TURNING SUICIDE INTO HOMICIDE: CAN YOU BE BOUND BY YOUR TEXT MESSAGES?

Jenna Connors*

I. Introduction

Suicide is the second leading cause of death for children and adolescents, according to The American Academy of Child & Adolescent Psychiatry.[1] It leaves many unanswered questions and a myriad of emotions with the family and friends of the person who makes that ultimate decision.[2] There is also a strong correlation between the use of technology and mental health issues, especially in adolescents.[3] The untimely death of Florida native Conrad Roy III ("Roy") has proven to be no different and has fostered heated debates

* J.D. Candidate, Suffolk University Law School, 2019.

[1] *See Suicide in Children and Teens*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (Oct. 2017), *archived at* https://perma.cc/9VNF-38VL (listing some of the factors of suicide or suicide attempts as depression, bullying, and feelings of hopelessness or helplessness). "Depression and suicidal feelings are treatable mental disorders." *Id.*

[2] *See* Lindsey Bever & Kristine Phillips, *Texting Suicide Sentencing Provides No Closure, but Victim's Mother Declares: 'We Want to Move on'*, WASH. POST (Aug. 4, 2017), *archived at* https://perma.cc/G73E-SXLC (addressing Roy's mother, Lynn Roy's, interview on CBS News program "48 Hours").

[3] *See* Alison Jones, *More Technology Use Linked to Mental Health Issues in At-risk Adolescents*, DUKE TODAY (May 3, 2017), *archived at* https://perma.cc/NXK9-KXVD (stating that adolescents spend, on average, 2.3 hours a day using digital technologies). This study also suggests that: "when adolescents used their devices more—both when they exceeded their own normal use and when they exceeded average use by their peers—they were more likely to experience conduct problems such as lying, fighting and other behavioral problems." *Id.*

 ISSN 1536-7983.

throughout the country.[4] In July 2014, Roy committed suicide by suffocating himself with carbon monoxide in his truck in a Kmart parking lot.[5] Although his death was deemed a suicide, his girlfriend, Michelle Carter ("Carter"), arguably played a significant role in Roy's death, starting months before and up until moments before his death.[6] The text messages found on Carter and Roy's cell phones led to her indictment for involuntary manslaughter in February 2015.[7]

The background of their relationship was a bit different than many would assume.[8] In 2012, Carter and Roy met while visiting relatives in Florida.[9] However, most of their relationship consisted of conversations and communications via texting.[10] Carter's role in Roy's suicide was noticeable through the text messages she sent to him.[11] It was clear that Carter was aware of Roy's desperation and

---

[4] *See* Bever & Phillips, *supra* note 2 (quoting Roy's father, Conrad Roy, Jr.). "'I cannot begin to describe the despair I feel over the loss of my son . . . I am heartbroken. Our family is heartbroken. My son was my best friend.'" *Id.*

[5] *See* Dan Glaun, *Michelle Carter: 'All I Had to Say Was I Love You and Don't Do This One More Time and He'd Still Be Here'*, MASSLIVE (Apr. 11, 2016), *archived at* https://perma.cc/5Z6S-7W4Q [hereinafter *All I Had to Say Was I Love You*] (discussing the extent of Roy and Carter's relationship).

[6] *See id.* (describing the extent of the text message conversations between Roy and Carter). One text message at 4 AM on the day of Conrad's death even stated "'[y]ou said you were gonna do it. Like I don't get why you aren't. So I guess you aren't gonna do it then. All that for nothing.'" *Id.*

[7] *See* The Standard-Times, *Timeline of Michelle Carter Case*, SOUTHCOASTTODAY (June 16, 2017), *archived at* https://perma.cc/W9P5-8UMD (outlining the timeline of Carter's case and story, including both criminal charges and events after Conrad's death).

[8] *See All I Had to Say Was I Love You*, *supra* note 5 (noting that Roy's mother and best friend did not even know about their relationship).

[9] *See All I Had to Say Was I Love You*, *supra* note 5 (discussing the extent of Roy and Carter's relationship).

[10] *See All I Had to Say Was I Love You*, *supra* note 5 (commenting on the fact that Carter and Roy were not "together" for the whole time period, and apparently had not seen in each other in over a year at the time of this death).

[11] *See All I Had to Say Was I Love You*, *supra* note 5 (expanding upon prosecutor's arguments during trial). The prosecutors alleged that

> Carter played an instrumental role: she talked him out of his doubts point-by-point, assured him that his family would understand why he did it, researched logistics and reassured him that he was likely to succeed, and pushed him to stop procrastinating and get on with it, mocking his hesitation and threatening to get him help if he did not carry through with his plans.

Id. Conrad fought a long battle of depression and had tried to commit suicide before. *Id.* In 2012, he was committed to mental institutions in Worcester and Brookline.

history of mental illness.[12] The lack of clarity in this emotional case, however, lies in the criminal implications of Carter's words.[13]

Part II of this Note examines the specific law of Massachusetts behind *Commonwealth v. Carter* and how the Commonwealth obtained a conviction.[14] Part II then explains cyberbullying laws nationwide and their application to the First Amendment.[15] Lastly, Part II addresses the Supreme Court's stance on assisted suicide and how this law relates to Massachusetts' lack thereof.[16] Part III discusses the lengthy history of *Commonwealth v. Carter* from her indictment to the Bristol County Juvenile Court's finding, to the most recent direct appeal decision to the Supreme Judicial Court ("SJC").[17] Part IV analyzes how this case of first impression could have rippling effects in other areas of law.[18] Finally, Part V evaluates why the link between Carter's culpability, cyber communications, and prosecutorial discretion could change the future of the legal world.[19]

II. History

In Massachusetts, a charge of involuntary manslaughter requires the Commonwealth to prove that wanton or reckless conduct or wanton or reckless failure to act caused the death of a victim.[20] This rule of law has withstood the test of time for more than seventy years

Id. After his release, he tried to overdose on Acetaminophen, but one of his friends from treatment called 911 after hearing about his plans. *Id.*

[12] *See* Erin Moriarty, *Death by Text: The Case Against Michelle Carter*, CBS NEWS (Feb. 11, 2019), *archived at* https://perma.cc/8WMM-TPQ3 (quoting some of Carter's text messages from the days before Roy's death, in which Carter was encouraging Roy to follow through with his plan to commit suicide).

[13] *See id*. (expounding upon whether words can be "deadly"). By finding Carter guilty, Judge Lawrence Moniz seemed to recognize the "deadly power of words." *Id.*

[14] *See infra* Part II.

[15] *See infra* Part II.

[16] *See infra* Part II.

[17] *See infra* Part III.

[18] *See infra* Part IV.

[19] *See infra* Part V.

[20] *See* Commonwealth v. Welansky, 55 N.E.2d 902, 910 (Mass. 1944) (holding that conduct must involve a "high degree of likelihood that substantial harm will result to another"). "To constitute wanton or reckless conduct, as distinguished from mere negligence, grave danger to others must have been apparent, and the defendant must have chosen to run the risk rather than alter his conduct so as to avoid the act or omission which caused the harm." *Id.*

since *Commonwealth v. Welansky* was decided by the highest state court in Massachusetts, the SJC, in 1944.[21] Consistently, charges for manslaughter in Massachusetts have strongly depended on the facts of each case.[22] The SJC has even gone so far as to rule that a defendant need not even be physically present or commit a physical act.[23] In the context of modern-day, this non-requirement of a physical act or presence has been applied to harassment or cyberbullying via technology, such as cell phones.[24]

Criminal liability requires a guilty mind, or *mens rea*.[25] *Mens rea* is defined as "the mental state of the person under discussion at a given time, particularly the person's beliefs, purpose, and expectations that are relevant to some legally significant action or inaction by that person."[26] In Massachusetts, convictions of manslaughter require the

[21] *See id.* (affirming nightclub owner's conviction for manslaughter because his wanton or reckless disregard of safety of patrons from fire was the cause of their death); *see also What is Court of Last Resort?*, THE L. DICTIONARY (Mar. 18, 2019), *archived at* https://perma.cc/52HB-UQ6S (defining a "court of last resort" as the "highest court that can be approached and whose decision is final and no appeal can be taken against").

[22] *See* Commonwealth v. Carter, 52 N.E.3d 1054, 1056 (Mass. 2016) [hereinafter *Carter I*] (ruling that an indictment for involuntary manslaughter can stand because evidence of sending text messages that encourage suicide, can result in infliction of serious bodily harm). Cases indicate 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." *Id.* at 1062; *see also* Persampieri v. Commonwealth, 175 N.E.2d 387, 390 (Mass. 1961) (affirming defendant's conviction for voluntary manslaughter because he informed her how to kill herself, instead of bringing his distraught wife to her senses).

[23] *See Carter I*, 52 N.E.3d at 1061-62 (stating that the court has never required a physical act to withstand dismissal of an indictment); *see also* Commonwealth v. Pugh, 969 N.E.2d 672, 685 (Mass. 2012) (explaining that "wanton or reckless conduct" can mean an intentional act or an intentional omission of a "duty to act").

[24] *See* Commonwealth v. Carter, No. 15O0001NE (Mass. Juv. Ct. June 16, 2017) (finding defendant guilty of involuntary manslaughter by encouraging her boyfriend to commit suicide over a series of text messages).

[25] *See Mens Rea*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Desk ed. 2012) (addressing the state of mind the defendant must have had when committing the offense).

[26] *See id.* (elaborating on the definition of *mens rea*). "Each criminal offense requires an actus reus and a particular *mens rea*, which varies among purposeful, deliberate, intentional, knowing, negligent, or (in rare cases) none, as in the case for strict liability crimes. The *mens rea* for a particular crime is set out in either the relevant statute or at common law." *Id.*

Commonwealth to prove wanton or reckless conduct as the *mens rea*.[27] The meaning of the word "conduct" in criminal law seems clear under Massachusetts case law, whether it involves an affirmative act or a failure act.[28] *Mens rea* has a subjective element relevant to that individual's mindset at the time the act is committed.[29] In addition to an affirmative act, a *failure to act* can also result in a conviction for manslaughter as wanton or reckless conduct.[30]

Although an intervening cause may relieve the defendant of criminal liability, the intervening cause must be the sole cause, not merely a contributing cause, in order to defeat a conviction of involuntary manslaughter.[31] Additionally, an intervening conduct or cause that is "reasonably foreseeable" also will not relieve the

---

[27] *See* Commonwealth v. Welansky, 55 N.E.2d 902, 910 (Mass. 1944) (ruling that wanton or reckless conduct standard is both subjective and objective).

[28] *See* Commonwealth v. Walker, 812 N.E.2d 262, 277-78 (Mass. 2004) (upholding defendant's conviction where he intentionally gave his victims a drink laced with poison with specific intent to injure them); Commonwealth v. Levesque, 766 N.E.2d 50, 59 (Mass. 2002) (holding that defendants could be found guilty of involuntary manslaughter based on their failure to report a fire).

[29] *See* Commonwealth v. Pierce, 138 Mass. 165, 175-76 (1884) (holding that recklessness that a "moral sense" because it has to do with the consciousness of the consequences of one's one act).

> No matter whether defined as indifference to what those consequences may be, or as a failure to consider their nature or probability as fully as the party might and ought to have done, it is understood to depend on the actual condition of the individual's mind with regard to consequences, as distinguished from mere knowledge of present or past facts or circumstances from which some one [sic] or everybody else might be led to anticipate or apprehend them if the supposed act were done.

Id.

[30] *See Welansky*, 55 N.E.2d at 909 (comparing affirmative acts to negligent acts such as discharging a firearm or driving an automobile where there is failure to take care of those to whom the defendant had a duty to). "[I]n the present case, there is a duty of care for the safety of business visitors invited to premises which the defendant controls, wanton or reckless conduct may consist of intentional failure to take such care in disregard of the probable harmful consequences to them…" *Id. But see* Commonwealth v. Life Care Ctrs. of Am., Inc., 926 N.E.2d 206, 212 (Mass. 2010) (holding that a conviction of involuntary manslaughter requires more than negligence or gross negligence).

[31] *See* Commonwealth v. Perry, 733 N.E.2d 83, 96 (Mass. 2000) (ruling that another party's abuse of the victim was not an intervening cause to relieve the defendant of criminal liability because the conduct of the parties combined cause the death of the victim).

defendant of criminal liability.[32] For example, a defendant can be found criminally liable where an "intervening cause," such as a third party attempting to grab a loaded firearm from the defendant and shooting the victim, whether or not he or she knew the gun was loaded.[33] Situations such as this, again, bear on the defendant's state of mind and the sequence of events leading up to the shooting.[34]

In order to protect constitutional rights, courts will apply the Rule of Lenity to ambiguous criminal statutes.[35] "The Rule of Lenity is a rule of statutory construction, according to which a criminal statute that is sufficiently ambiguous that it cannot be said exactly what conduct is barred must be read in the light more favorable to the defendant."[36] The protections afforded by statutory interpretation principles are grounded in due process rights and prosecutorial

---

[32] *See* Commonwealth v. Catalina, 556 N.E.2d 973, 980 (Mass. 1990) (holding that denial of motion to dismiss by lower court was correct because there was probable cause to believe that the defendant committed involuntary manslaughter).

> It is untenable to suggest that heroin consumption is not a reasonably foreseeable consequence of selling that drug to a known addict. We conclude that the act of the customer injecting [her]self is not necessarily so unexpected, so unforeseeable or remote as to insulate the seller from criminal responsibility as a matter of law.

Id.

[33] *See* Commonwealth v. Askew, 536 N.E.2d 341, 342 (Mass. 1989) (affirming defendant's conviction for involuntary manslaughter because his wanton or reckless conduct the death of the victim, although the third-party's action was an intervening cause). The *Askew* court drew from criminal law: "the acts of an intervening third party will only 'relieve a defendant of culpability' if the victim's 'response was not reasonably foreseeable.'" *Id.* at 343. "You must be satisfied that this was not just an accident for which no one really is to blame.'" *Id.*; *see also* Aaron Keller, *Why Convicting Michelle Carter Was Right Call Under State Law*, LAW & CRIME (Aug. 3, 2017), *archived at* https://perma.cc/ZN8V-NCD7 (comparing precedent between *Levesque* and *Askew*). Keller states that the *Levesque* court drew from tort law: "the acts of an intervening third party will only 'relieve a defendant of culpability' if the victim's 'response was not reasonably foreseeable.'" *Id.*

[34] *See Askew*, 536 N.E.2d at 343 (ruling that there was no reversible error because the judge did not mislead the jury into believing that they had to find him guilty if he knew the gun was loaded).

[35] *See* Intisar A. Rabb, *The Appellate Rule of Lenity*, 131 HARV. L. REV. F. 179, 203-04 (2018) (defining the Rule of Lenity and its application).

[36] *See id.* at 19 (explaining Justice Scalia's theory that the Rule of Lenity is based on due process of law that a criminal statute be clear in giving notice of what conduct the law prohibits).

discretion to charge.[37] With regard to juveniles specifically, the rule "may be applied when a statute can plausibly be found to be ambiguous to give the juvenile the benefit of the ambiguity."[38] It is not a "rigid requirement" to interpret a statute in a manner most favorable to defendants in every case, and also requires application of an actual statute.[39] The rule does, however, have a different application to the First Amendment.[40]

Laws specifically regarding text messages stem from the aspect of whether a person is physically present or aware enough of the consequences of his or her words.[41] A "text message" is defined as "a short message sent electronically usually from one cell phone to another."[42] In the context of civil liabilities, courts have found that

---

[37] *See* Kolender v. Lawson, 461 U.S. 352, 357-58 (1983) (expanding upon the void-for-vagueness doctrine).

> The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement….the more important aspect of the vagueness doctrine is "not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement."

Id. (citations omitted).

[38] *See* Charles C. v. Commonwealth, 612 N.E.2d 229, 236 (Mass. 1993) (holding the intent of the legislature to alter the method of proceeding against juveniles charged with murder is clear).

[39] *See* Simon v. Solomon, 431 N.E.2d 556, 565 (Mass. 1982) (stating that the more sensible interpretation must be applied as opposed to a perverse one, despite the fact that "contrary suggestions of its language and background").

[40] *See* Smith v. Goguen, 415 U.S. 566, 573 (1974) (ruling that the "vagueness" doctrine demands a higher degree of specificity in statutes when the expression falls under First Amendment protection); Commonwealth v. Abramms, 849 N.E.2d 867, 873 (Mass. App. Ct. 2006) (holding that Massachusetts statute was not unconstitutionally vague because statute used "unlawful assembly" in conjunction with violence); *accord* Brief of Defendant-Appellant at 29-30, Commonwealth v. Carter, 52 N.E.3d 1054 (2016) (No. 12043) (arguing that the Rule of Lenity should apply to Carter's charges because involuntary manslaughter is a common law crime and not defined by statute).

[41] *See* Dan Glaun, *Michelle Carter Trial: Watch Guilty Verdict Being Read by Judge Lawrence Moniz*, MASSLIVE (Jun. 15, 2017), *archived at* https://perma.cc/T8M3-S3MK [hereinafter *Verdict*] (discussing the prosecution's contention that Carter knew that she created a dangerous situation for Conrad through their text message exchanges and can be held criminally responsible for his death).

[42] "[T]ext message," MERRIAM-WEBSTER ONLINE DICTIONARY (Oct. 22, 2017), *archived at* https://perma.cc/A8M3-QV94 (defining a text message as a short

text messages can create legally binding contracts.[43] In *St. John's Holdings, LLC v. Two Elecs., LLC*, the Massachusetts Land Court found that the text message exchanges between two companies to secure a sale of real estate were sufficient to satisfy the Statute of Frauds.[44] Although civil and criminal liability are very different, it is becoming increasingly important to be aware of what one says via text message, as there is much litigation involving discovery of text messages and other electronic exchanges.[45]

Many courts have questioned the validity of charges and convictions for cyberbullying and harassment via text messages and

message sent electronically usually from one cell phone to another); Dickens v. State, 927 A.2d 32, 36-38 (Md. App. 2007) (upholding lower court's decision to admit text messages offered to show that sender threatened his wife over a period of time before he murdered her); State v. Thompson, 777 N.W.2d 617, 626-27 (N.D. 2010) (holding that a party's own statements via text messages are not inadmissible hearsay under state's rules of evidence); *see also* Lawrence Morales II, *Social Media Evidence: "What You Post on Twitter Can and Will be Used Against You in a Court of Law"*, 60 THE ADVOCATE 32, 37-38 (2012) (discussing the application of criminal liability from multiple social media and electronic platforms).

[43] *See* Matthew DeVries, *LOL! OMG. HUH? Court Finds That Text Message Can Form Binding Contract*, BEST PRACTICE CONSTR. L. (June 24, 2016), *archived at* https://perma.cc/Y65M-JN69 (discussing a Massachusetts Land Court decision on text messages as constituting a writing under the statute of frauds); *see also* Schindler v. Seiler, 474 F.3d 1008, 1010-11 (7th Cir. 2007) (ruling that statements that entail "verbal acts," such as "words of a contract," are not hearsay); *cf.* FED. R. EVID. 801(c)(1) – (2) (defining hearsay). "'Hearsay' means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." *Id.*; State v. Otero, 401 P.3d 1063 (Kan. App. 2017) (reasoning that text message offer to buy marijuana would be the first step to formation of a contract). "[T]he text message represented a verbal act and, therefore, was not hearsay. It doesn't matter that the proposed contract would have been illegal and, thus, unenforceable." *Id.*

[44] *See* St. John's Holdings, LLC v. Two Elecs., LLC, 2016 WL 1460477, at *6 (Mass. Land Ct. Apr. 14, 2016) (noting that text messages must contain the essential elements of the agreement and a signature to bind the parties). "*Singer* was decided over a decade ago." *Id*. at *7. "Since then the use of electronic communications, particularly in the legal field, has advanced immensely and become commonplace." *Id.*; *see also* Singer v. Adamson, 11 Land Ct. Rptr. 338, 342 (Mass. 2003), *aff'd*, 837 N.E.2d 313 (Mass. App. Ct. 2005) (deciding that emails between real estate agents did not meet Statute of Frauds because they are too quick and casual in nature).

[45] *See* DeVries, *supra* note 43 (mentioning how there are lessons to be learned from this land court case such as living in a mobile, technology-driven environment, claims succeeding or failing based on the documentation, and the need to harness digital data).

other social media outlets.[46] Appeals and reversals of charges or convictions have usually been based on the freedom of speech protected by the First Amendment.[47] Restrictions on speech are to be

[46] *See* State v. Hall, 887 N.W.2d 847, 858 (Minn. Ct. App. 2016) (holding that there was sufficient evidence to prove that defendant knew or had reason to know that his conduct would cause victim to feel threatened and stalking statute did not violate the First Amendment). *But see* Brown v. Entm't Merch. Ass'n, 564 U.S. 786, 791 (2011) (stressing that restrictions on the content of speech are limited to certain speech, such as "fighting words," true threats, incitement, obscenity, and defamation or statements integral to criminal conduct); Reno v. Am. Civil Liberties Union, 521 U.S. 844, 875 (1997) (ruling that the government has a compelling interest in protection from harmful publications or materials); State v. Bishop, 774 S.E.2d 337 (N.C. Ct. App. 2015), *rev'd*, 787 S.E.2d 814 (N.C. 2016) (holding that cyberbullying statute violates the First Amendment because it does not restrict speech in a content-neutral way); People v. Marquan M., 19 N.E.3d 480, 488 (N.Y. 2014) (ruling that cyberbullying statute was overbroad and facially invalid under the Free Speech Clause of the First Amendment). The New York statute pertaining to electronic communications criminalized cyberbullying as:

> any act of communicating or causing a communication to be sent by mechanical or electronic means, including posting statements on the internet or through a computer or email network, disseminating embarrassing or sexually explicit photographs; disseminating private, personal, false or sexual information, or sending hate mail, with no legitimate private, personal, or public purpose, with the intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person.

Id. at 484. The court also reasoned that, although defendant's actions of posting photographs of classmates and other adolescents with detailed descriptions of their alleged sexual practices and predilections, partners and other personal information may still not be protected by the First Amendment, the statute also criminalizes a variety of constitutionally-protected modes of expression. *Id.*

[47] *See* U.S. CONST. amend. I (protecting the right to freedom of speech). The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*; MASS. CONST. art. XVI (stating that "[t]he right of free speech shall not be abridged"). *Compare Bishop*, 787 S.E.2d at 819 (ruling that cyberbullying statute is content based because it criminalizes some messages and not others), *with* Commonwealth v. Carter, 52 N.E.3d 1054, 1064 n.17 (Mass. 2016) (*Carter I*) (stating that indictment does not violate First Amendment because Commonwealth has a "compelling interest in deterring speech that has a direct, causal link" to a victim's suicide); Commonwealth v. Carter, 115 N.E.3d 559, 569-72 (2019) [hereinafter *Carter II*] (Addressing a similar First Amendment argument as *Carter I*: "[t]his restriction [on free speech] is necessary to further the Commonwealth's compelling interest in preserving life. Thus, such a prohibition would even survive strict scrutiny.").

applied equally to all new media and forms of communication that society makes available.[48] Therefore, in order to protect First Amendment rights, a statute must be still be content-neutral and survive strict scrutiny.[49] Most courts, however, have not ruled that free speech is still protected when the defendant, or speaker, has been charged with manslaughter.[50]

Criminal liability through text messages and other social media and electronic platforms are prominent in cyberbullying issues.[51] "Cyberbullying" has been defined by courts as "willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices."[52] Cyberbullying has led to many serious issues, such as suicide, especially in younger people.[53] For example, in

[48] *See Brown*, 564 U.S. at 790 (noting that video games qualify for First Amendment protection); *see also* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 504 (1952) (holding that a state may not ban a film based on the fact that it is "sacrilegious"). "[T]he basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule." *Id.* at 503

[49] *See* Reed v. Town of Gilbert, 576 U.S. __, 135 S. Ct. 2218, 2226 (2015) (expanding upon strict scrutiny test); *see also Bishop*, 787 S.E. at 818 (concluding the court finds that North Carolina's cyberbullying statute implicates the First Amendment because it restricts speech).

[50] *See* Sean Sweeney, *Deadly Speech: Encouraging Suicide and Problematic Prosecutions*, 67 CASE. W. RES. L. REV. 941, 952 (2017) (discussing methods prosecutors can make when trying to charge for aiding or encouraging suicide); *see also* Carla Zavala, *Manslaughter by Text: Is Encouraging Suicide Manslaughter?*, 47 SETON HALL L. REV. 297, 308 (2016) (explaining how Massachusetts has recognized encouraging suicide as murder under common law).

[51] *See* Nicole P. Grant, *Mean Girls and Boys: The Intersection of Cyberbullying and Privacy Law and its Social-Political Implications*, 56 HOW. L.J. 169, 172-73 (2012) (discussing the various methods of cyberbullying and how it is becoming difficult to control).

[52] *See* Sameer Hinduja & Justin W. Patchin, *Cyberbullying Fact Sheet: What You Need to Know About Online Aggression*, CYBERBULLYING RES. CTR., 2009, 1 (discussing issues that new technologies create and how cyberbullies can remain "virtually anonymous").

[53] *See* Grant, *supra* note 51, at 183-85 (explaining cyberbullying situations that have led to the death of many teenagers and young adults, such as Megan Meier). Another example is the story of Ryan Patrick Halligan from Vermont. *Id.* at 185. Ryan was repeatedly "'sent instant messages from middle school classmates accusing him of being gay,' and 'threatened, taunted and insulted incessantly.'" *Id.* He was bullied for months over the internet and physically. *Id.* Seven months after Ryan's death, the governor of Vermont signed "An Act Relating to Bullying Prevention Policies." *Id.* This Act is now law in Vermont and defines "bullying" as:

October 2006, a 13-year-old girl named Megan Meier committed suicide after a "cyber hoax" in which the mother of Megan's former friend created a fictitious MySpace profile to learn about what Megan was saying about her daughter.[54] Somehow the conversation between the mother and Megan became hostile and, as a result of many communications, Megan committed suicide.[55] Situations, such as Megan's, have compelled many states to enact anti-bullying laws.[56]

Cyberbullying and First Amendment issues overlap because

> any overt means any overt act or combination of acts, including an act conducted by electronic means, directed against a student by another student or group of students and that: is repeated over time; is intended to ridicule, humiliate, or intimidate the student; and occurs during the school day on school property, on a school bus, or at a school-sponsored activity, or before or after the school day on a school bus or at a school-sponsored activity; or does not occur during the school day on school property, on a school bus, or at a school-sponsored activity and can be shown to pose a clear and substantial interference with another student's right to access educational programs.

16 V.S.A. § 11(a)(32)(A) – (C) (2012) (codifying Vermont's definition of "bullying" into enforceable law to protect the rights of students affected).

[54] *See Parents: Cyber Bullying Led to Teen's Suicide*, ABC NEWS (Nov. 19, 2007), *archived at* https://perma.cc/AR7D-2U7F (explaining Megan's parents' story about how why they believe their daughter committed suicide).

[55] *See id.* (expanding upon fake profile created by Megan's former friend's mother).

[56] *See* REV. CODE WASH. § 28A.300.285 (1) – (2) (2013) (requiring all school districts to adopt a policy to prohibit harassment, intimidation, or bullying, and defining these terms).

> 'Harassment, intimidation, or bullying' means any intentional electronic, written, verbal, or physical act, including but not limited to one shown to be motivated by any characteristic in RCW 9A.36.080(3), or other distinguishing characteristics, when the intentional electronic, written, verbal, or physical act: (a) Physically harms a student or damages the student's property; or (b) Has the effect of substantially interfering with a student's education; or (c) Is so severe, persistent, or pervasive that it creates an intimidating or threatening educational environment; or (d) Has the effect of substantially disrupting the orderly operation of the school. Nothing in this section requires the affected student to actually possess a characteristic that is a basis for the harassment, intimidation, or bullying.

§ 28A.300.285 (2); Grant, *supra* note 51 (noting that as of July 2012, forty-nine states have enacted anti-bullying laws). "These real life cases all show that the evolution of technology, coupled with heightened concerns about cyber bullying, present new legal issues for educators that may not align with earlier legal precedence or older educational policies." *Id.*

many school districts attempt to balance the free speech of students with the necessity to maintain an effective and safe learning environment for children and adolescents.[57] In *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*,[58] the Supreme Court notably decided on the extent of First Amendment rights of schoolchildren.[59] However, First Amendment rights of students in school yards differ from First Amendment rights related to cyberbullying and words transmitted over the internet.[60] Since *Tinker* was decided in 1969, these freedom of speech issues have leaked into homes and affected children in different ways through the internet, social media, and text messaging.[61] In

[57] *See* Kevin Turbert, *Faceless Bullies: Legislative and Judicial Responses to Cyberbullying*, 33 SETON HALL LEGIS. J. 651, 664-65 (2009) (discussing free speech cases and Supreme Court decision on how to protect First Amendment rights in schools).

[58] 393 U.S. 503, 506 (1969).

[59] *See id.* (ruling that students do not lose their constitutional rights to freedom of speech or expression "at the schoolhouse gate").

[60] *See* Turbert, *supra* note 57, at 653-54 (explaining problems with anonymity over the internet).

> What makes cyberbullying more dangerous, and perhaps more damaging than traditional bullying is that the cyberbully can maintain anonymity. Although anonymity is a protected First Amendment right applauded by many because it allows for free expression over the Internet, bullies have abused the Internet's privilege of anonymity to inflict serious psychological harm on their victims.

Id.; *see also* CATHERINE J. ROSS, LESSONS IN CENSORSHIP: HOW SCHOOLS AND COURTS SUBVERT STUDENTS' FIRST AMENDMENT RIGHTS 210-11 (Harv. Univ. Press, 2015) (noting that the Supreme Court has only once addressed the issue of whether schools can extend restrictions on student speech into the privacy of their homes).

> The federal government has encouraged this invasion of liberty [the authority over off-campus speech] by requiring schools to control bullying wherever it occurs and threatening to strip districts of federal funds if they don't meet this demand. These radical departures conflict with longstanding jurisprudence and *Tinker*'s vision of one regime inside the schoolhouse gate and another outside.

Id. at 207.

[61] *See* Turbert, *supra* note 57, at 654-55 (discussing how bullying has gone from the schoolyard into the home through cyberbullying). "[C]yberbullying has no distinct boundaries and can reach a victim anytime and anywhere. As a result, a cyberbullying victim may experience more damaging effects than a traditional bullying victim because the home is no longer a place to hide from the ridicule." *Id.* at 654.

addition, the Supreme Court has "dealt with anonymity and First Amendment rights issues in previous Supreme Court decisions where it found that an author may remain anonymous under the First Amendment, and restrictions on political speech must pass the strict scrutiny analysis."[62]

Despite legislative and judicial attempts to protect citizens from cyberbullying, it is unclear how constantly changing technologies should apply to the First Amendment.[63] More specifically, many courts and legislatures have not addressed the First Amendment implications when cyberbullying leads to the death of a victim.[64] In Massachusetts, however, there is not a specific statute prohibiting "aiding or assisting a suicide attempt."[65] Instead,

---

[62] Grant, *supra* note 51, at 197 (defining anonymity and its application to free expression); *see also* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995) (ruling that an author's decision to remain anonymous is an aspect of free speech protected by the First Amendment).

[63] *See* Andrew Friedman, *Can Constitutional Drafters See the Future? No, and It's Time We Stop Pretending They Can*, 46 SW. L. REV. 29, 55 (2016) (mentioning that some Supreme Court justices have difficulty applying the First Amendment to the Internet and Facebook).

[64] *See* CAL. PENAL CODE § 401 (2010) (criminalizing "aiding or abetting suicide"). "Every person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony." *Id.*; LA. STAT. ANN. § 14:32.12 (2016) (defining Louisiana's statute of "criminal assistance to suicide").

> Criminal assistance to suicide is: (1) The intentional advising or encouraging of another person to commit suicide or the providing of the physical means or the knowledge of such means to another person for the purpose of enabling the other person to commit or attempt to commit suicide. (2) The intentional advising, encouraging, or assisting of another person to commit suicide, or the participation in any physical act which causes, aids, abets, or assists another person in committing or attempting to commit suicide.

Id.; *see also* Sweeney, *supra* note 50, at 958-60 (discussing a few states with special statutes criminalizing encouraging suicide). States attempts at criminalizing encouraging suicide are typically done to be part of a "broader prohibition against assisted suicide." *Id.* at 957.

[65] *See* Sweeney, *supra* note 50, at 962 (explaining significance of prosecutor's discretion because Massachusetts does not have a statute regarding a person encouraging suicide to another). *But see* Petition for Writ of Certiorari, Final Exit Network, Inc. v. State of Minnesota, 2017 WL 2591419, at *26 (U.S.), *cert. denied* (U.S. Oct. 2, 2017) (No. 16-1479) (arguing that Minnesota's statute stating that "causing" death is a murder and citing *Carter* to support its argument). In its Petition, Final Exit Network also cites an Illinois statute that is a narrowly

prosecutors have proceeded under a theory of manslaughter, which is not defined in the Massachusetts manslaughter statute, but instead is derived from the common law meaning of "manslaughter."[66]

The Supreme Court has recognized assisted suicide as a "protected liberty right."[67] In *Washington v. Glucksberg*,[68] the Supreme Court held that a Washington state statute prohibiting physician-assisted suicide did not violate the Fourteenth Amendment.[69] There is also a distinction between a right to physician-

tailored law to "prohibit speech that *causes* suicide." *Id.*; ILL. STAT. CH. 720 § 5/12-34.5 (2011) (criminalizing the inducement of suicide for specific reasons).

> A person commits inducement to commit suicide when he or she . . . : [k]nowingly coerces another to commit suicide and the other person commits or attempts to commit suicide as a direct result of the coercion, and he or she exercises substantial control over the other person through (i) control of the other person's physical location or circumstances; (ii) use of psychological pressure; or (iii) use of actual or ostensible religious, political, social, philosophical or other principles.

Id.; Nicholas LaPalme, *Michelle Carter and the Curious Case of Causation; How to Respond to a Newly Emerging Class of Suicide-Related Proceedings*, 98 B.U.L. REV. 1444, 1465 (2018) (proposing a Model Penal Code approach to create a new causation standard for proximate cause and encouraging suicide—"the predictability of the result"). The author also suggests that the causation requirement should "be deemed met when an actor deliberately encourages the suicide of someone that he or she knows battles with severe mental health issues, especially those who have previously attempted suicide." *Id.* at 1466.

[66] *See* Zavala, *supra* note 5050, at 303 (defining common law involuntary manslaughter); *see also* MASS. GEN. LAWS ch. 265, § 13 (2010) (stating the law in Massachusetts for manslaughter).

> Whoever commits manslaughter shall, except as hereinafter provided, be punished by imprisonment in the state prison for not more than twenty years or by a fine of not more than one thousand dollars and imprisonment in jail or a house of correction for not more than two and one half years.

Id.

[67] *See* Sherry F. Cobb, *When Should Encouraging Suicide be a Crime?*, VERDICT (July 5, 2017), *archived at* https://perma.cc/4QD6-AFLG (arguing that "assistance in suicide" rights should not apply to Roy because he was physically healthy).

[68] 521 U.S. 702, 709 (1997).

[69] *See* U.S. CONST. amend. XIV, § 1 (stating that the Fourteenth Amendment permits each state to enact legislation so long as the law does not "abridge the privileges or immunities of citizens of the United States"); *see also Glucksberg*, 521 U.S. at 735-36 (reasoning that this holding allows states to disagree on whether or not they want to allow physician-assisted suicide).

assisted suicide and a right to suicide in general.[70] "Suicide itself is not protected by law."[71] Instead, it is considered a grievous, nonfelonious wrong that a family member of the deceased cannot be punished.[72] In Massachusetts, although there is no statute prohibiting assisted suicide, the state has not expressed a public policy by enacting such a statute that would impose criminal liability.[73]

---

[70] *See* Cobb, *supra* note 67 (noting the difference between a right to physician-assisted suicide for a person in his or her final stages of life and a healthy person who has mental health issues).

[71] *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring) (agreeing that the state of Missouri cannot impose the right to refusal of treatment to anyone but the patient, but that this holding does not preclude the a future determination that the Constitution can require a state to implement the decision of a patient's surrogate). "'[T]here is no significant support for the claim that a right to suicide is so rooted in our tradition that it may be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'" *Id.* at 295; Cobb, *supra* note 67 (arguing that she could also be held criminally liable if she provided a means for him to commit suicide).

[72] *See Glucksberg*, 521 U.S. at 714-15 (discussing the common law difference, historically between suicide and assisting suicide); *see also* Bigelow v. Berkshire Life Ins. Co., 93 U.S. 284, 286 (1876) (stating that suicide is "an act of criminal self-destruction").

[73] *See* LaPalme, *supra* note 65, at 1444 (stating proposition that there is no statute prohibiting assisted-suicide in Massachusetts); *see also* Commonwealth v. Carter, 115 N.E.3d 559, 572 (Mass. 2019) (*Carter II*) (reaffirming *Carter I* and its argument on assisted suicide); Commonwealth v. Carter, 52 N.E.3d 1054, 1064 (Mass. 2016) (*Carter I*) (discussing the difference between the holding and physician-assisted suicide).

> It is important to articulate what this case is not about. It is not about a person seeking to ameliorate the anguish of someone coping with a terminal illness and questioning the value of life. Nor is it about a person offering support, comfort, and even assistance to a mature adult who, confronted with such circumstances, has decided to end his or her life. These situations are easily distinguishable from the present case, in which the grand jury heard 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. On the specific facts of this case, 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, causal link to his death.

Id.; Kligley v. Healy, No. SUCV2016-03254-F, 2017 WL 2803074, at *6 (Mass. Super. Ct. May 31, 2017) (stating that the court has not made a judgment on the

III. Premise

"[The victim's] death is my fault like honestly I could have stopped him I was on the phone with him and he got out of the [truck] because it was working…I […] told him to get back in."[74] In February 2015, a grand jury in Bristol County of Massachusetts indicted Michelle Carter for involuntary manslaughter for the death of Roy in July 2014 based on text message exchanges.[75] Subsequently, Carter moved to dismiss this indictment arguing that her conduct was not enough to return an indictment for manslaughter, however, her motion to dismiss was denied by the Bristol County Juvenile Court.[76] In *Carter I*, the SJC ruled that Carter's indictment for involuntary manslaughter cannot be dismissed simply because her indictment was based on "words alone."[77] Consequently, in July 2016 the court affirmed Carter's indictment and remanded for jury instructions on involuntary manslaughter.[78]

---

legality of physician-assisted suicide in Massachusetts). "Moreover, the SJC has suggested in dicta that assisting a terminally ill patient in ending his or her life may not be manslaughter." *Id.* at *5; Maggie Clark, *49 States Now Have Anti-Bullying Laws. How's that Working Out?*, GOVERNING (Nov. 4, 2013), *archived at* https://perma.cc/K8D8-8ADG (mentioning another criminal case in Massachusetts where a teenager was charged for bullying). In 2010, a teenager named Dharun Ravi served twenty days in jail for using a webcam to spy on Tyler Clementi, a freshman at Rutgers University, and sharing the video. *Id.* The judge found that it was a hate crime. *Id.*

[74] *See Carter I*, 52 N.E.3d at 1059 (stating the key text message defendant sent to her friend after the victim committed suicide).

[75] *See* Zavala, *supra* note 50, at 303 (discussing prosecution's case against Carter in which they argued that Carter's actions were both objectively and subjectively reckless).

[76] *See Carter I*, 52 N.E.3d at 1056 (stating the procedural history of Carter's motion to dismiss, which was eventually denied).

[77] *See Carter I*, 52 N.E.3d at 1061-62 (ruling that a physical act is not required to return an indictment for involuntary manslaughter).

[78] *See Carter I*, 52 N.E. 3d at 1060 n.9 (stating jury instructions for involuntary manslaughter as "an unlawful killing unintentionally caused by wanton or reckless conduct"). Wanton or reckless conduct:

> is conduct that creates a high degree of likelihood that substantial harm will result to another. It is conduct involving a grave risk of harm to another that a person undertakes with indifference to or disregard of the consequences of such conduct. 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. If the defendant realized the grave risk created

During trial, the defense and the prosecution vehemently disagreed about the meaning of the text messages sent between Carter and Roy.[79] Carter's attorney, Joseph Cataldo ("Cataldo"), argued that Roy's suicide is an intervening act because he chose to take his own life.[80] Cataldo also argued that Carter cannot be held responsible for

> by his conduct, his subsequent act amounts to wanton and reckless conduct whether or not a reasonable person would have realized the risk of grave danger. Even if the defendant himself did not realize the grave risk of harm to another, the act would constitute wanton and reckless conduct if a reasonable person, knowing what the defendant knew, would have realized the act posed a risk of grave danger to another. It is not enough for the Commonwealth to prove the defendant acted negligently, that is, in a manner that a reasonably careful person would not have acted. The Commonwealth must prove that the defendant's actions went beyond negligence and amounted to wanton and reckless conduct as . . . defined . . . .

Id. (citation omitted).

[79] *See* Dan Glaun, *Michelle Carter Trial Closing Arguments: Was it a 'Crime via Text,' or Did Conrad Roy Cause his own Death?*, MASSLIVE (June 13, 2017), *archived at* https://perma.cc/L5YQ-5LN2 [hereinafter *Closing Arguments*] (discussing stipulations and disagreements between defense and prosecution).

> They agree that on July 13, 2014, Carter's boyfriend Conrad Roy III was found dead of carbon monoxide poisoning in his truck, the victim of a suicide carried out following weeks of text messages in which Carter encouraged him to kill himself. They agree that both Carter and Roy had histories of mental illness, and that Roy had attempted suicide before in 2012 -- and that, at that time, Carter had tried to convince him to get help. And no one disputes that, in the minutes, hours and days after Roy's death, Carter messaged friends saying that she had been on the phone with Roy as he died -- in one case, saying his death was her fault and that she told him to get back in the truck as it filled with the deadly gas. But in closing arguments in Carter's manslaughter trial this afternoon, they disagreed profoundly on what those text messages meant, who was the driving force being the suicide plan, and -- most importantly -- who was ultimately responsible for Roy's death at the age of 18.

Id.

[80] *See Closing Arguments Made in Michelle Carter Texting Suicide Trial*, CBS BOSTON (June 13, 2017), *archived at* https://perma.cc/P4JX-27F8 (citing the defense's legal argument that Carter cannot be legally responsible for Roy's choice to take his own life).

his suicide because it does not rise to the level of a homicide.[81] Cataldo used the text messages that Roy sent to Carter in which he stated: "[t]here is nothing anyone can do to make me want to live" as evidence that he made his own decision.[82] According to the defense, there were many "messages" that Roy was determined to commit suicide: he did not inform any therapists of his plans, he sent Carter a picture of the generator he planned to use, and he suggested that they delete their text messages.[83] The defense quoted a text message from Roy to Carter stating that Roy believed he "dragged" her into his plan and used expert testimony from a psychiatrist, Dr. Peter Breggin, to testify that Carter was susceptible to this because she was "involuntarily intoxicated" by antidepressants.[84] Ultimately, the defense argued that the actual contents of the two phone calls between Carter and Roy on the night of his death are "unknown," and therefore, his death was the "result of his own choices."[85]

The prosecution began its closing argument by reading the messages Carter sent to her friend.[86] In the messages, Carter stated that Roy's death "'is my fault,' that she could have stopped him and that she '[…] told him to get back in'" his truck.[87] Assistant District

[81] *See id.* (summarizing Cataldo's closing argument in which he claims that Carter can't be responsible for Roy taking his own life). "'It's sad, it's tragic,' Cataldo said. 'But it's just not a homicide.'" *Id.*

[82] *See id.* (Quoting Roy's text message from closing argument in which he wrote "there is nothing anyone can do to make me want to live.").

[83] *See Closing Arguments*, *supra* note 79 (pointing to Roy's text message that he sent to Carter to show that it was his intention to commit suicide).

[84] *See Closing Arguments*, *supra* note 79 (Explaining Dr. Breggin's testimony and his reasoning that "Carter was 'involuntarily intoxicated' by the anti-depression Celexa when she encouraged Roy to kill himself."). Dr. Breggin's previous views about, and commentary on, "the dangers of psychiatric medication" have made him a controversial figure in the field of psychiatry. *Id*.

[85] *See Closing Arguments*, *supra* note 79 (highlighting Cataldo's summation statement that the prosecution based their arguments of what Carter said to Roy on text messages sent to her friends). "'Nobody really knows what happened at or around the time Conrad Roy took his own life, other than Conrad Roy,' Cataldo said." *Id.*

[86] *See Closing Arguments*, *supra* note 79 (describing the prosecution's use of the text messages to support his argument). Assistant District Attorney Rayburn stated, "[Carter] created the harm when she told him to get back in. . . . knew in that moment he did not want to die, and. . . . just as important [knew] exactly what would happen when he got back in that truck." *Id*.

[87] *See Closing Arguments*, *supra* note 79 (discussing Carter's suspicious actions, "around the time of Roy's death", such as asking "him to tweet about her before his

Attorney, Katie Rayburn ("ADA Rayburn"), painted Carter as a disturbed teenager who pressured Roy into committing suicide in order to gain sympathy and attention from her peers as a grieving girlfriend.[88] She described multiple exchanges between Carter and Roy, including an angry conversation between the two because Roy did not follow through with his suicide a few days prior to his actual death.[89] ADA Rayburn stated "[y]ou can encourage someone to die via text, and you can commit a crime via text."[90] She argued that the nexus between Roy's death and Carter's motive was when Carter told him to get back into the truck.[91] She concluded that Carter should be found guilty for the death of Roy because she "'absolutely knew what she was doing, absolutely knew it was wrong, and she absolutely caused the death of this 18-year-old boy.'"[92]

In June 2017, Carter was found guilty of involuntary manslaughter after a bench trial in Bristol County Juvenile Court.[93] In his guilty verdict, Judge Moniz found that Carter created her duty to act because she allowed Roy to put himself into that position while she was on the phone with him.[94] As evidence of "words that kill," or lack thereof,

suicide and demanding credit for a memorial baseball tournament she organized afterward—demonstrated her motive").

[88] *See Closing Arguments*, *supra* note 79 (arguing that Carter's motive for orchestrating Roy's death was to "reignite friendships that had faded and to gain sympathy" with the community).

[89] *See Closing Arguments*, *supra* note 79 (claiming that Carter "ramped up the pressure on Roy" to ensure that he followed through and no one would find out she lied). "'She keeps up the charade,…[n]ow she's a little bit stuck, because unfortunately Conrad keeps showing up alive.'" *Id.*

[90] *See Closing Arguments*, *supra* note 79 (comparing Carter's actions which encouraged Roy to commit suicide via text as the same as someone committing a crime via text).

[91] *See Closing Arguments*, *supra* note 79 (outlining ADA Rayburn's argument that Carter created the harm to Roy and knew "exactly what would happen when he got back in that truck.").

[92] *See Closing Arguments*, *supra* note 79 (portraying Carter's *mens rea* at the time of Roy's death and the events leading up to it). ADA Rayburn contended that Carter "wants to feel like she was the one.…Poor her, her boyfriend died, they were going to get married one day, now she's the grieving girlfriend."; *see also* Keller, *supra* note 33 (discussing Massachusetts' low threshold for establishing causation for involuntary manslaughter, and the similarities between Carter's actions and the actions of other individuals convicted of the same crime).

[93] *See Verdict*, *supra* note 41 (stating judge's verdict should not be construed as a complete explanation of the facts).

[94] *See Verdict*, *supra* note 41, at 9:51 (videotaping shows Judge Moniz's finding).

Judge Moniz listed all the words Carter did not say: "[s]he did not tell Roy to step out and save himself. She did not tell the police that a teenager was dying. She did not tell Roy's family."[95] Without a statute, Judge Moniz applied the common law precedent set in *Commonwealth v. Levesque*.[96] Carter was sentenced to two and a half years in the Bristol County House of Correction and five years of probation, but was released pending appeal.[97] Carter's attorneys

> Ms. Carter at that point, therefore, had reason to know that Mr. Roy had followed her instruction, and had placed himself in the toxic environment of that truck. At this point the courts analysis, the court took direction from a case, Commonwealth v. Levesque. In Commonwealth v. Levesque, it is indicated that where one's actions creates a life-threatening risk to another, there is a duty to take reasonable steps to alleviate the risk. The reckless failure to fulfill this duty can result in a charge of manslaughter. Knowing that Mr. Roy is in the truck, knowing the condition of the truck, knowing or at least having a state of mind that 15 minutes would pass, Ms. Carter takes no action, in the furtherance of the duty that she has created by instructing Mr. Roy to get back in the truck. . . . She called no one, and finally, she did not issue a simple, additional instruction: Get out of the truck.

Id.

[95] *See* Mark Arsenault, *Experts Say Michelle Carter Case Revolved Around Concept that Words Can Kill*, BOSTON GLOBE (June 16, 2017), *archived at* https://perma.cc/C797-2Y7D (quoting part of Judge Moniz's verdict). An attorney who followed the case also stated: "[b]y her instructing him—given the nature of their relationship—to get back in the truck, it clearly presented the potential for a known risk of death." *Id.*

[96] *See* Commonwealth v. Levesque, 766 N.E.2d 50, 62 (Mass. 2002) (holding that defendants could be indicted for involuntary manslaughter based on neglect of a duty to report a fire). The court further explains the "omission" of a duty: "[I]n general, one does not have a duty to take affirmative action, however, a duty to prevent harm to others arises when one creates a dangerous situation, whether a dangerous situation was created intentionally or negligently." *Id.* at 56. *But see Commonwealth v. Carter: Trial Court Convicts Defendant of Involuntary Manslaughter Based on Encouragement of Suicide*, 131 HARV. L. REV. 918, 918 (2018) [hereinafter *Trial Court Convicts Defendant*] (opining that Judge Moniz erred in basing his verdict on omission, and instead could have based his verdict on a theory of overcoming the victim's free will).

[97] *See* Emily Shapiro & Doug Lantz, *Michelle Carter Sentenced to 2.5 Years for Texting Suicide Case*, ABC NEWS (Aug. 3, 2017), *archived at* https://perma.cc/FNR2-KXRE (reiterating Carter's sentence given by Judge Moniz). Carter will serve fifteen months in the Bristol County House of Correction and the rest will be suspended, followed by the five years of probation. *Id.*

appealed her conviction and sentence in March 2018.[98]

The prosecutor was able to use a wide range of discretion when indicting Carter because of the lack of legislative guidance regarding suicide.[99] To date, there has not been any proposed legislation specifically geared towards encouraging suicide or cyberbullying in Massachusetts.[100] A few pieces of proposed legislation could be beneficial to situations such as Carter and Roy's, however, there are none specifically criminalizing Carter's actions.[101]

On March 14, 2018, the SJC allowed Direct Appellate Review for Carter's appeal, which allows the court to hear cases on direct appeal that are:

---

[98] *See* Danny McDonald, *Michelle Carter's Attorney Files Notice to Appeal Her Conviction*, BOSTON GLOBE (Sept. 1, 2017), *archived at* https://perma.cc/LQ4G-C9P5 (acknowledging that a notice to appeal is a procedural move signaling that the defense will file an appeal thereafter).

[99] *See* Sweeney, *supra* note 50, at 966 (discussing how prosecutors have broad discretion without these statutes). *But see* ALASKA STAT. § 11.41.120(a)(2) (1996) (criminalizing intentionally aiding another to commit suicide). "A person commits the crime of manslaughter if the person intentionally aids another person to commit suicide." *Id.*; *see also* COLO. REV. STAT. § 18-3-104 (1996) (providing another example of specifically criminalizing causing or aiding suicide as manslaughter). "A person commits the crime of manslaughter if such person intentionally causes or aids another person to commit suicide." *Id.*

[100] *See* Matthew Segal, *ACLU of Massachusetts Statement on Michelle Carter Guilty Verdict*, ACLU MASS. (June 16, 2017), *archived at* https://perma.cc/E8CC-QEB9 (recognizing that there are currently no laws criminalizing encouraging, or even persuading, suicide). "The implications of this conviction go far beyond the tragic circumstances of Mr. Roy's death." *Id.* "If allowed to stand, Ms. Carter's conviction could chill important and worthwhile end-of-life discussions between loved ones across the Commonwealth." *Id.*

[101] *See* An Act Relative to Healthy Youth, H.B. 263, 2018 Leg., 191st Gen. Court (Mass. 2017) (proposing special commission relative to child suicide). This bill establishes a special commission "for the purpose of making an investigation and study relative to strategies for suicide prevention and the resources necessary to assist elementary and secondary schools in identifying and assisting children at risk." *Id.* at 2; H.B. 1229, 2017-2018 Leg., 190th Gen. Court (Mass. 2017) (proposing "an Act to establish an Office of Youth Development"). This bill discusses that the analysis of current social and health status indicators indicate that an unacceptable number of urban youth are becoming involved in the criminal justice system, experiencing high rates of homicide and suicide, engaged in violence and anti-social behaviors, becoming abusers of drugs, alcohol, tobacco and marijuana, experiencing a high rate of pregnancies and sexually transmitted diseases, and leaving school without marketable skills. *Id.* There is clear and present danger that the current socio-economic status of this generation of urban youth will have a negative impact on the general well-being of the entire society of the Commonwealth. *Id.* at 2.

> (1) questions of first impression or novel questions of law which should be submitted for final determination to the SJC; (2) questions of law concerning the Constitution of the Commonwealth or questions concerning the Constitution of the United States which have been raised in a court of the Commonwealth; or (3) questions of such public interest that justice requires a final determination by the full SJC.[102]

Carter's defense attorneys, including Cataldo, applied for Direct Appellate Review based on the constitutional implications and possible negative precedent for the Commonwealth.[103] The relevant bases for Carter's appeal were the discrepancy between her indictment charges and conviction, insufficient evidence to prove Carter was guilty beyond a reasonable doubt, the common law of involuntary manslaughter as applied to encouraging suicide with words alone as "unconstitutionally vague."[104] The SJC has previously decided that Carter's indictment was sufficient, however, in February 2019, the SJC directly addressed and affirmed Carter's conviction.[105] As a result,

---

[102] *See* MASS. R. APP. P.11 (2002) (delineating the procedure upon grant of direct appellate review); *see also* Commonwealth v. Carter, SJC-12502 (Jan. 8, 2018) (granting Carter's application for direct appellate review, holding that the defendant's confession was corroborated by sufficient evidence, that the law of involuntary manslaughter was not unconstitutionally vague, that the defendant's free speech rights were not violated, that the evidence supported the finding that the defendant's actions were reckless, and that the trial court acted within its discretion in denying the defendant's motion in limine to admit expert testimony by the forensic psychologist).

[103] *See* Curt Brown, *SJC Will Hear Michelle Carter on Direct Appeal*, SOUTHCOASTTODAY (Mar. 15, 2018), *archived at* https://perma.cc/6G8K-4JA5 (discussing the SJC's decision to hear Carter's appeal and Cataldo's thoughts).

[104] *See* Brief for Appellant at 17-18, Commonwealth v. Carter, 52 N.E.3d 1054 (2019) (No. SJC-12502) (outlining arguments in Carter's brief appealing her conviction); *see also* Beth David, *Carter Appeal to Go Directly to SJC*, FAIRHAVEN NEIGHBORHOOD NEWS (Apr. 19, 2018), *archived at* https://perma.cc/XFJ4-GQ4B (delineating all of Carter's arguments on appeal and the connections between each claim); *accord* Brief for American Civil Liberties Union and the American Civil Liberties Union of Massachusetts as Amici Curiae Supporting Appellant at 26, Commonwealth v. Carter, 52 N.E.3d 1054 (2019) (No. SJC-12502) (questioning the constitutionality of Carter's conviction of involuntary manslaughter, specifically the First Amendment).

[105] *See* Commonwealth v. Carter, 115 N.E.3d 559, 569-72 (Mass. 2019) (*Carter II*) (concluding that the evidence before the trial judge was sufficient to find proof beyond a reasonable doubt that Carter committed involuntary manslaughter). Specifically, the SJC also held that Carter's First Amendment claim lacks merit. *Id.*

Carter's defense team intends to apply for a writ of certiorari to the Supreme Court to challenge the SJC's decision.[106] Despite her attorneys' objections, Carter began her sentence in February 2019.[107]

IV. Analysis

A. The (Un)likelihood of Success Before the Supreme Court

Carter's appellate attorneys and the American Civil Liberties Union miss the mark.[108] They ignore the issue that many adolescents and teenagers know too well.[109] Friends are bullied, classmates are

> In sum, our common law provides sufficient notice that a person might be charged with involuntary manslaughter for reckless or wanton conduct, including verbal conduct, causing a victim to commit suicide. The law is not unconstitutionally vague as applied to the defendant's conduct.

Id. at 570. Carter argued that her conviction cannot survive because "she did not inflict serious bodily harm on the victim." *Id.* at 572. The Court rejected this argument because: "[t]he youthful offender statute authorizes an indictment against a juvenile who is "'alleged to have committed an offense …. involving the infliction or threat of serious bodily harm'" (emphasis added). *Id.*; *see also* Keller, *supra* note 33 (arguing that Carter's appeal is not likely to succeed based on First Amendment arguments); *accord* MASS. GEN. LAWS ch. 119, § 54 (2013) (allowing prosecutors to indict children as "youthful offenders" where they feel a child has committed a serious offense, subsequently subjecting them to treatment as an adult).

[106] *See* David Linton, *Michelle Carter of Plainville Sent to Jail While Her Lawyer Pursues Appeal to U.S Supreme Court*, THE SUN CHRONICLE (Feb. 11, 2019) (Quoting Cataldo's arguments: "'[s]he is being put in jail for something he wanted.'").

[107] *See id.* (noting the defense team's possible argument for the Supreme Court: the First Amendment); *see also* Dan Glaun, *SJC Denies Emergency Stay of Sentence for 'Texting Suicide' Defendant Michelle Carter*, MASS LIVE (Feb. 11, 2019), *archived at* https://perma.cc/6JVE-ZUN8 (Arguing that Carter's motion should be allowed because "'[a]n extended stay would avoid the possibility that Carter may prevail on appeal only after she has already lost her liberty.'"). Without a stay of sentence, Carter will have likely served her sentence before the Supreme Court decides these issues because these decisions can take so long. *Id.*

[108] *Compare* Brief for Appellant, *supra* note 104, at 17-18 (summarizing why Carter's conviction cannot stand), *with* Brief for American Civil Liberties Union as Amici Curiae at 7 (arguing that the common law should be interpreted so as "to avoid the constitutional questions raised."). *But see Carter II*, 115 N.E.3d at 562 (affirming Carter's conviction on all grounds).

[109] *See* Jones, *supra* note 3 (suggesting studies show that problems with self-regulation and conduct are linked to time spent online by adolescents). The ability

bullied, family members are bullied, and in Massachusetts there is absolutely no legislation to resolve this issue.[110] Schools and family members may try to take initiative, but in a digital world this is not enough.[111] However, as zealous advocates, they brought forth every possible argument before the SJC in the hopes of reversing Carter's conviction.[112]

Ultimately, the SJC essentially snubbed every potential argument on appeal to affirm Carter's conviction.[113] Carter delineated multiple arguments on appeal that seemed promising to those who question the constitutionality of her conviction.[114] Despite these arguments, the SJC likely wanted to find a way to hold Carter liable for her actions, or what Judge Moniz considered her inactions.[115] Despite every loophole argued by Carter, the SJC affirmed her conviction based on Massachusetts' common law theory of involuntary manslaughter.[116] As a court of last resort in Massachusetts, the SJC's decision on involuntary manslaughter itself

of young adults to control their behaviors and emotions are linked to time spent online as well. *Id.*

[110] *See* Persampieri v. Commonwealth, 175 N.E.2d 387, 389-90 (Mass. 1961) (opining defendant challenges conviction on basis of no error of law); *see also* Clark, *supra* note 73 (reiterating the state bullying laws have not been developed enough to truly have an impact on those that are bullied).

[111] *See* ROSS, *supra* note 60, at 207 (explaining that regulating student internet use typically results in student retaliation online).

[112] *See* Brief for Appellant, *supra* note 104, at 17-18 (summarizing the arguments made on behalf of the appellant); David, *supra* note 104 (listing the six points argued by appellant on appeal).

[113] *See* Commonwealth v. Carter, 115 N.E.3d 559, 571-74 (Mass. 2019) (*Carter II*) (showing that the SJC did not concur with the arguments made on behalf of Carter).

[114] *See* Brief for Appellant, *supra* note 104, at 36, 45 (asserting multiple arguments that questioned the constitutionality of Carter's conviction).

[115] *See* Commonwealth v. Carter, 52 N.E.3d 1054, 1056 (Mass. 2016) (*Carter I*) (holding that Carter's actions and her failure to act justified imposing liability); *see also Carter II*, 115 N.E.3d at 568 (affirming the holding in *Carter I* that Carter's actions/inactions constituted legal causation, specifically, "after she convinced him to get back into the carbon monoxide filled truck, she did absolutely nothing to help him"); *Verdict*, *supra* note 93 (expounding on how the Court's rationale for upholding Carter's conviction).

[116] *See Carter II*, 115 N.E.3d at 573-74 (concluding that Carter's conviction of involuntary manslaughter as a youthful offender is not legally or constitutionally infirm).

likely will not be challenged by the Supreme Court.[117] Carter's best possible arguments, if certiorari is even granted, would be the same First Amendment claims brought in *Carter II*.[118] The important aspect to note is the nexus between Carter's words and Roy getting back into the car, as fully fleshed out by Judge Moniz's findings during trial.[119] As the SJC notes, it is not her "words alone" that are being punished.[120] Wanton or reckless words causing death are being punished.[121] If she had not told him to "get back in the truck," he likely would not have gotten back in.[122] The causation falls on these words, and they differ from some other types of possibly protected speech, such as "go jump off a bridge" or "no one cares about you."[123] The text messages leading up to Roy's death do not paint Carter to be a particularly sympathetic petitioner before the highest court in the United States.[124] These arguments will not likely hold weight before the Supreme

[117] *See id.* (affirming and ordering the lower court's judgment); *What is Court of Last Resort?*, *supra* note 21 (defining a court of last resort as "the highest court that can be approached and whose decision is final and no appeal can be taken against").

[118] *See* Brief for Appellant, *supra* note 104, at 38-47 ("Because the judge convicted Carter for what she said, or failed to say, not what she did, this case implicates free speech under the First Amendment and art. 16."); *see also* Linton, *supra* note 106 (asserting Carter's attorney's argument that the First Amendment issues present in Carter's case merit review by the United States Supreme Court).

[119] *See Verdict*, *supra* note 41 (highlighting prosecution's use of Carter's text messages from weeks surrounding Roy's death in which Carter admits telling Roy to "get back in" his truck as it filled with carbon monoxide).

[120] *See* Commonwealth v. Carter, 115 N.E.3d 559, 571-72 (Mass. 2019) (*Carter II*) (noting Court's opinion that text messages were only one aspect of holding Carter criminally liable, and that the speech at issue is "thus integral to a course of criminal conduct").

[121] *See id.* (highlighting the recklessness of the words communicated as justification for conviction).

[122] *See Carter II*, 115 N.E.3d at 568 (stating "However, he breaks the chain of self-causation by exiting the vehicle. He takes himself out of the toxic environment that it has become. This is completely consistent with his earlier attempts at suicide."); *see also Verdict*, *supra* note 41 (noting prosecution's argument of Carter's texts being the proximate cause of Roy's death).

[123] *See Carter II*, 115 N.E.3d at 570-71 ("Indeed, the United States Supreme Court has held that 'speech or writing used as an integral part of conduct in violation of a valid criminal statute' is not protected by the First Amendment.").

[124] *See id.* at n.3 (quoting text exchange between Carter and Roy, showing that Carter suggested using a generator to commit suicide because it has less of a chance of malfunctioning than a water pump).

Court.[125]

The final decision in *Carter II*, although currently pending appeal to the Supreme Court, should serve as a wakeup call to Massachusetts legislators.

B. Why Legislation in Massachusetts is Imperative

The appeal and final decision in *Commonwealth v. Carter* will have residual effects on Massachusetts law without further clarification from the legislature.[126] Specific legislation on the issues brought about in *Carter* should include new laws on cyberbullying and assisted suicide exclusively and separately because, although somewhat intertwined in *Carter I* and *Carter II*, these key issues cannot be addressed through one singular law.[127]

1. To Curb a Prosecutor's Discretion

Massachusetts is mainly a common law state.[128] Instead of looking to criminal statutes for notice on prohibited conduct, citizens must rely on centuries of common law that has built to this point.[129] The common law on involuntary manslaughter is no different.[130] For example, Massachusetts courts still consider decisions on involuntary

---

[125] *See Carter II*, 115 N.E.3d at 570-72 (explaining why Carter's words are not protected speech under the First Amendment because "speech or writing used as an integral part of conduct in violation of a valid criminal statute" is not given First Amendment protection).

[126] *See* Sweeney, *supra* note 50, at 943 (noting the lack of legislative guidance on laws against encouraging suicide).

[127] *See* Sweeney, *supra* note 50, at 976 (highlighting the difficulty of restricting speech due to constitutional protections).

[128] *See* Brief for Appellant, *supra* note 104, at 37-38 (arguing why the Massachusetts involuntary manslaughter statute can be vague as applied to speech); Zavala, *supra* note 50, at 303 (noting that common law's definition of involuntary manslaughter accords with Massachusetts' definition with regard to Michelle's action).

[129] *See* MASS. GEN. LAWS ch. 265, § 13 (2018) (setting forth punishment for manslaughter to include punishment by imprisonment for no more than twenty years or fine no more than one thousand dollars); Zavala, *supra* note 50, at 303 (discussing the common law definition of manslaughter and whether the defendant was objectively and subjectively wanton and reckless).

[130] *See* Commonwealth v. Welansky, 55 N.E.2d 902, 908 (Mass. 1944) (detailing how the Commonwealth will not indicate what statutes have been violated).

manslaughter from the late 1800s and the mid-1900s good law.[131] The issue, however, exists in the social changes that have happened since then: mainly, the advancement of technology.[132]

Prosecutorial discretion is kept in check by constitutional protections such as Due Process and the void for vagueness doctrine.[133] In Carter's case, prosecutors used this discretion when deciding how exactly to charge Carter to be criminally responsible for Roy's death.[134] This discretion allowed prosecutors to charge Carter with involuntary manslaughter under the theory of wanton or reckless conduct, which led to her indictment for this crime.[135] As argued in the American Civil Liberties Union's ("ACLU") amicus brief, when laws can be considered "ambiguous," defendants should be given "the benefit of the ambiguity."[136] The ACLU significantly notes that prosecutors are trying to force Carter's involuntary manslaughter charge to fit into a centuries-old common law doctrine that might not exactly fit anymore.[137] Technology has significantly advanced over the past half-century, since some of the cited involuntary manslaughter cases cited have been decided, that could not have been foreseen by neither prosecutors, nor judges, nor legislators.[138]

---

[131] *See id.* at 910 (providing common law definition for wanton or reckless conduct); *see also* Commonwealth v. Pierce, 138 Mass. 165, 175-76 (1884) (discussing what is considered "reckless" with regard to the nature of one's actions).

[132] *See* Friedman, *supra* note 63, at 55 (explaining the struggle courts have applying new technologies to the law).

[133] *See* Kolender v. Lawson, 461 U.S. 352, 357-58 (1983) (noting how the void for vagueness doctrine requires the "legislature establish minimal guidelines to govern law enforcement.").

[134] *See* Sweeney, *supra* note 50, at 954 (examining that prosecutors have a "variety of options" regarding charges related to encouraging suicide).

[135] *See* The Standard-Times, *supra* note 7 (providing a timeline of the procedural history of Carter's case).

[136] *See* Brief for American Civil Liberties Union, *supra* note 104, at 10 (purporting that ambiguity is a well-established doctrine within criminal law).

[137] *See* Brief for American Civil Liberties Union, *supra* note 104, at 11-12 (arguing that prosecutors had too much discretion in charging Carter for involuntary manslaughter). "These principles should apply as strongly, if not more so, when, in the absence of a clear statute, the state attempts to shoehorn a prosecution into the common law." *Id.*

[138] *See* Friedman, *supra* note 63, at 35 (reinforcing the importance of anticipating how technology will interact with the law in the future).

2. To Address the Key Issue: Cyberbullying

As previously mentioned, Massachusetts is one of the states that still has absolutely no legislation regarding cyberbullying.[139] It is possible this issue could have fallen into a prosecution for cyberbullying if there was a statute on the books.[140] Take, for example, a situation where there is a cyberbullying statute on the books, Roy is still alive, and Carter has been put on notice of the criminality of cyberbullying through her school or other means.[141] If Roy commits suicide and Carter is charged under a cyberbullying criminal statute, there would be less room to Due Process and void for vagueness issues: the statute would be clear as to where her conduct turned from speech into criminal conduct and the *mens rea* required for a conviction.[142] If there would be a First Amendment issue, the statute itself could be challenged using an appropriate First Amendment analysis.[143] A cyberbullying statute itself could circumvent the issues of where Carter's speech was protected, and where it was not.[144] Carter and Roy's relationship was mostly digital, which is common in today's world.[145] Adolescents spend hours a day in front of screens seeking

---

[139] *See* Segal, *supra* note 100 (Arguing against Carter's conviction because "'[t]here is no law in Massachusetts making it a crime to encourage someone, or even to persuade someone, to commit suicide.'"); Sweeney, *supra* note 50, at 962 (opining that a Massachusetts state statute "prohibiting aiding or assisting a suicide attempt" would have provided the Commonwealth with an alternative legal theory to prosecute Carter other than involuntary manslaughter).

[140] *See* Grant, *supra* note 51, at 185 (providing an example of a law passed after serious cyberbullying issues).

[141] *See Trial Court Convicts Defendant*, *supra* note 96, at 921 (discussing Judge Moniz's verdict and his approach to applying the common law precedent of wanton or reckless conduct). *But see* Commonwealth v. Carter, 52 N.E.3d 1054, 1059 n.8 (Mass. 2016) (*Carter I*) (noting the text message Carter sent to her friend that could indicate she was aware her conduct was criminal).

[142] *See Mens Rea*, *supra* note 25 (explaining the importance of a *mens rea* in criminal statutes); *see also* Kolender v. Lawson, 461 U.S. 352, 357-58 (1983) (discussing that due process requires citizens to be on notice of what conduct is prohibited).

[143] *See* Reed v. Town of Gilbert, 576 U.S. __,135 S. Ct. 2218, 2227 (2015) (expanding upon strict scrutiny test).

[144] *See* State v. Bishop, 787 S.E.2d 814, 818 (2016) (providing a First Amendment analysis to a cyberbullying statute); *see also* Commonwealth v. Carter, 115 N.E.3d 559, 572 (Mass. 2019) (*Carter II*) (discussing that, even if Carter's speech was protected, a prohibition on her speech would survive a strict scrutiny analysis).

[145] *See All I Had to Say Was I Love You*, *supra* note 5 (noting that Carter and Roy had only met in person briefly a few times).

approval from those they interact with mainly, or only, through digital means.[146] The legislature would be remiss to fail to address this social issue that could only grow larger if ignored.[147]

Legislation for cyberbullying should never have to get to a point where a young life is gone, or where one was in jeopardy.[148] Avoiding suicide should not be retroactive.[149] The unfortunate reality after *Carter I* and *Carter II* is that Roy is gone.[150] Many lives have been ruined and parties involved, and uninvolved, are looking for someone to take responsibility.[151] SJC, Supreme Court holdings, and legislation will not alleviate any harm done, but the way to prevent future harm is through specific legislation targeting cyberbullying in Massachusetts.[152] Focusing on suicide caused by cyberbullying is not enough.[153] Legislation should focus on how to avoid any bullying or cyberbullying situation from getting to a point where a child, adolescent, or an adult feels so hopeless.[154]

In crafting cyberbullying statutes, Massachusetts legislators

---

[146] *See All I Had to Say Was I Love You*, *supra* note 5 (discussing the extent of Carter and Roy's relationship); *Jones*, *supra* note 3 (describing a study which shows that adolescents spend a portion of their days in front of a screen).

[147] *See* Sweeney, *supra* note 50, at 976 (noting that increased media attention increases the scrutiny of existing laws regarding speech encouraging suicide).

[148] *See* Turbert, *supra* note 57, at 654-55 (explaining how damaging cyberbullying can be to a person's self-worth).

[149] *See* LaPalme, *supra* note 65, at 1465-66 (proposing an expansion of the Model Penal Code to criminalize Carter's conduct). LaPalme proposed that the causation element "should be deemed met when an actor deliberately encourages the suicide of someone that he or she knows battles with severe mental health issues, especially those who have previously attempted suicide." *Id*.

[150] *See All I Had to Say Was I Love You*, *supra* note 5 (discussing the multitude of disturbing text messages between Carter and Roy leading up to his death).

[151] *See* Bever & Phillips, *supra* note 2 (discussing Roy's relationship with his father); *see also Closing Arguments*, *supra* note 79 (mentioning the prosecutor's closing argument, in which she argued that Carter caused the death of an 18-year-old boy).

[152] *See* Sweeney, *supra* note 50, at 968 (discussing the specific need for statutes in Massachusetts).

[153] *But see* LaPalme, *supra* note 65, at 1465 (proposing the "predictability of the result" and overbearing the will as possible standards for suicide-related charges).

[154] *See* State v. Hall, 887 N.W.2d 847, 853 (Minn. Ct. App. 2016) (articulating an example where the legislature set the bar for stalking too high which allowed situations to grow out of control); *see also* Grant, *supra* note 51, at 171-172 (examining bullying as an "age-old societal problem" that still continues in schools today).

should look to statutes enacted by other states as examples.[155] For example, a Vermont statute defines "bullying" as "any overt act or combination of acts, including an act conducted by electronic means"…."that: is repeated over time; is intended to ridicule, humiliate, or intimidate the student."[156] This language could prove beneficial to borrow from Vermont, as it somewhat mirrors the SJC's characterization of Carter's acts that suggested "a systematic campaign of coercion."[157] Although Carter and Roy were not students at the same school, and these bullying issues did not arise from a school setting, definitions such as this could help legislators craft laws that will encompass relationships such as the peculiar one between Carter and Roy.[158] Additionally, it seems that most cyberbullying issues begin on school grounds, so it is important to consider protections for schoolchildren.[159]

[155] *See* REV. CODE WASH. § 28A.300.285 (1) – (2) (2013) (referencing the Washington State Legislative policies for bullying in school which require schools to adopt a bullying policy and define "harassment, intimidation, and bullying"); *see also* People v. Marquan M., 19 N.E.3d 480, 488 (N.Y. 2014) (criticizing an Albany County cyberbullying law that is too vague and therefore has not met its burden of proving that the restrictions on speech contained in its cyberbullying law survive strict scrutiny).

[156] *See* 16 V.S.A. § 11(a)(32)(A) – (C) (2012) (reiterating the definition of bullying as concluded by the Vermont statute to include systematic electronic communications among others).

[157] *Compare with* 16 V.S.A. § 11(a)(32)(A) – (C), *with* Commonwealth v. Carter, 115 N.E.3d 559, 572 (Mass. 2019) (*Carter II*) (commentating on the similarities between the Vermont statutory definition of "bullying" and how Carter's behavior in the case was described by the SJC).

[158] *See* ROSS, *supra* note 60, at 211 (reiterating the change in bullying that has occurred over the years from occurring in the school yards to children being bullied in their own homes online). Legislators have the difficult task of trying to enact laws that protect children from cyberbullying. *Id.* at 658. "Due to the widespread nature of this elusive new form of bullying, several state legislatures have scrambled to recognize cyberbullying as a punishable act under their anti-bullying legislation." *Id.*; Turbert, *supra* note 57, at 652-53.

[159] *See* ROSS, *supra* note 60, at 211 (indicating that cyberbullying is an extension of bullying that occurs on school grounds); Turbert, *supra* note 57, at 664.

3. To Express a State Policy on Assisted Suicide

In both *Carter I* and *Carter II*, the SJC explicitly mentioned that the Court is not taking a stance on assisted suicide.[160] In sidestepping this specific issue, the SJC arguably is deferring to the legislature to pass laws on assisted suicide when necessary.[161] This expression is consistent with the holding in *Glucksberg*.[162] Under the Fourteenth Amendment, every state is entitled to make its own decisions and pass legislation on physician-assisted suicide.[163] There is little case law on physician-assisted suicide in Massachusetts.[164] Therefore, it is important that the legislature propose new laws regarding how to criminalize assisting suicide as well since courts have declined to express a "public policy" about how it would be treated in the criminal justice system.[165] By enacting legislation on both assisted

[160] *See* Commonwealth v. Carter, 52 N.E.3d 1054, 1064 (Mass. 2016) (*Carter I*) (explaining that in this case 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, causal link to his death); *Carter II*, 115 N.E.3d at 572 (affirming the difference between assisted suicides as it may occur with terminally ill patients and doctors versus the case at hand in *Carter*).

[161] *See Carter I*, 52 N.E.2d at 1064; *Carter II*, 115 N.E.3d at 572 (declining to articulate exactly how assisted suicide fits within the involuntary manslaughter statute).

[162] *See* Washington v. Glucksberg, 521 U.S. 702, 735-36 (1997) (holding that individual states have the right to enact legislation on physician-assisted suicide as each sees fit).

[163] *See* U.S. CONST. amend. XIV, § 1 (providing states with wide discretion in enacting legislation, with the only limitations being those stated in this section); *Glucksberg*, 521 U.S. at 735-36 (noting the nation's historical adherence to allowing states to freely enact their own legislation).

[164] *See* Kligler v. Healy, 2017 WL 2803074, *5 (Mass. Sup. 2017) (discussing that the court considered dicta in *Carter* that assisting a terminally-ill person *may* not be considered manslaughter); s*ee also Carter I*, 52 N.E.3d at 1064 (discussing that the court is not making a determination on different circumstances, such as physician-assisted suicide).

> It is important to articulate what this case is not about. It is not about a person seeking to ameliorate the anguish of someone coping with a terminal illness and questioning the value of life. Nor is it about a person offering support, comfort, and even assistance to a mature adult who, confronted with such circumstances, has decided to end his or her life.

Id.

[165] *See Kligler*, 2017 WL 2803074, at *7 (stressing that Massachusetts has not expressed a public policy about physician-assisted suicide yet).

suicide and cyberbullying, Massachusetts law could clearly indicate the blurry line between criminal liability and constitutionally-protected rights that could solve problems similar to Carter's before they arise.[166]

V. Conclusion

Despite the heated emotions and opinions surrounding *Commonwealth v. Carter*, it is important to understand what this case is really about. This case is not about a person's "right to die" or the First Amendment rights of school children. This case is also not about "watching what you say." The real-life implications of *Commonwealth v. Carter* revolve around the ambiguous discretion of prosecutors to charge individuals with crimes, such as in Carter's case, in today's digital world. In a common law state like Massachusetts, precedent from the Appeals Court and SJC is where citizens have to look on how to behave in today's society. It was no surprise that the SJC took Carter's case on Direct Appellate Review to affirm her conviction since the court already articulated what Massachusetts citizens still have a hard time accepting: words can be deadly "conduct" and Carter's conviction is valid under Massachusetts law. The alarming reality is that unless and until the legislature addresses the lack of statutory crimes relating to suicide, especially cyberbullying, this ruling could open floodgates for state prosecutors looking to hold others liable for another person's death. Since Massachusetts is one of the few states that does not have any laws criminalizing the encouragement of suicide in any form, this case should be the wake-up call the legislature needs to pass applicable but fair laws in order to protect the rights of individuals in Massachusetts.

[166] *Compare Glucksberg*, 521 U.S. at 735-36 (allowing states to enact their own legislation on physician-assisted suicide), *with* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 295 (1990) (O'Connor, J., concurring) (arguing that there is no "right to suicide" that can be considered a fundamental right) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).