹ In a podcast interview, Dr. Weiner said, “Malpractice in behavioral health is a really hazy gray area. In medicine, there are algorithms sometimes for how you treat things. If you have a certain infection, there’s certain antibiotics that you really should be using, that sort of stuff. When it comes to behavioral health, we don’t have that. So, when you’re talking about online . . . you can say what you want . . . there’s no gatekeepers online, there’s nothing to hold you accountable. It’s actually a bit of an issue. And it kind of bridges into this question: do we need more gatekeepers in behavioral health to ensure quality?”⁶² Dr. Weiner raises a critical question regarding the need for gatekeepers to ensure the quality of mental health information online.⁶³

Most editorial articles on the topic speak to the dangers of Instagram therapy. One editorial piece cautions therapists to consider how people in distress interpret the information on their profile; after all, people struggling with mental health issues make up an Instagram therapist’s primary audience.⁶⁴ Other editorial pieces explain how Instagram therapy can be helpful, but warn that some people make these accounts without the proper certifications, creating a danger when posing as therapists online.⁶⁵ There is also a risk of “offense through miscommunication” in therapy, and social media only increases this risk.⁶⁶ The following is an example of “offense through miscommunication:” Sam is a 27-year-old nonbinary person with generalized anxiety disorder, panic disorder, and post-traumatic stress

60. *Id.*

61. Aaron Weiner, *About*, AARON WEINER, PH.D., <https://www.weinerphd.com/about> [<https://perma.cc/64XE-ZHFP>].

62. Montell & Medina-Maté, *supra* note 2.

63. *Id.*

64. Crystal Raypole, *A Therapist’s Guide to Ethical Social Media Use*, GOOD THERAPY, <https://www.goodtherapy.org/for-professionals/marketing/digital-marketing/article/therapists-guide-ethical-social-media-use> [<https://perma.cc/DR4U-4WDK>] (last updated Mar. 26, 2020).

65. Lydia Smith, *Social Media Therapy: Is Online Mental Health Advice Helpful?*, PATIENT (Nov. 15, 2021), <https://patient.info/news-and-features/social-media-therapy-is-online-mental-health-advice-helpful> [<https://perma.cc/32U8-BPVJ>].

66. Jordan et al., *supra* note 19, at 107; *see also* Smith, *supra* note 65.

disorder (PTSD) diagnoses who is in self-harm recovery.⁶⁷ As a person with mental health diagnoses, Sam feels stressed out and triggered by Instagram therapy accounts, so they have had to unfollow them for their well-being.⁶⁸ Although the intent behind Instagram therapy posts may be to help those with disorders like Sam's, the information in the posts was not communicated in a way that resonated with Sam, and they were ultimately offended.

Even if Instagram therapists believe they are providing helpful mental health advice, the risks associated with giving medical advice without first examining the client and inquiring more about their situation are very high.⁶⁹ There are risks associated with the Instagram therapist's inability to see a client's body language, as well as issues in assessing the client's risk of danger to themselves and others.⁷⁰ One Instagram therapist concerned with the ethics of her practice, Dr. Jennifer Mills, explained that it could be difficult for the client to communicate what they are feeling.⁷¹ In other words, a patient may be unable to parse apart their feelings to consider if they are experiencing anxiety, depression, or something else entirely.⁷² Dr. Mills explained that if the client cannot identify their feelings without guidance, it is crucial for them to seek an in-person or one-on-one therapy experience, not only the therapy they get for free on social media.⁷³

Instagram therapy is an ironic issue, as there is growing evidence of a correlation between social media usage and depression.⁷⁴ As explained by clinical psychologist Alexandra Hamlet, Ph.D., one reason is the lack of connection derived from social media interaction.⁷⁵ The more superficial the interactions on social media are, the less likely they are to make a person feel "connected," a feeling all people require.⁷⁶ Although social media usage can lead to negative mental health consequences, it functions like an addiction, reinforcing itself by

67. Belle, *supra* note 14.

68. *Id.*

69. Tatum Hunter, *How to Vet Mental Health Advice on TikTok and Instagram*, WASH. POST (Oct. 3, 2022, 7:00 AM), <https://www.washingtonpost.com/technology/2022/10/03/tiktok-instagram-mental-health/> [<https://perma.cc/ADT6-8WF6>].

70. Jordan et al., *supra* note 19, at 107.

71. DeMaio, *supra* note 1.

72. *Id.*

73. *Id.*

74. Miller, *supra* note 32.

75. *Id.*

76. *Id.*

releasing dopamine and activating the brain's reward center.⁷⁷ The “feel good chemical” (dopamine) relates to pleasurable activities like sex, food, and social interaction. However, social media surfing is known to lead to a progressive decrease in a person's level of satisfaction derived from said social interaction.⁷⁸ The design of social media triggers this addiction and eventually triggers anxiety, depression, and even physical ailments.”⁷⁹

B. What has the law said?

1. State Laws

No federal laws govern the unlicensed practice of therapy, as these laws exist on the state level.⁸⁰ All fifty states, the District of Columbia, and Puerto Rico have laws with their licensure standards for the practice of mental health therapy.⁸¹ Ohio law serves as an example of this article; however, some examples of similar laws include Massachusetts⁸², Kentucky⁸³, Colorado,⁸⁴ and Minnesota⁸⁵.

Presently, Ohio has a law criminalizing the unauthorized practice of therapy.⁸⁶ The statute has three elements, prefaced by “[n]o person shall . . . unless the person is currently licensed . . . as a licensed professional clinical counselor or licensed professional counselor:” (1) “engage in or claim to the public to be engaging in;” (2) “the practice of professional counseling;” (3) “for a fee, salary, or other consideration.”⁸⁷ The third element of this statute is vital, as it calls

77. *Are You Addicted to Social Media*, LEE HEALTH, <https://www.leehealth.org/health-and-wellness/healthy-news-blog/mental-health/are-you-addicted-to-social-media> [<https://perma.cc/ZXK8-DNJQ>].

78. *Id.*

79. *Id.*

80. *Licensure Requirements: U.S. State and Territory Licensing of Professional Counselors*, ACA <https://www.counseling.org/knowledge-center/licensure-requirements> [<https://perma.cc/2CLB-9244>].

81. *Id.*

82. 16 MASS. GEN. LAWS CH. 112, § 164 (2023); 16 MASS. GEN. LAWS CH. 112 § 171 (2023).

83. KY. REV. STAT. ANN. § 335.505 (West 2002).

84. 43 COLO. REV. STAT § 12-43-225 (2016).

85. Minn. R. § 2150.7575 (2023) (highlighting that this Act pertains to “aiding and abetting” in the unlicensed practice of mental health services, § 2150 refers to “Licensure” more generally).

86. OHIO REV. CODE § 4757.02 (effective Apr. 6, 2023) (“No person shall engage in or claim to the public to be engaging in the practice professional counseling for a fee, salary, or other consideration unless the person is currently licensed under this chapter as a licensed professional clinical counselor or licensed professional counselor.”).

87. *Id.*

into question what it means for there to be a “fee, salary, or other consideration” in exchange for the therapy services.

Precisely, what constitutes “consideration” for Instagram therapy is essential to identify, given that people use Instagram therapy because it is free. Consideration is “a promise, performance, or forbearance bargained by a promisor in exchange for their promise.”⁸⁸ Although Instagram therapy is free for the user, Instagram therapists can still profit from their profiles.⁸⁹ Instagram therapists with less than ten thousand followers are deemed “Micro influencers” and make an average of \$88 per post on their account.⁹⁰ Instagram therapists, with between 10,000 and 99,999 followers, make an average of \$200 per post.⁹¹ Instagram therapists with a following anywhere from one hundred thousand followers to 999,999 followers make an average of \$670 per post.⁹² These Instagram users make money through brand deals, sponsorships, and paid advertisements on their accounts. The potential for profit incentivizes Instagram therapists to pump out content and increase their follower count to make more profits. Although the Instagram user is not personally paying the Instagram therapist, following the Instagram therapy account and interacting with its content creates more opportunities for the Instagram therapist to profit. The Instagram therapist offers the performance of providing new content, and the Instagram user offers the performance by interacting with the content; thus, consideration exists.

2. The *Carter* Case

Commonwealth v. Carter discusses the power of words to influence suicide and the legal consequences of weaponizing the power of one’s free speech to harm others.⁹³ Although not a case that pertains directly to “Instagram therapy,” *Carter* illustrates a valuable connection between it and criminal law.

The victim in *Carter*, Conrad Roy, had been receiving treatment for mental health services since 2011.⁹⁴ Around this time, Roy met Michelle Carter, an out-of-town friend whom he communicated with

88. *Consideration*, CORNELL L. SCH., <https://www.law.cornell.edu/wex/consideration> [<https://perma.cc/3QSB-RVCJ>].

89. The Petal Team, *How Much Money Does an Instagram Influencer Make?*, PETAL (Apr. 1, 2019), <https://www.petalcard.com/blog/money-instagram-influencer-make/> [<https://perma.cc/4C4U-8SBZ>].

90. *Id.*

91. *Id.*

92. *Id.*

92. *Id.*

93. *Commonwealth v. Carter*, 481 Mass. 352 (2019); *see also* *Commonwealth v. Carter*, 474 Mass. 625 (2016).

94. *Commonwealth v. Carter*, 474 Mass. 625 (2016).

regularly through text messages and phone calls.⁹⁵ Carter and Roy met in person a few times between these phone interactions, leading them into their eventual “dating” phase.⁹⁶ In 2013, Roy attempted suicide by overdosing on pills, but his attempt was unsuccessful.⁹⁷ A friend recused Roy when they found out about his attempt and contacted emergency services to prevent him from completing suicide.⁹⁸ However, Roy was persistent in his suicidal ideation, and on July 14, 2014, he completed suicide by carbon monoxide poisoning.⁹⁹ This time, Roy parked his truck in a store parking lot and began inhaling the poisonous gas from a gasoline-powered water pump located in the truck.¹⁰⁰ He was hesitant in his attempt and even got out of the truck to breathe fresh air, but Carter assured him that his choice to complete suicide was the right one.¹⁰¹ Listening to Carter’s words, Roy returned to the truck and died from inhaling the poisonous fumes.¹⁰²

Following Roy’s death, a series of text messages between him and Carter detailing his history of mental illness and his plans to “kill himself” uncovered a grizzly truth.¹⁰³ In these messages, Carter takes advantage of Roy’s vulnerable mental state, telling him that he should complete suicide, assuaging his concerns over completing suicide, and even chastising him when he delays his plans to do so.¹⁰⁴ On Roy’s final day, as he contemplated his plans, Carter sent the words, “You just [have] to do it,” to his phone four times.¹⁰⁵ In her text messages to another friend, Carter admitted that at one point Roy had gotten out of the truck and was “scared,” but that she had “commanded” him to get back in.¹⁰⁶

In *Carter*, the court decided that there was “probable cause to show that the coercive quality of the defendant’s verbal conduct overwhelmed whatever willpower the eighteen-year-old victim has to cope with his depression and that, but for the defendant’s admonishments, pressure, and instructions, the victim would not have [completed suicide].”¹⁰⁷ The

95. *Id.* at 626.

96. *Id.*

97. *Id.* at 625.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 629 n.8, 630.

102. *Id.* at 629 n.8.

103. *Id.* at 626.

104. *Id.* at 626–28.

105. *Id.* at 629.

106. *Id.*

107. *Commonwealth v. Carter*, 481 Mass. 352, 353 (2019).

court, in this case, also found that “verbal conduct in appropriate circumstances could ‘overcome a person’s willpower to live, and therefore . . . be the cause of a suicide.’”¹⁰⁸ A crucial element of this case, though, is the court’s finding that the victim broke the “chain of self-causation” when he got out of the truck, and it was only once the defendant instructed him to get back into the truck that he ultimately committed suicide.¹⁰⁹ A judge convicted Michelle Carter of involuntary manslaughter for the death of Conrad Roy.¹¹⁰ The Massachusetts Supreme Court ultimately upheld Carter’s involuntary manslaughter conviction because she overpowered Roy’s will, creating a high likelihood of substantial harm.¹¹¹

On its face, this story seems far different from the relationship between an Instagram therapist and their followers. However, *Carter* demonstrates that knowingly discouraging someone who is obviously mentally ill from seeking help (and, in the present case, actively persuading them not to seek help) is a crime. More importantly, *Carter* demonstrates that at a certain point, a person can break “the chain of self-causation” to another person’s self-harm, transferring the liability to themselves.

Instagram therapists, although not actively coercing people to commit suicide, have the same potential to cause harm found in *Carter*. Recall that mentally ill people are the target audience of Instagram therapists.¹¹² Whether Instagram therapists break the “chain of self-causation” when giving their followers mental health advice is essential when deciding how to remedy this troubling situation. When Instagram therapists post advice online, they can “overwhelm[] whatever willpower” their followers have and break the “chain of self-causation” to whatever result follows.¹¹³

A likely counterargument to arise from these laws is the First Amendment right to free speech. *Commonwealth v. Carter* addresses this issue by finding:

“[T]he defendant cannot escape liability just because she happened to use ‘words to carry out [her] illegal [act].’”¹¹⁴ Furthermore, the court found that “[e]ven if we were able to apply strict scrutiny to the verbal conduct at issue because it might implicate other constitutionally protected speech regarding suicide . . . we would conclude that the restriction on speech here

108. *Id.* at 359.

109. *Id.* at 362.

110. *Id.* at 352–53.

111. *Id.*

112. *See supra* Part I.

113. *Commonwealth v. Carter*, 481 Mass. 352 (2019).

114. *Id.* at 366.

has been narrowly circumscribed to serve a compelling purpose . . . Only the wanton or reckless pressuring of a person to commit suicide that overpowers that person's will to live has been proscribed. This restriction is necessary to further the Commonwealth's compelling interest in preserving life."¹¹⁵

In other words, Instagram therapists who cause harm by recklessly using their social media accounts are not *per se* immune to punishment under the First Amendment. The court in *Carter* demonstrates an application of strict scrutiny in circumstances where someone ends up in danger as the result of another's words.

3. Review Boards

In 2021, the American Psychological Association (APA) issued guidelines for mental health providers using social media.¹¹⁶ These guidelines state psychologists should be "mindful of ethical and legal obligations to maintain client privacy and confidentiality at all times" and "consider the need to avoid contact with their current or past clients on social media, recognizing that it may blur boundaries of the professional relationship."¹¹⁷ However, the APA is not a review board. Instead, it is an organization representing psychologists in the United States.¹¹⁸

Psychologists are licensed by state boards and reviewed by the Association of State and Provincial Psychology Boards (ASPPB)¹¹⁹ and the American Board of Professional Psychology (ABPP).¹²⁰ Review boards like ASPPB and ABPP function by examining and certifying professional psychologists to ensure they are fit for specialty practice.¹²¹ For psychiatrists, the respective boards are their applicable state medical board and the American Board of Psychology and Neurology (ABPN).¹²² State boards license social workers and are reviewed by the National Association of Social

115. *Id.* at 368–69.

116. DeMaio, *supra* note 1.

117. *Id.*

118. *See About APA*, AM. PSYCH. ASS'N, <https://www.apa.org/about> [<https://perma.cc/L2Q4-YRQZ>].

119. *See History*, ASSOC. STATE & PROVINCIAL PSYCH. BD., <https://www.asppb.net/page/History> [<https://perma.cc/6JZZ-LVEK>].

120. *See About ABPP*, AM. BD. PRO. PSYCH., <https://abpp.org/about-abpp/> [<https://perma.cc/Q8QJ-XM2Y>].

121. *Id.*; *History*, *supra* note 119.

122. *See VerifyCERT*, AM. BD. PSYCH. & NEUROLOGY, <https://apps.abpn.org/verifycert/> [<https://perma.cc/EU9L-C68N>].

Workers (NASW)¹²³ and the Association of Social Work Boards (ASWB)¹²⁴, among others. Counselors are licensed by state boards for counseling and reviewed by the National Board for Certified Counselors (NBCC)¹²⁵ and the Commission on Rehabilitation Counselor Certification (CRCC),¹²⁶ among others. Finally, marriage and family therapists are licensed by state boards and reviewed by the American Association for Marriage and Family Therapy (AAMFT).¹²⁷

Each review board has requirements for becoming a mental health professional and maintaining a license or certificate.¹²⁸ These requirements include completing a certain level of education, passing a licensure exam, and participating in continuing education opportunities.¹²⁹ Furthermore, each review board has its own set of responsibilities to ensure that mental health professionals meet their competency and ethical standards.¹³⁰ The review boards have the power to grant and revoke licenses or certifications, receive and review complaints or violations of ethical standards, and discipline professionals who do not follow the rules.¹³¹ The review boards also have sanctioning power as well; they can impose fines and suspend or revoke licenses or certifications.¹³²

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123. *See Ethics*, NAT'L ASS'N SOC. WORKERS, <https://www.socialworkers.org/About/Ethics> [https://perma.cc/N9YW-HNZ3].
124. *See Association of Social Work Boards*, ASSOC. OF SOC. WORK BD., <https://www.aswb.org> [https://perma.cc/3ZM6-T4CA].
125. *See Resources*, NAT'L BD. CERTIFIED COUNS., INC., <https://www.nbcc.org/resources> [https://perma.cc/2KVU-ANWN].
126. *See Mission*, COMM'N REHAB. COUNS. CERTIFICATION, <https://crccertification.com/about-crcc/> [https://perma.cc/W9ZS-386W].
127. *See About AAMFT*, AM. ASS'N. MARRIAGE & FAM. THERAPY, https://www.aamft.org/AAMFT/About_AAMFT/About_AAMFT/About_AAMFT/About_AAMFT.aspx?hkey=16b5d51c-da6b-4edb-b0b4-448cfbf9426f [https://perma.cc/AT3Q-F7X6].
128. *Licensing Boards*, GOOD THERAPY, <https://www.goodtherapy.org/blog/psychpedia/licensing-boards> [https://perma.cc/2CWU-7H44].
129. *Id.*
130. *Understanding the Role of Licensing Boards*, S J HARRIS LAW, <https://www.sjharrislaw.com/blog/understanding-the-role-of-licensing-boards/> [https://perma.cc/WXA3-QUN2].
131. *Id.*
132. *Id.*

4. Social Media Self-Imposed Regulations

Instagram,¹³³ Facebook¹³⁴, X¹³⁵, and TikTok¹³⁶ have Community Guidelines and Terms of Service in writing on their websites to prevent the public from viewing sensitive content. When each user creates an account with one of these social media platforms, they agree to a clause confirming their agreement to the Terms and Conditions of that platform.¹³⁷ For example, when creating an Instagram account, the user must agree to the following clause, “By signing up, you agree to our Terms, Data Policy, and Cookies Policy.”¹³⁸ “Terms” is linked to the “Terms and Imprint” page and acts as an agreement between Instagram and the user, detailing what is and isn’t allowed on the platform.¹³⁹ The same applies to the other social media platforms but to their respective terms.

The Terms are worded slightly differently for all the social media platforms. However, the consensus is no nudity (mostly), no illegal conduct (i.e., buying and selling sex and drugs), and no bullying.¹⁴⁰

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133. *Community Guidelines*, INSTAGRAM, <https://help.instagram.com/477434105621119> [<https://perma.cc/6C4S-GDHC>] (last updated 2022); *Terms and Imprint*, META, https://help.instagram.com/581066165581870/?helpref=hc_fnav [<https://perma.cc/EXX6-GM8S>] (last updated 2022).
134. *Facebook Community Guidelines*, META, <https://transparency.fb.com/policies/community-standards/> [<https://perma.cc/ERE8-QXCD>]; *Terms of Service*, FACEBOOK, <https://www.facebook.com/legal/terms/> [<https://perma.cc/KB9A-2U6F>].
135. *Notices on X and What They Mean*, X, <https://help.twitter.com/en/rules-and-policies/notices-on-x> [<https://perma.cc/HS2H-ETJS>].
136. *Community Guidelines*, TIKTOK, <https://www.tiktok.com/community-guidelines?lang=en> [<https://perma.cc/66HK-74CP>] (last updated Mar. 2023); *Terms of Service*, TIKTOK, <https://www.tiktok.com/legal/terms-of-service-us?lang=en> [<https://perma.cc/VR3P-J5KH>] (last updated July 2023).
137. *Sign Up for TikTok*, TIKTOK, <https://www.tiktok.com/en> [<https://perma.cc/RM2G-BVMP>]; *Sign Up*, FACEBOOK, <https://www.facebook.com/signup> [<https://perma.cc/WE88-9PT8>]; *Join X Today*, X, <https://twitter.com/i/flow/signup> [<https://perma.cc/LFH4-67TU>]; *Instagram: Sign Up to See Photos and Videos From Your Friends*, INSTAGRAM, <https://www.instagram.com/accounts/emailsignup/> [<https://perma.cc/JMC9-TQXF>].
138. *Sign Up*, INSTAGRAM, <https://www.instagram.com/accounts/emailsignup/> [<https://perma.cc/KJG4-JYH6>].
139. *Id.*; *Terms and Imprint*, *supra* note 133.
140. *Restricted Goods and Services*, META, <https://transparency.fb.com/policies/community-standards/restricted-goods-services/> [<https://perma.cc/ZN5U-35YA>]; *Bullying and Harassment*, META, <https://transparency.fb.com/policies/community-standards/bullying-harassment/> [<https://perma.cc/8BYC-X6AA>]; *Adult Nudity and Sexual Activity*, META, <https://transparency.fb.com/policies/community-standards/adult->

Furthermore, in 2021, Instagram announced its new “Sensitive Content Control,” designed to allow users to “decide how much sensitive content shows up in Explore.”¹⁴¹ The same announcement also states, “We’ve always had rules about what kind of content can be on Instagram, which we call Community Guidelines, and the point of these guidelines is to keep people safe.”¹⁴²

TikTok has made similar announcements, detailing, “[w]e’re also introducing opt-in viewing screens on top of videos that some may find graphic or distressing.”¹⁴³ TikTok also described its effort to “raise awareness on topics others may find triggering.”¹⁴⁴ In 2020, TikTok was also committed to removing “misinformation about the coronavirus and vaccines.”¹⁴⁵ These policies show that social media platforms have developed procedures in the past for censoring harmful content and removing misinformation-spreading content.

One feature employed across various social media platforms, including Instagram, is the “blue checkmark.”¹⁴⁶ Although the integrity of the “blue checkmark” has recently been threatened on X by Elon Musk’s new policy allowing users to purchase checkmarks,¹⁴⁷

nudity-sexual-activity/ [https://perma.cc/J8KP-UA3X]; *Terms of Service*, *supra* note 134; *Community Guidelines*, *supra* note 133; *Sensitive and Mature Themes*, TIKTOK, <https://www.tiktok.com/community-guidelines/en/sensitive-mature-themes/> [https://perma.cc/W49Y-3Z85] (last updated March 2023).

141. *Introducing Sensitive Content Control*, INSTAGRAM (July 20, 2021), <https://about.instagram.com/blog/announcements/introducing-sensitive-content-control> [https://perma.cc/X8VL-N9UG]; see Lina S., *How Does Instagram Explorer Page Work*, SOCIAL TRADIA (Oct. 13, 2020), <https://socialtradia.com/blog/how-does-instagram-explorer-page-work/> [https://perma.cc/VU3Y-AA8X].
142. *Introducing Sensitive Content Control*, *supra* note 141.
143. Cormac Keenan, *Refreshing Our Policies to Support Community Well-Being*, TIKTOK (Dec. 15, 2020), <https://newsroom.tiktok.com/en-us/refreshing-our-policies-to-support-community-well-being> [https://perma.cc/2ZHW-42XC].
144. *Id.*
145. *Id.*
146. Bobby Allyn, *Twitter’s Blue Checkmarks Now Indicate Something Other Than a Verified Account*, NPR (Nov. 10, 2022), <https://www.npr.org/2022/11/10/1135865156/twitters-blue-checkmarks-now-indicate-something-other-than-a-verified-account> [https://perma.cc/RNJ5-YEUE]; *Verified Badges*, INSTAGRAM, <https://help.instagram.com/854227311295302> [https://perma.cc/24LM-ZAY4].
147. *Id.* (“Twitter has overhauled its system of marking verified accounts with blue checkmarks. Some still indicate verified accounts, but others indicate that a user has a monthly subscription.”).

Instagram’s “verified badge” system remains intact.¹⁴⁸ These badges are issued when Instagram verifies that the person behind the account is who they claim to be.¹⁴⁹ These badges do not represent whom Instagram endorses.¹⁵⁰ Furthermore, these badges are not symbols of “importance, authority, or subject matter expertise.”¹⁵¹

C. This research adds to the current opinions and laws surrounding the topic of Instagram therapy.

The existing Terms and Community Guidelines in place to protect vulnerable users of social media platforms do not do enough to protect the public from the dangers of practices like Instagram therapy. For example, some social media platforms are committed to removing content that promotes misinformation about the pandemic,¹⁵² demonstrating their commitment to promoting public health and safety. However, these same platforms do not take explicit measures to promote mental health safety. Social media platforms do not demonstrate an awareness that one-size-fits-all mental health advice on their platforms can cause more harm than good.¹⁵³ That is why a new

148. *Verified Badges on Instagram*, INSTAGRAM (2023) <https://help.instagram.com/733907830039577> [<https://perma.cc/UV4X-8LTL>] (“The meaning of the verified badge has been updated to represent authenticity. An Instagram account with a verified badge next to its name now means that Instagram has confirmed that it is the authentic presence for that person or brand. Previously, the verified badge also required the person or brand to be notable and unique. You may still see users with a verified badge that represents our previous eligibility requirements. The verified badge is a tool to help people find the real accounts of people and brands. If an account has the verified badge, we’ve confirmed that it represents who it says it does. A verified badge is not a symbol to show importance, authority or subject matter expertise. We don’t use the verified badge to endorse or recognize public figures or brands. Once verified, public figures, celebrities and brands that meet certain account and eligibility requirements may not change their username on their account. Verification cannot be transferred to a different account. Instagram accounts that impersonate public figures or other people go against our Community Guidelines and aren’t allowed on Instagram. Note: While many public figures verify their account on Instagram, not all public figures have verified badges. As we test and learn, there will be no immediate changes to accounts on Instagram or Facebook that are already verified based on prior requirements.”)

149. *Id.*

150. *Id.*

151. *Id.*

152. Keenan, *supra* note 143.

153. See Lydia Smith, *Social Media Therapy: Is Online Mental Health Advice Helpful?*, PATIENT (Nov. 15, 2021), <https://patient.info/news-and-features/social-media-therapy-is-online-mental-health-advice-helpful> [<https://perma.cc/7UJF-6SKU>].

checkmark that works similarly to the “verified badge” on Instagram may be beneficial to verify real medical professionals.

Existing literature focuses on the dangers of social media therapy, yet it does not focus on how the law can be employed to diminish its risks. Sanctioning those who do not request a “green checkmark” on social media will improve the system of Instagram therapy in a way that could give it more validity. After all, the American healthcare system is why Instagram therapy exists,¹⁵⁴ and the American legal system needs to safeguard vulnerable populations susceptible to following Instagram therapists. This new intersection between social media and the law requires only small shifts in the law, with most of the burden falling on social media companies to comply with the existing laws for mental health professionals. However, the legal action required is crucial to (1) making the jobs of social media moderators more productive and (2) sanctioning those who practice Instagram therapy without a “badge-like”¹⁵⁵ verification.

One misguided solution is the employment of moderators to sort through these Instagram accounts and disable ones that promote harmful behavior. This will not make financial sense to social media companies.

Instagram has two billion users¹⁵⁶ and approximately 19,000 employees.¹⁵⁷ The average salary of a social media moderator is approximately \$45,000 per year.¹⁵⁸ If Instagram wanted to hire moderators to check every account for issues such as those posted by Instagram therapists, they would have to hire one million new employees to moderate at least 2,000 accounts daily. To provide for this gatekeeping, Instagram would have to 1) perversely violate labor and employment laws on ethical pay wages or 2) pay new employees over \$4,500,000,000,000, total annually, to act as moderators. It would be absurd for a company to do this. Based on simple math, Instagram cannot feasibly complete the task of checking over every Instagram account to ensure they are not posting dangerous mental health advice.

Finally, using the sensitivity controls on Instagram¹⁵⁹ will not likely protect anyone from accessing harmful content. The only thing required

154. *See supra* Note Part I(B).

155. *Verified Badges on Instagram*, *supra* note 148.

156. Salman Aslam, *Instagram By the Numbers: Stats, Demographics, & Fun Facts*, OMNICORE (Feb. 28, 2023) <https://www.omnicoreagency.com/instagram-statistics/> [<https://perma.cc/P6CA-SNAR>].

157. *Instagram Overview*, ZIPPAA, <https://www.zippia.com/instagram-careers-1566240/> [<https://perma.cc/C7T6-Y3CZ>].

158. *Social Media Moderator Salary*, ZIPRECRUITER, <https://www.ziprecruiter.com/Salaries/Social-Media-Moderator-Salary> [<https://perma.cc/84AM-8CG2>].

159. *Introducing Sensitive Content Control*, *supra* note 141.

for a user to access content hidden by this type of control is the click of a button next to an agreement stating that the user is 18 years or older and wishes to see what is behind the sensitivity control.¹⁶⁰ This type of regulatory feature has no legal teeth when it comes to protecting the user. It only serves to protect Instagram from liability that can come from exposing people to harmful content.

III. PROPOSED SOLUTION: A “GREEN CHECKMARK”

Several states already have laws prohibiting the unauthorized practice of therapy and regulations govern the practice of mental health professionals.¹⁶¹ However, effectively regulating Instagram therapy requires establishing a connection between the law and regulations, social media companies, and Instagram therapists. Sanctions deter criminal conduct in the form of dishonest actions;¹⁶² therefore, states can impose sanctions on individuals who engage in Instagram therapy without proper verification. Such sanctions could result from two scenarios: (1) the unlicensed practice of therapy or (2) the failure to register the Instagram therapy account with Instagram and notify the relevant board of this registration.

The first scenario already warrants sanctioning under state law, for example, O.R.C. § 4757.99.¹⁶³ The second scenario requires a proposed new law modeled after Ohio’s state law. The new law should read, in part: “No person shall utilize a social media platform as a base for providing therapy for a fee, salary, or other consideration without first (1) notifying their respective regulatory board of their use of social media to practice therapy and (2) registering their social media account the respective social media platform”¹⁶⁴ This proposed law addresses the issue of moderating every Instagram account,¹⁶⁵ making it a comprehensive solution.

160. *About Sensitive Content Control on Instagram*, INSTAGRAM, <https://help.instagram.com/1055538028699165/?helpref=search&query=sensitive%20content%20control> [https://perma.cc/Q8X4-ATLM].

161. *Licensure Requirements: U.S. State and Territory Licensing of Professional Counselors*, *supra* note 80.

162. Heather Mann et al., *What Deters Crime? Comparing the Effectiveness of Legal, Social, and Internal Sanctions Across Countries*, 7 FRONTIERS PSYCH. 1 (2016) (The results of this study “suggest that the relative strengths of legal and internal sanctions are robust across cultures and dishonest actions.”).

163. OHIO REV. CODE § 4757.99 (1997) (“Whoever violates section 4757.02 of the Revised Code is guilty of a misdemeanor of the fourth degree on a first offense; on each subsequent offense, such person is guilty of a misdemeanor of the third degree.”).

164. *See* OHIO REV. CODE § 4731.41 (2019).

165. *See supra* note Part II(C).

Suppose platform users come across someone posing as a mental health professional without proper verification. In that case, they should be able to report the account to the relevant social media platform, such as Instagram. The platform should then conduct a review of the reported account. However, this situation still places a heavy burden on the user. Rather than use reporting as the only solution to the Instagram therapy problem, this new law would require the Instagram therapist to register their account as a “therapy” account before it is even allowed to be active on the platform. This step can be as simple for the aspiring Instagram therapist as checking a box that says, “I am a licensed mental health professional and intend to use this account to provide advice based on my credentials” upon signing up for an account.

With this proposed law, the burden on the Instagram therapist is low: checking a box when registering for an account. However, the burden on the platform is higher: employ specialized moderators to validate the accounts that request Instagram therapy verification. The “green checkmark,” however, does not require Instagram to hire as many moderators as they would have to without it because it does not require Instagram to parse through every active account. Rather, it only requires moderators to check the credentials of those who have opted into a “green checkmark.” The burden is on both the Instagram therapist and the social media company. Still, the social media company is ultimately the party that must conduct due diligence to ensure the validity of the requested profile.

Once the account is live, the validation will appear like the “blue checkmark,”¹⁶⁶ except it will be, for example, a “green checkmark.” With this new type of badge, Instagram users can know which accounts are run by validated mental health professionals and other therapists. It also allows review boards and moderators to detect dangerous posting activity more easily from “green checkmark” accounts. Furthermore, courts can better know the relationship between what the therapist posts online and its intended influence on their audience, allowing for potential *Carter* applications.

The proposed new “green checkmark” system would bring Instagram Therapy closer to operating like other app-based mental health services, like BetterHelp.¹⁶⁷ The main difference between this new “green checkmark” and the existing “blue checkmark” is that it acts as a symbol of subject matter expertise.¹⁶⁸ BetterHelp is a better version of app-based therapy than Instagram therapy because it has a vetting

166. Allyn, *supra* note 146.

167. *About*, *supra* note 33.

168. *Verified Badges on Instagram*, *supra* note 148.

system for its therapists,¹⁶⁹ meaning that every therapist who makes an account has an invisible “green checkmark.”¹⁷⁰

Let us consider a hypothetical scenario to better explain the “green checkmark” concept. Jane Doe is a licensed therapist who creates an Instagram therapy account, where she promotes general ideas about well-being and how to access one-on-one mental health services. During the account creation process, Jane Doe checks a box requesting a “green checkmark” from Instagram. This action notifies Instagram moderators of the new account with the validation request, and they are responsible for verifying Jane Doe’s credentials. Once her credentials are validated, Jane Doe can post on Instagram as an Instagram therapist while adhering to the ethical restrictions of her license. Having the green checkmark makes it easier for other mental health professionals to ensure that Jane Doe complies with her license’s restrictions.

In the opposite scenario, Jane Doe decides to create an Instagram account. Despite lacking proper credentials or a green checkmark from Instagram, she includes the words “mental health counselor” in her bio. While Instagram may not be aware of Jane Doe’s false impression, other users can recognize that she is not a verified mental health professional due to the lack of a green checkmark on her profile. If a user reports Jane Doe’s misleading bio, Instagram moderators can quickly locate her account to verify her credentials. They can report her under applicable state laws upon discovering that Jane Doe is misrepresenting herself.

The incentive for the Instagram therapist is simple. If a user reports them for running an Instagram therapy account, claiming credentials, but not having a “green checkmark,” then the Instagram therapist can be sanctioned under state law. Although reporting alone is insufficient and places too heavy of a burden on the user, the option to report suspicious activity, which social media companies like Instagram already employ, proves to be a useful tool in deterrence.

The incentive for a social media company like Instagram is more complex; however, it maintains its potential through the debates about the law surrounding vicarious liability for social media companies.¹⁷¹

169. *But see* Shira Li Bartov, *BetterHelp Patients Furious at ‘Sketchy’ Therapists*, NEWSWEEK (Nov. 28, 2022, 5:16 PM) <https://www.newsweek.com/betterhelp-patients-tell-sketchy-therapists-1762849> [<https://perma.cc/EJ9F-ETG3>] (highlighting some reasons that BetterHelp is still controversial).

170. BETTERHELP, <https://www.betterhelp.com> [<https://perma.cc/7BWD-YQSG>] (access these vetting qualities by clicking “Therapist Jobs” on the top menu bar, then scroll down to the bottom of that webpage to “Requirements”).

171. Andrew R. Klein, *Balancing Interests Under Section 230(C) of the Communications Decency Act: Using the Sword As Well as the Shield*, 55 LOY. L.A. L. REV. 645, 645 (2022) (“Perhaps no existing law faces more scrutiny than Section 230(c) of the Communications Decency Act”); *see* David Morar & Chris Riley, *A Guide for Conceptualizing the Debate Over Section 230*, BROOKINGS (Apr. 9, 2021), <https://www.brookings.edu>.

Vicarious liability is a legal concept that holds a supervisory party responsible for the actions of a subordinate party.¹⁷² For a social media giant like Instagram, vicarious liability would arise if someone were to take legal action against Instagram for the actions of one of its users, such as an Instagram therapist.

In general, companies can be vicariously liable for the actions of their employees or agents if they took those actions within the scope of their employment or agency.¹⁷³ However, regarding user-generated content on social media platforms, the issue of vicarious liability is more complex. One reason this complexity arises is the difficulty of determining whether the platform had actual or constructive knowledge of the user's conduct.¹⁷⁴ Furthermore, what type of conduct falls within the "scope" of their use of social media is tricky, especially since there is no case law on the topic. In theory, Instagram can be liable if a court finds that it enabled the unauthorized practice of therapy on its platform by not monitoring it. For example, if Instagram allows unlicensed individuals to provide therapy services for a fee or consideration on its platform without taking appropriate action, it could be held responsible for any harm that results from those actions.

Another legal barrier remains between social media giants and vicarious liability: The Communications Decency Act (CDA). Under Section 230 of the CDA, online service providers like Instagram are generally protected from liability for user-generated content posted on their platforms.¹⁷⁵ Specifically, 230(c)(1) bars companies like Instagram from liability for information provided by its users.¹⁷⁶ However, this protection does not extend to content that the platform creates or develops. The protection also does not apply to situations where the platform has actual knowledge of unlawful content and fails to act on

edu/techstream/a-guide-for-conceptualizing-the-debate-over-section-230/
[https://perma.cc/74PY-K4X6].

172. *Vicarious Liability*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/vicarious_liability [https://perma.cc/8VE2-NULA].

173. *Id.*

174. *Id.*

175. Klein, *supra* note 171; Michael D. Smith & Marshall Van Alstyne, *It's Time to Update Section 230*, HARV. BUS. REV. (Aug. 12, 2021), <https://hbr.org/2021/08/its-time-to-update-section-230> [https://perma.cc/T5JB-R7Y2].

176. 47 U.S.C. § 230(C)(1) (2018) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

it.¹⁷⁷ This exception is known as the “Good Samaritan” provision, found in CDA section (c)(2).¹⁷⁸

Instagram would likely argue that it is protected under the CDA’s safe harbor provisions and is not liable for a therapist’s actions, as they are not employees or agents of Instagram. Several cases exhibit examples of this claim being valid. However, the present case evokes a different clause of the CDA than prior cases have ruled upon.¹⁷⁹ The solution to this issue is in the writing of Section 230 itself. Since the CDA does not protect against situations where Instagram has actual knowledge of unlawful content and fails to act on it, Instagram could be viciously liable for the actions of Instagram therapists if it does not enact the “green checkmark” system.

Overall, the issue of regulating Instagram therapy raises complex legal and ethical questions. It will require collaboration between regulators, social media companies, and mental health professionals to develop effective solutions prioritizing patient safety and well-being.

CONCLUSION

In conclusion, the regulation of Instagram therapy demands a comprehensive approach involving multiple stakeholders, including lawmakers, social media companies, and Instagram therapists. The proposed solution, modeled after Ohio’s state law and existing social media regulations, requires the registration of Instagram therapy accounts with the therapist’s regulatory board and the desired social media platform. Implementing a “green checkmark” system will validate the authenticity of the therapist’s account, bringing Instagram

177. *Section 230*, EFF, <https://www.eff.org/issues/cda230> [<https://perma.cc/BUT7-FDA5>].

178. 47 U.S.C. § 230(C)(2) (2018) (“No provider or user of an interactive computer service shall be held liable on account of—(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).”).

179. *See Doe v. MySpace Inc.*, 528 F.3d 413 (5th Cir. 2008) (A 13-year-old minor opened a MySpace account, claiming to be 18, allowing her to circumvent MySpace’s safety features to prevent sexual predators from contacting minors. The minor arranged to meet with a 19-year-old on the website and was subsequently sexually assaulted. The court found that §230(c)(1) of the CDA barred claims against MySpace because the service was “merely a distributor of online third-party-generated content, not its publisher.” The CDA immunity applied because the service was not negligent for failing to take more precautions to detect predators by employing age verification software to check the profiles for truthfulness.); *see also Herrick v. Grindr LLC*, 765 F. App’x 586, 589 (2d Cir. 2019).

therapy closer to actual telehealth services. By doing so, Instagram therapy can become a safer option for individuals seeking mental health advice on social media platforms.

However, it is crucial to acknowledge that the rise of Instagram therapy is a byproduct of capitalism. Instagram therapy cannot replace visits with licensed and vetted professional therapists, but it can help reduce the stigma surrounding mental health issues. Scholars must address the limitations of relying solely on Instagram for mental health support and the structural issues within our mental health system to provide accessible mental health care for all.

Finding a balance between denouncing Instagram therapy and regulating it while recognizing its potential benefits is necessary. Furthermore, scholars need to address broader issues in the American mental health system alongside Instagram therapy. The proposed solution serves as a starting point for creating a safer and more effective mental health support environment on social media platforms. It is up to all stakeholders to work together to ensure that mental health support is accessible and reliable for everyone. Ideas for further research include the interaction between Instagram therapy and privacy concerns (HIPAA) and a deeper look into the laws of each state and review board.