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“You Just Need to Do It!”: When Texts Encouraging Suicide Do Not Warrant Free Speech Protection

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"YOU JUST NEED TO DO IT!"[1]: WHEN TEXTS ENCOURAGING SUICIDE DO NOT WARRANT FREE SPEECH PROTECTION

Abstract: Is it constitutional to hold an individual criminally liable for another's suicide when words alone drive the conviction? After a Massachusetts court convicted Michelle Carter of involuntary manslaughter following the suicide of her boyfriend Conrad Roy in 2014, the answer seemed to be "yes." Although Carter's conviction—which focused on the content of her text messages—was a first-of-its-kind, that was not the case for long. Just five years later, the Commonwealth of Massachusetts brought similar charges against Inyoung You for causing the suicide of her boyfriend, Alexander Urtula, also via text. Although the facts in the two cases are not identical, they both raise the question of whether the First Amendment to the U.S. Constitution protects this type of speech. The United States is built upon a foundation that safeguards freedom of speech. There are important limits, however, on just how far that protection extends. In 2016, the Massachusetts Supreme Judicial Court in *Commonwealth v. Carter* focused on a First Amendment carveout—speech integral to criminal conduct—when convicting Carter of involuntary manslaughter. But as critics have emphasized, that was arguably a stretch of the exception. This Note argues that, although the reasoning of the Massachusetts Supreme Judicial Court was not terribly convincing, criminalizing speech that encourages another person's suicide can be constitutional. Ultimately, Massachusetts's proposed bill, aptly named Conrad's Law, which criminalizes this type of speech and conduct, could both eliminate future First Amendment questions and protect those struggling with mental illnesses.

INTRODUCTION

On July 12, 2014, Michelle Carter engaged in a text message conversation with her then-boyfriend Conrad Roy, an exchange that resulted in Roy's unfortunate death and Carter's criminal conviction.[2] What began with, "Con-

[1] Exhibit 30 at 175, Commonwealth v. Michelle Carter, No. 15YO0001NE (Mass. Juv. Ct. June 17, 2017), https://htv-prod-media.s3.amazonaws.com/files/carter-exhibit-30-1497356322.pdf [https://perma.cc/U7B2-S46F].

[2] *See id.* at 172–73. Michelle Carter was charged with involuntary manslaughter after encouraging Conrad Roy to commit suicide. *Commonwealth v. Carter* (*Carter I*), 52 N.E.3d 1054, 1056 (Mass. 2016), *aff'd*, 115 N.E.3d 559 (Mass. 2019). When reaching its indictment, the grand jury focused on the texts sent by Carter to Roy "in the minutes, days, weeks, and months" leading up to Roy's suicide. *Id.* at 1057. Carter appealed her conviction, which the Massachusetts Supreme Judicial Court affirmed in 2019. *See* Commonwealth v. Carter (*Carter II*), 115 N.E.3d 559, 562 (Mass. 2019), *cert. denied*, 140 S. Ct. 910 (2020). The judge sentenced her to fifteen months in prison and five years of probation, but she secured release after spending less than a year behind bars for "good behavior." Elisha Fieldstadt, *Michelle Carter, Convicted in Texting Suicide Case, Released from Jail*, NBC NEWS (Jan. 23, 2020),

rad! Hey you there?" quickly turned into Carter's asking Roy, "Why haven't you done it yet tho?" and her telling him, "You're just making it harder on yourself by pushing it off, you just have to do it."[3] As the text transcript shows, Carter actively encouraged Roy to follow through with his suicide plan more than twenty times over the course of approximately fourteen hours.[4] Notably, this specific conversation was just one among many in which Carter encouraged Roy to take his own life.[5]

Nearly five years later, in a strikingly similar situation, Alexander Urtula lost his life and another set of text messages, sent by Inyoung You, is at the center of the case.[6] Text transcripts indicated that You repeatedly told Urtula to "go kill himself" and "go die" when she knew he was depressed and suicidal.[7]

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https://www.nbcnews.com/news/us-news/michelle-carter-convicted-texting-suicide-case-released-jail-n1120411 [https://perma.cc/E9EZ-ULZN]. For clarification purposes, this Note discusses two *Commonwealth v. Carter* cases that were heard in the Massachusetts Supreme Judicial Court—one in 2016 and in one in 2019, affirming the 2016 decision—but collectively refers to both decisions as *Commonwealth v. Carter*. *See infra* notes 3–226 and accompanying text.

[3] *See* Exhibit 30, *supra* note 1, at 172–73.

[4] *See id.* at 172–75 (providing a transcript of the text messages between Roy and Carter, illustrating the number of texts where Carter encouraged Roy to kill himself). Examples of the suicide-encouraging texts are: "Do it now like early"; "You just need to do it Conrad"; and "The time is right and you're ready, you just need to do it! You can't keep living this way. You just need to do it like you did last time and not think about it and just do it babe. You can't keep doing this everyday." *Id.* at 174, 175.

[5] Paul LeBlanc, *The Text Messages That Led Up to Teen's Suicide*, CNN (June 16, 2017), https://www.cnn.com/2017/06/08/us/text-message-suicide-michelle-carter-conrad-roy/index.html [https://perma.cc/D93K-URY6]. The text messages began with Carter's encouraging Roy to seek medical attention for suicidal thoughts but progressed to her coaxing Roy into following through with his suicide. *See id.* (providing a curated transcript of texts between Carter and Roy from June 19, 2014 to July 12, 2014).

[6] *See* Press Release, Renee Algarin, Deputy Press Sec'y, Suffolk Cnty. Dist. Att'y's Off., Former BC Student Indicted for Boyfriend's Suicide (Oct. 28, 2019), https://www.suffolkdistrictattorney.com/press-releases/items/2019/10/28/former-bc-student-indicted-for-boyfriends-suicide?rq=inyoung%20you [https://perma.cc/VD4E-3NWJ] [hereinafter Press Release, Algarin 1] (detailing the alleged facts supporting a charge of involuntary manslaughter against Inyoung You for sending suicide-encouraging texts to Alexander Urtula). *But see* Emily Sweeney, *Transcript of Text Messages Between Inyoung You and Alexander Urtula*, BOS. GLOBE (Nov. 19, 2019), https://www.bostonglobe.com/metro/2019/11/19/transcript-text-messages-between-inyoung-you-and-alex-urtula/0z9izqMqHR4xX5XGT0rplM/story.html?p1=Article_Inline_Text_Link [https://perma.cc/V6TZ-G9UE] (showing text messages between You and Urtula on the day of his suicide that paint a loving and considerate relationship). On January 14, 2021, the Massachusetts Superior Court denied You's motion to dismiss, allowing the Commonwealth of Massachusetts to move forward with its "manslaughter by commission" theory. Press Release, Renee Algarin, Deputy Press Sec'y, Suffolk Cnty. Dist. Att'y's Off., Court Ruling Allows Inyoung You Prosecution to Proceed (Jan. 15, 2021), https://www.suffolkdistrictattorney.com/press-releases/items/inyoung-you-prosecution-proceed [https://perma.cc/QM2E-DUMS] [hereinafter Press Release, Algarin 2]. Under this theory, the Commonwealth argues that You's words (and texts) could have been the cause of Urtula's suicide. *Id.* The Superior Court, however, did eliminate the Commonwealth's "manslaughter by omission" theory—that You caused Urtula's death by failing to seek help—by granting the corresponding motion to dismiss. *Id.*

[7] Press Release, Algarin 1, *supra* note 6.

You was even present when Urtula jumped to his death from a parking garage.[8] Although *Commonwealth v. Carter* and *Commonwealth v. You* are factually distinct in some ways, a common question that places the two in conversation is whether the speech at issue—text messages encouraging another's suicide—can and should be criminalized without running afoul of the First Amendment to the U.S. Constitution.[9]

The First Amendment guarantees freedom of speech, allowing individuals to speak freely without the fear of government intervention.[10] But this guarantee also has important limits, and not all types of speech receive the same level of protection.[11] The U.S. Supreme Court under Chief Justice John Roberts has taken an extremely speech-protective stance.[12] This approach, however, has not been immune from strong criticism.[13] Specifically, opponents have ques-

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[8] *See id.* (noting that You tracked Urtula's phone in the moments leading up to his suicide).

[9] *See* Erin Tiernan, *Expert: Michelle Carter, Inyoung You Cases 'Weaken' First Amendment*, BOS. HERALD (Oct. 29, 2019), https://www.bostonherald.com/2019/10/28/expert-michelle-carter-inyoung-you-cases-weaken-first-amendment/ [https://web.archive.org/web/20201028180151/https://www.bostonherald.com/2019/10/28/expert-michelle-carter-inyoung-you-cases-weaken-first-amendment/] (providing one expert's view on the First Amendment to the U.S. Constitution's implications of these two cases). The Suffolk County District Attorney acknowledges the similarities in both cases but views the case against You as stronger than the case against Carter because You was physically present when Urtula jumped from a parking garage. *Id.*

[10] U.S. CONST. amend. I ("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.").

[11] *See* Snyder v. Phelps, 562 U.S. 443, 452 (2011) (explaining that speech pertaining to purely private issues does not warrant the same level of protection as speech on public matters, which contributes to important public debates and ideas); *see also* Lauren E. Beausoleil, Note, *Free, Hateful, and Posted: Rethinking First Amendment Protection of Hate Speech in a Social Media World*, 60 B.C. L. REV. 2101, 2112 (2019) (introducing categories of speech that are excluded from free speech protection). These categories include obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. United States v. Stevens, 559 U.S. 460, 468–69 (2010). Part I of this Note discusses these First Amendment limitations in greater detail. *See infra* notes 21–97 and accompanying text.

[12] Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 J.L. & POL'Y 63, 64 (2016) (providing an analysis of recent U.S. Supreme Court decisions implicating the First Amendment). Joel Gora argues that the Roberts Court is the "most speech-protective Court in a generation." *Id.*; *see also Stevens*, 559 U.S. at 468–69, 472 (upholding the unconstitutionality of a statute outlawing depictions of animal cruelty). In 2010, the U.S. Supreme Court in *United States v. Stevens* under Chief Justice Roberts held that animal cruelty depictions did not fit within a category unprotected by the First Amendment; the Court further noted that banning these depictions was consequently presumed to be invalid as a content-based restriction subject to strict scrutiny balancing. 559 U.S. at 468. Under strict scrutiny, the government must prove that a compelling interest exists and that the speech restriction is narrowly tailored to achieve its stated interest. Reed v. Town of Gilbert, 576 U.S. 155, 171 (2015). The Court also refused to declare a new category of unprotected speech and set a high bar for establishing new categories going forward. *See Stevens*, 559 U.S. at 472 (stating that the Court does not have "freewheeling authority to declare new categories of speech outside the scope of the First Amendment").

[13] *See Stevens*, 559 U.S. at 490–91 (Alito, J., dissenting) (criticizing the Court's decision to invalidate the ruling as overly broad). Justice Alito pointed specifically to the "constitutionally permissible

tioned whether such a speech-protective posture actually fulfills the purpose of the First Amendment or wrongly pushes aside other important societal values.[14]

This Note argues that, even against the current Supreme Court's posture, criminalizing speech that encourages another person to commit suicide can be constitutional when limits are set.[15] Part I of this Note provides an analysis of the First Amendment, including exceptions to free speech protection, and discusses how technological changes present challenges to traditional First Amendment doctrine.[16] Part II then introduces the *Carter* and *You* cases.[17] Part II also presents the First Amendment arguments for and against eliminating free speech protection in the context of text messages that encourage another to commit suicide.[18] Finally, Part III analyzes the shortcomings of the Massachusetts Supreme Judicial Court's decision in *Carter*, including its controversial use of First Amendment carveouts and failure to emphasize the purely private nature of Carter's speech.[19] In arguing in favor of Carter's criminal conviction, Part III also illustrates the constitutionality of Massachusetts's proposed law criminalizing suicide-encouraging speech, which would eliminate similar First Amendment questions in the future.[20]

I. THE FIRST AMENDMENT: THEN AND NOW

In the wake of the Michelle Carter and Inyoung You cases, the press and legal scholars once again ignited debates surrounding the First Amendment to the U.S. Constitution and the importance of protected speech.[21] To many, the

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applications" of the statute, and he argued that the Court must not only look in absolute terms. *Id.* at 491.

[14] *See* Gora, *supra* note 12, at 64–65 (noting that decisions from the U.S. Supreme Court regarding free speech protection have been heavily criticized by outsiders to the Court as well as Justices on the bench); *see also, e.g.*, Citizens United v. FEC, 558 U.S. 310, 426–27 (2010) (Stevens, J., concurring in part and dissenting in part) (emphasizing the original drafters' narrower view of protected speech in the context of corporations, and disagreeing with the Court's decision to grant this high level of speech protection to corporations). Three prevailing rationales exist that inform the purpose of the First Amendment: the "marketplace of ideas," "self-governance," and "self-fulfillment/autonomy." *See* GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT 9–14 (5th ed. 2016) (emphasis omitted). Critics have argued that such a speech-protective stance pushes aside other important values, including privacy, equality, and decency. Gora, *supra* note 12, at 64–65.

[15] *See infra* notes 180–226 and accompanying text.

[16] *See infra* notes 21–97 and accompanying text.

[17] *See infra* notes 98–137 and accompanying text.

[18] *See infra* notes 138–179 and accompanying text.

[19] *See infra* notes 180–212 and accompanying text.

[20] *See infra* notes 213–226 and accompanying text.

[21] *See, e.g.*, Tiernan, *supra* note 9 (providing a First Amendment expert's opinion on how these two cases weaken free speech protection). Michelle Carter's legal team also challenged the decision for weakening the First Amendment to the U.S. Constitution, but the Massachusetts Supreme Judicial

notion of criminalizing speech in the form of text messages runs afoul of the very basis of free speech protection.[22] To more fully understand the role of the First Amendment in these two cases—and future cases that may invoke similar issues—Section A of this Part provides an overview of the First Amendment, including its history and doctrinal evolution.[23] Against the historical pro-speech backdrop, Section B discusses key limitations created by the U.S. Supreme Court that cut against absolute speech protection.[24] Finally, Section C focuses on the intersection between technological advancements and the First Amendment, including whether traditional understandings of free speech can, or should, be applied to modern-day questions.[25]

A. The Evolution of the First Amendment

Although Congress passed the First Amendment in 1791, it was not until 1919 that the U.S. Supreme Court began to truly mold the meaning of free speech.[26] At its core, the First Amendment prevents Congress from passing a law abridging an individual's speech and expression.[27] In 1919, in *Schenck v. United States*, however, Justice Oliver Wendell Holmes of the U.S. Supreme Court explicitly placed important limits on this guaranteed right for the first time.[28] *Schenck* involved the distribution of documents intended to undermine

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Court rejected the argument. *See* Commonwealth v. Carter (*Carter II*), 115 N.E.3d 559, 562 (Mass. 2019), *cert. denied*, 140 S. Ct. 910 (2020).

[22] *See* Robby Soave, Opinion, *Michelle Carter Didn't Kill with a Text*, N.Y. TIMES (June 16, 2017), https://www.nytimes.com/2017/06/16/opinion/michelle-carter-didnt-kill-with-a-text.html [https://perma.cc/Z4K3-442E] (arguing that although Carter's conduct was morally wrong, there was nothing illegal about her sending the text messages encouraging Conrad Roy to commit suicide); Tiernan, *supra* note 9 (illustrating the disapproval of Harvey Silverglate, an expert in civil rights and constitutional law, of the outcome in *Commonwealth v. Carter*, commenting that free speech is almost "absolute").

[23] *See infra* notes 26–41 and accompanying text.

[24] *See infra* notes 42–81 and accompanying text.

[25] *See infra* notes 82–97 and accompanying text.

[26] U.S. CONST. amend. I; Olivia B. Waxman, *The Freedom of the Press Is Enshrined in the First Amendment—But What That Means Has Changed*, TIME (May 3, 2019), https://time.com/5580170/first-amendment-press-freedom-history/ [https://perma.cc/5M8Y-5UYF]. The First Amendment applies to the states through the Fourteenth Amendment. Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015); Gitlow v. New York, 268 U.S. 652, 667 (1925). The year 1919 is referred to as the start of "The Free Speech Century," as it was the first year in which the U.S. Supreme Court began to develop and define First Amendment doctrine. Waxman, *supra* (emphasis omitted). The underlying purpose of the First Amendment, as defined by the Court is to allow for the spread of ideas, public debate, and individual self-expression. *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978).

[27] U.S. CONST. amend. I; *see* Schenck v. United States, 249 U.S. 47, 51–52 (1919) (recognizing that the purpose of the First Amendment is to limit governmental constraints on free speech and expression).

[28] *See* 249 U.S. at 52 (holding that speech that is typically constitutionally protected may not receive that same high level of protection if the circumstances do not permit). In 1919, in *Schenck v. United States*, the U.S. Supreme Court illustrated this notion by providing the example of a man in a theatre shouting that there is a fire simply to cause panic. *Id.* The Court explained that protection of free speech would not, even in its strictest form, protect this speech. *Id.*

the draft during World War I.[29] The Supreme Court ruled that the First Amendment did not protect the speech in these documents.[30] In reaching this conclusion, the Court emphasized the importance of context, articulating that the question to be asked in every case is whether the words used in that specific circumstance create a "clear and present danger" that Congress is authorized to prevent.[31] The U.S. Supreme Court confirmed this approach in 1919 in both *Frohwerk v. United States*[32] and *Debs v. United States*.[33]

Between the 1920s and 1960s, the Supreme Court was relatively inconsistent in its treatment of free speech.[34] For example, in 1927, the U.S. Supreme Court in *Whitney v. California* loosened the proximity requirement of a "clear and present danger," cutting against broad protection of speech.[35] Conversely, in 1952, the Court in *Burstyn v. Wilson* decided to broaden free speech protection beyond traditional speech by holding that the First Amendment does in fact capture expression found in motion pictures.[36] After years of turbulent treatment, the tide shifted in 1964 when the U.S. Supreme Court decided *New York Times Co. v. Sullivan* and laid the foundation for a precedent that sustained strong free speech protection.[37] In addition to emphasizing the im-

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[29] *Id.* at 48–49.

[30] *Id.* at 52–53. The *Schenck* Court convicted the defendants under the Espionage Act for distributing documents intended to undermine the draft when the United States was at war with Germany. *Id.* at 48–49, 53. The documents said things such as "a conscript is little better than a convict" and "your right to assert your opposition to the draft." *Id.* at 50–51.

[31] *Id.* at 52. The Supreme Court articulated that it is "a question of proximity and degree." *Id.*

[32] *See* 249 U.S. 204, 206 (1919) (stating that the purpose of the First Amendment was not to protect every single use of language).

[33] *See* 249 U.S. 211, 216–17 (1919) (holding that an anti-war proclamation was not protected speech because its purpose was to disrupt recruitment for the war effort).

[34] *See* Waxman, *supra* note 26 (presenting an overview of the evolution of First Amendment doctrine). The Supreme Court issued many very pro-speech decisions in the 1930s, but governmental attempts to control Communist messaging resulted in a downtick of this trend. *Id.*

[35] *See* 274 U.S. 357, 374–75 (1927) (Brandeis, J., concurring) (articulating that whether there is a "clear and present danger" must be determined based on the time and circumstances), *overruled per curiam by* Brandenburg v. Ohio, 395 U.S. 344 (1969). In 1927, in *Whitney v. California*, the U.S. Supreme Court convicted the defendant, Charlotte Anita Whitney, under the California Criminal Syndicalism Act for her ties to the Communist party after the Court determined that the Act was not an unreasonable or arbitrary exercise of the state's police power. *Id.* at 359, 369, 371 (majority opinion). Consequently, there was no free speech violation either. *Id.* at 371. The Supreme Court eventually overturned *Whitney*. *Brandenburg*, 395 U.S. at 449.

[36] 343 U.S. 495, 501–02 (1952) (reasoning that because motion pictures communicate ideas, they are within the scope of the First Amendment). A motion picture distributor challenged a New York state statute allowing for sacrilegious films to be banned. *Id.* at 497. In 1952, in *Burstyn v. Wilson*, the U.S. Supreme Court also noted that even though motion pictures can introduce more evil to society than traditional communications, that fact alone does not exclude motion pictures from First Amendment protection. *Id.* at 502.

[37] 376 U.S. 254, 285–86 (1964); *see, e.g.*, United States v. Stevens, 559 U.S. 460, 468–69 (2010) (upholding the unconstitutionality of a statute outlawing depictions of animal cruelty); *see also* Waxman, *supra* note 26 (arguing that *New York Times Co. v. Sullivan* stood for an extremely speech-protective stance).

portance of public debate in American society by ruling that a public official cannot bring a libel action without showing actual malice, the majority also underscored the Court's dedication to protecting against "forbidden intrusion[s] on the field of free expression."[38]

This speech-protective stance continued over the decades and carried through to the present-day Roberts Court.[39] To some, today's Supreme Court is among the most free-speech protective Courts in U.S. history.[40] Not only has the Supreme Court issued decisions that value free speech over other societal interests, the Court has, up to this point, also refused to create new categories of speech excluded from First Amendment protection.[41]

B. Constraints on First Amendment Protection: Exclusions, Strict Scrutiny, and Purely Private Speech

Although the Supreme Court's modern-day approach is highly speech protective, the Court still follows the important and firmly rooted limits that have shaped First Amendment doctrine over time.[42] This Section introduces the types of speech that are categorically excluded from free speech protection as well as the strict scrutiny balancing test that applies to other types of content-based restrictions.[43] This Section also explains the varying degrees of protection available to speech of public versus purely private concern.[44]

1. Categorical Exclusions from Free Speech Protection

The basic premise of the First Amendment is that the government does not have the right to interfere with an individual's expression stemming from

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[38] *Sullivan*, 376 U.S. at 285. In *Sullivan*, the plaintiff, an elected commissioner, brought libel claims against the defendant, *The New York Times*, after it published an advertisement that negatively referred to the plaintiff without being completely factually true. *Id.* at 257–58. The U.S. Supreme Court rejected the plaintiff's claim because there was no showing of "actual malice." *Id.* at 281, 284.

[39] Waxman, *supra* note 26.

[40] *See* Gora, *supra* note 12, at 68 (listing notable attempts by the government to regulate speech, including violent video games, animal cruelty, and fabrication of military honors, all of which the Supreme Court rejected).

[41] *See* VICTORIA L. KILLION, CONG. RSCH. SERV., IF11072, THE FIRST AMENDMENT: CATEGORIES OF SPEECH 1–2 (2019), https://fas.org/sgp/crs/misc/IF11072.pdf [https://perma.cc/6NCF-MGSV] (identifying the unprotected speech categories as obscenity, defamation, fraud, incitement, true threats, fighting words, child pornography, and speech integral to criminal conduct); Gora, *supra* note 12, at 65–66 (arguing that values such as privacy, equality, decency, and democracy have been pushed aside to uphold a pro-speech approach); *see also* Snyder v. Phelps, 562 U.S. 443, 458 (2011) (holding that speech cannot be restricted because it is merely upsetting).

[42] *See* Gora, *supra* note 12, at 64 (arguing that the Roberts Court is one of the most pro-speech Courts in history); Beausoleil, *supra* note 11, at 2114 (explaining that different kinds of speech receive disparate treatment and listing the categories of unprotected speech).

[43] *See infra* notes 45–73 and accompanying text.

[44] *See infra* notes 74–81 and accompanying text.

that person's ideas and beliefs, even if the government disagrees or finds the speech distasteful or offensive.[45] But free speech is by no means absolute; over time, the Supreme Court has established well-recognized categories that are excluded from First Amendment protection altogether.[46] These categories include obscenity, defamation, fraudulent speech leading to deception, incitement, fighting words, true threats, speech integral to criminal conduct, and child pornography.[47] Because of the low social value these categories of speech provide, the Court has concluded that they are outside the bounds of the First Amendment's protections.[48]

In the context of speech encouraging another to commit suicide, the most relevant categories of exclusion are fighting words, true threats, and speech integral to criminal conduct.[49]

a. A Closer Look: Fighting Words

The Supreme Court has defined fighting words to mean words that "inflict injury" or cause an "immediate breach of peace."[50] When the Court first construed the term, it implied that fighting words were not within the scope of the First Amendment because they were not considered speech at all.[51] More recently, however, the Court has stepped away from this notion and the doctrine has evolved significantly.[52] The Supreme Court has stressed the requirement that the words be directed to an individual in a face-to-face context.[53] Furthermore, the Court has been increasingly hesitant to turn to the fighting

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[45] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994); *see* Beausoleil, *supra* note 11, at 2113 (stating that the "bedrock" of the First Amendment is that the government cannot restrict speech because it finds the speech offensive).

[46] *See* Gitlow v. New York, 268 U.S. 652, 666–67 (1925) (affirming that free speech protection, although guaranteed by the U.S. Constitution, is not absolute). In 1925, in *Gitlow v. New York*, the U.S. Supreme Court also emphasized the reasonable limits that are needed to ensure that individuals do not abuse the privilege afforded by free speech protection and to preserve the ability of the states and the government to punish when it is abused. *Id.* at 677; *see* Beausoleil, *supra* note 11, at 2113 (reinforcing that free speech is not absolute and has been limited by the Supreme Court over time).

[47] KILLION, *supra* note 41, at 1–2.

[48] R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992) (citing Chaplinsky v. New Hampshire., 315 U.S. 568, 572 (1942)) (holding that the First Amendment does not protect speech that is of such low societal value because the interest of order in society outweighs any possible benefit).

[49] *See infra* notes 50–66 and accompanying text.

[50] *Chaplinsky*, 315 U.S. at 572.

[51] Michael J. Mannheimer, Note, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527, 1527 (1993); *see Chaplinsky*, 315 U.S. at 571, 573 (articulating that fighting words are not a way to express ideas). In 1942, in *Chaplinsky v. New Hampshire*, the U.S. Supreme Court stated that "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution." *Id.* at 572 (quoting Cantwell v. Connecticut, 310 U.S. 296, 309–10 (1940)).

[52] *See R.A.V.*, 505 U.S. at 383 (articulating that even categorically unprotected speech must be viewed in context when assessing the applicability of First Amendment protection).

[53] Mannheimer, *supra* note 51, at 1551.

words doctrine to restrict speech for its content alone, instead focusing on the context.[54] Although the doctrine has changed since its origination and legal scholars have cast doubt on the true purpose of this exclusion, the Court continues to recognize fighting words among those categories of speech excluded from First Amendment protection.[55]

b. A Closer Look: True Threats

Similar to the fighting words exclusion, the Supreme Court has placed significant limitations on what is considered a true threat, and thus outside the bounds of First Amendment protection.[56] The Court defines true threats as statements indicating that the speaker intends to commit an act of violence against a person or group.[57] This restriction does not simply protect individuals from violent acts, but it also protects them from fear of violence and the ensuing disruption this fear is likely to cause.[58] Similar to fighting words, there has been debate about what true threats actually encompass and how to determine when speech fits into this category.[59] Most courts apply an objective standard when they look at the context and content of the speech to determine if a reasonable person would perceive the speech as a true threat.[60]

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[54] *Id.* at 1546–48.

[55] *See* STONE ET AL., *supra* note 14, at 84 (recognizing that various decisions cite the fighting words exclusion, including in recent years); Mannheimer, *supra* note 51, at 1548 (reiterating that fighting words is a well-established category of unprotected speech, even amidst changes to the doctrine).

[56] *See* Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 295–96 (2001) (analyzing the factors the Supreme Court suggested when determining whether speech rises to the level of a true threat). Because the Court views First Amendment exclusions narrowly, the context, the audience reaction, the dependency of the statement, and the setting in which the words were spoken are all relevant factors in the Court's inquiry. *Id.* at 295, 298.

[57] Virginia v. Black, 538 U.S. 343, 359 (2003). In 2003, the U.S. Supreme Court in *Virginia v. Black* held that the Commonwealth of Virginia was legally authorized to prohibit individuals from burning crosses as a form of intimidation under the true threats exclusion. *Id.* at 357, 363.

[58] *Id.* at 360.

[59] Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam) (emphasizing that words arguably categorized as true threats must be considered in context to determine if the speech rises to this level of threatening). In 1969, the U.S. Supreme Court in *Watts v. United States* ultimately determined that defendant Robert Watts's statement to kill the President if forced to take part in the war effort was not a true threat because it was conditional and in the context of a larger political debate. *Id.* at 707; *see* Jennifer Elrod, *Expressive Activity, True Threats, and the First Amendment*, 36 CONN. L. REV. 541, 543 (2004) (examining the gray area that exists when threats are made outside of a neutral setting, such as in the context of political debate).

[60] Elrod, *supra* note 59, at 577–78; *see also* Beausoleil, *supra* note 11, at 2121 (illustrating what courts consider when examining threats, which includes context, "reactions of listeners, the nature of the threat, . . . any prior incidents where the speaker had threatened the victim, and any potential reasons for the recipient of the threat to believe that the speaker had violent propensities").

c. A Closer Look: Speech Integral to Criminal Conduct[61]

In its simplest terms, speech integral to criminal conduct refers to speech that is central to violating a criminal statute.[62] Speech alone, however, is not sufficient to constitute this type of expression; rather, the speech has to cause or threaten to cause illegal activity.[63] Obvious examples include aiding and abetting speech leading to murder or sexual abuse.[64] Again, there are a number of boundaries that the Supreme Court has placed on this exception.[65] For instance, telling another person to kill in the abstract (as opposed to killing a particular victim in a particular way) is protected speech, as is speech lacking special knowledge or expertise regarding the commission of a crime.[66]

Because these categories of speech—fighting words, true threats, and speech integral to criminal conduct—are of such minimal social value, the Court

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[61] Because laws regarding assisted suicide vary among the states, whether a state has a law in effect criminalizing this conduct is a relevant part of the discussion. For an overview of state laws that prohibit assisted suicide, see ROBERT RIVAS, FINAL EXIT NETWORK, SURVEY OF STATE LAWS AGAINST ASSISTING IN A SUICIDE (2019), http://hstrial-004jedic.homestead.com/Survey_of_State_Laws_Against_Assisting_in_a_Suicide_2019_update.pdf [https://web.archive.org/web/20200215082151/http://www.finalexitnetwork.org/Survey_of_State_Laws_Against_Assisting_in_a_Suicide_2019_update.pdf]. Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, and Wisconsin all have statutes that criminalize aiding another person's suicide. *Id.* Notably, Massachusetts does not. *See id.* For the states that do criminalize aiding or assisting with another's suicide, those statutes have passed constitutional muster. *Id.* For example, in 2016, in *State v. Final Exit Network, Inc.*, the Court of Appeals of Minnesota upheld a criminal conviction against the defendant, Final Exit Network, for violating the state's assisted suicide law. 889 N.W.2d 296, 299 (Minn. Ct. App. 2016). The court rejected the defendant's argument that the statute was unconstitutional on its face and as applied because the statute only assigned criminal liability when another person provides an individual with the tools necessary to commit suicide—whether through verbal instruction or conduct. *Id.* at 301. In this case, the defendant assisted through verbal instructions by providing information on what supplies to buy and how to carry out the suicide. *Id.* at 300. The Minnesota court's decision reiterated that narrowly tailored statutes criminalizing assisting in another person's suicide—even through verbal means—can withstand a strict scrutiny inquiry. *See id.* at 303.

[62] Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

[63] *See* Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981, 1051 (2016) (providing a high-level overview of the Supreme Court's understanding of speech integral to criminal conduct).

[64] *Id.* at 986. These are clear examples of speech integral to criminal conduct because the conduct itself is illegal. *Id.* at 986, 993.

[65] *Id.* at 986, 993. An example of a limitation of the exception is that this category does not apply when the speech itself is a violation of the law. *Id.* at 986–87.

[66] *See* Rice v. Paladin Enters., Inc., 128 F.3d 233, 249 (4th Cir. 1997) (drawing a distinction between speech that provides a play-by-play of how to commit a crime—in this context murder by a hitman—with speech that abstractly encourages criminal activity); Volokh, *supra* note 63, at 993–94 (emphasizing the difference between speech that targets a specific victim and speech that alludes to more abstract killing).

has historically excluded them from First Amendment protection.[67] Therefore, when speech or expression falls within one of these categories, it is unnecessary to weigh competing interests, unlike other content-based restrictions.[68]

2. Applicable Balancing Test Applied to Other Content-Based Restrictions

Although courts typically presume that content-based restrictions outside of the established categorical exclusions are invalid under the First Amendment, the strict scrutiny balancing test provides a mechanism for restricting speech on an ad hoc basis because of the content itself.[69] Under this test, the government bears the burden of showing that the speech restriction at issue is narrowly tailored in a way that promotes a compelling government interest.[70] The Supreme Court has recognized various interests that may rise to this level of compelling, including preventing sex and race discrimination, maintaining a stable political system, and ensuring that criminals do not profit from their crimes.[71]

If the government prevails under a strict scrutiny inquiry, then the government may place restrictions on the time, place, and manner of the speech.[72] This power of the government further illustrates the non-absolute nature of speech protection while simultaneously emphasizing the high threshold the government must overcome before impeding on an individual's First Amendment rights.[73]

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[67] *See* United States v. Stevens, 559 U.S. 460, 470–71 (2010) (emphasizing the Court's long-recognized practice of excluding certain categories of speech when they have minimal social value).

[68] *See id.* at 470 (articulating the importance of restricting the evil encompassed by categories of unprotected speech, even when there may be competing interests that relate to free expression).

[69] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382, 386 (1992) (explaining that the Supreme Court has upheld content-based restrictions that limit the time, place, or manner of speech).

[70] Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015). When a court applies the strict scrutiny test to a content-based restriction, the government's motive is irrelevant to the inquiry. *Id.* at 164–65. The government needs to identify a compelling state interest and prove that the regulation is narrowly tailored to achieve that interest. *Id.* at 163. A regulation is narrowly tailored when it is neither underinclusive nor overinclusive, meaning that the regulation neither encompasses too much nor too little. Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 232 (1987). In 2015, in *Reed v. Town of Gilbert*, the government did not satisfy the strict scrutiny test because the regulation was underinclusive. 576 U.S. at 172. Instead of banning all outdoor signs for aesthetic and safety concerns, the regulation only banned certain signs (ideological and political signs) but not others (temporary directional signs). *Id.* at 159.

[71] Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2420–21 (1996).

[72] Beausoleil, *supra* note 11, at 2113.

[73] *See* Volokh, *supra* note 71, at 2421–23 (noting that the "narrowly tailored" prong of the strict scrutiny test sets an extremely high bar). To satisfy this prong, a court must find that the measure actually advances the government's interest, that the measure is not overinclusive or underinclusive, and that there is no less restrictive measure that would satisfy the governmental interest. *Id.*

3. Speech of Public Versus Purely Private Concern

The Supreme Court also has articulated that the level of protection warranted by certain speech can vary depending on whether it is of public or purely private concern.[74] According to the Court, speech concerning public matters warrants the highest level of protection, whereas speech of private concern does not automatically receive this presumption.[75] When speech relates to a matter of public concern, the arguably controversial or offensive nature of the speech is irrelevant because this type of speech is "at the heart of the First Amendment."[76]

The difficulty lies in determining when, in fact, speech is of public or private concern.[77] Guidance from the Supreme Court does provide some important boundaries, but the public versus private distinction is often not a clear-cut determination.[78] Generally speaking, if the speech in question relates to a concern of the community—whether it be social, political, or of some other relevance—it constitutes public speech and is worthy of the highest level of protection.[79] This often includes speech of general interest as well.[80] Speech of purely private concern, on the contrary, does not warrant this heightened level

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[74] *See* Snyder v. Phelps, 562 U.S. 443, 451–52 (2011) (stating that speech relating to public matters warrants special protection because it is among the most valued speech protected by the First Amendment).

[75] *Id.* In 2011, the U.S. Supreme Court in *Snyder v. Phelps* broadly defined speech of public concern to mean "'relating to any matter of political, social, or other concern to the community' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'" *Id.* at 453 (citation omitted) (first quoting Connick v. Myers, 461 U.S. 138, 146 (1983); and then quoting City of San Diego v. Roe, 543 U.S. 77, 83–84 (2004) (per curiam)). Speech that is purely private in nature, on the other hand, is "of less First Amendment concern." Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759 (1985).

[76] *Snyder*, 562 U.S. at 451–52 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776 (1978)). The *Snyder* Court explained purely private speech is often afforded "less rigorous" protection. *Id.* at 452.

[77] *See id.* at 453 (stating that a court must independently examine the content, form, and context of the speech when determining whether it is of public or private concern); W. Robert Gray, *Public and Private Speech: Toward a Practice of Pluralistic Convergence in Free-Speech Values*, 1 TEX. WESLEYAN L. REV. 1, 3 (1994) (underscoring the challenge that both lowers courts and the Supreme Court has had in drawing a distinction between private and public speech). Beginning in the 1970s, the Court attempted to bucket speech into two categories: low-value private speech versus high-value public speech. Gray, *supra*, at 3–4.

[78] *See Snyder*, 562 U.S. at 454 (weighing the content, form, and context of the Westboro Baptist Church signs used to picket a military funeral to communicate their beliefs on homosexuality). The Court reasoned that the content (signs that read, "F[*]g Troops") was of public concern but the context (at a funeral) was private. *Id.* Nevertheless, the Court reasoned the speech was of public concern when viewed in totality of the circumstances, and therefore concluded that the highest level of protection under the First Amendment applied to the speech. *Id.* at 458. The fact that it was upsetting was not enough to warrant an intrusion on the picketers' First Amendment rights. *Id.*

[79] *Id.* at 453.

[80] *Id.*

of protection because it does not threaten public debate or important dialogue on public matters.[81]

C. Technology, Its Impact on Communication, and the First Amendment

Undoubtedly, technology has complicated the original interpretations of the First Amendment, including its protections and exceptions.[82] Technological innovation has had a profound impact on the ways in which people communicate.[83] Consequently, modern-day communication presents an opportunity to rethink the existing First Amendment framework shaped by the U.S. Supreme Court and whether and how the historical exclusions apply.[84] As individuals are able to reach more people than ever before with a click of a button by posting a status update on Facebook or sending out a public Tweet, face-to-face interaction has drastically decreased.[85] Furthermore, it is not uncommon for relationships to begin or indefinitely remain online, consequently changing how people build these personal connections, whether they are in romantic or platonic settings.[86]

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[81] *Id.* at 452. The *Snyder* Court reasoned that because restricting private speech does not raise the "same constitutional concerns," including interfering with public debate and the spread of ideas, it does not need to be as heavily protected. *Id.*

[82] *See* Ashutosh Bhagwat, *Candides and Cassandras: Technology and Free Speech on the Roberts Court*, 95 WASH. U. L. REV. 1327, 1345–46 (2018) (illustrating the Supreme Court's hesitation in addressing First Amendment questions relating to technology, but noting the impact of technology on speech). As of 2018, the Roberts Court only squarely addressed free speech and the internet in one decision—*Packingham v. North Carolina*. *Id.* at 1328–29. In 2017, in *Packingham*, the U.S. Supreme Court invalidated a North Carolina statute that made it illegal for registered sex offenders to access certain websites, including social media sites, used by minors. 137 S. Ct. 1730, 1733, 1738 (2017). The Court noted that even though parks and streets are still essential forums for people to voice their opinions and listen to others, the internet must also be added to this list. *Id.* at 1735. Furthermore, the Court emphasized the importance of social media in allowing people to "engage in a wide array of protected First Amendment activity." *Id.* at 1735–36.

[83] Pimenov Maxim, *How Internet Changed the Way We Communicate*, ENGADGET (Nov. 29, 2016), https://www.engadget.com/2016/11/29/how-internet-changed-the-way-we-communicate/ [https://perma.cc/8DC6-F9QT]. As of October 2020, nearly 59% of the world's population uses the internet. Joseph Johnson, *Global Digital Population as of October 2020*, STATISTA (Jan. 27, 2021), https://www.statista.com/statistics/617136/digital-population-worldwide/ [https://perma.cc/SCV4-J79X].

[84] *See* Bhagwat, *supra* note 82 at 1349 (implying the tension the Court will likely face when trying to uphold traditional First Amendment doctrine, but grappling with the reality that new technologies bring); Maxim, *supra* note 83 (articulating the ways in which the internet, in particular, has changed means of communication).

[85] *See* Maxim, *supra* note 83 (arguing that the rise of the internet and social media impacts people's relationships and how they communicate with others by using technology). For instance, it is now possible to create and maintain relationships without ever meeting in-person. *Id.*

[86] *See This Is How Technology Is Affecting Your Relationship,* HUFFPOST (Oct. 19, 2014), https://www.huffpost.com/entry/technology-changing-relationships_n_5884042 [https://perma.cc/QP2K-GVLR] (providing ways in which technology is changing personal relationships, including existing relationships and new relationships formed over the internet). Today, relationships either formed or maintained online appear to move along quicker and in-person meetings are delayed. *Id.*

Today, people can learn about one another through texting, video-chatting, and social media, for example, all without ever meeting in person.[87]

Although the ability to communicate with others through technological means does provide important benefits, there are also major concerns that accompany technology.[88] For instance, with the growth of the internet, including social media, cyberbullying continues to be commonplace.[89] The effects of cyberbullying can often be devastating, especially on teens.[90] Additionally, in relationships, technology provides people with tools to harass, scare, and intimidate their friends or partners.[91] Not only can abusers use technology to control victims through constant oversight and a "virtual presence," they can also use technology to isolate victims and punish or humiliate them.[92]

Technology is here to stay and these concerns cannot be completely eliminated.[93] But what role can, and should, the government play in addressing these problems?[94] Especially regarding communication in the modern era, the First Amendment provides an important shield for speech expressed over cyberspace.[95] *Commonwealth v. Carter* and *Commonwealth v. You*, however,

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[87] *Id.*; *see* Maxim, *supra* note 83.

[88] *See* Romeo Vitelli, *Does Technology Make Bullying Easier?*, PSYCH. TODAY (Apr. 6, 2016), https://www.psychologytoday.com/us/blog/media-spotlight/201604/does-technology-make-bullying-easier [https://perma.cc/FWV3-XEL8] (examining how technology has contributed to the growing instances of cyberbullying and anonymous harassment campaigns).

[89] *Id.* Studies show that between 10% and 35% of young people experience cyberbullying. *Id.*

[90] *See id.* (indicating that cyberbullying victims have, on many occasions, committed suicide because of the abuse they experienced online).

[91] Wendy L. Patrick, *Remote Controlled: Domestic Abuse Through Technology*, PSYCH. TODAY (July 22, 2018), https://www.psychologytoday.com/us/blog/why-bad-looks-good/201807/remote-controlled-domestic-abuse-through-technology [https://perma.cc/F5BK-5874].

[92] *See id.* (providing specific examples of the ways abusers can use technology to harm their victims). Examples of abuse include threatening to expose intimate photos, tracking the victims' locations for stalking purposes, and constantly calling and texting people against their will. *Id.* In 2016, in *Commonwealth v. Carter*, the Massachusetts Supreme Judicial Court emphasized Carter's "virtual presence," which was made possible through texting. *Commonwealth v. Carter* (*Carter I*), 52 N.E.3d 1054, 1063 (Mass. 2016), *aff'd*, 115 N.E.3d 559 (Mass. 2019). Although Carter was not physically present at the time of Roy's suicide, she was virtually present and able to coerce Roy through her use of technology. *Id.*

[93] *See* Bhagwat, *supra* note 82 at 1349–50 (articulating challenges faced by the Supreme Court in the wake of technological developments as it concerns the First Amendment, including social media and minors, privacy on the internet, and "fake news").

[94] Staci Garber, *Freedom of Speech? A Lesson on Understanding the Protections and Limits of the First Amendment*, N.Y. TIMES (Sept. 12, 2018), https://www.nytimes.com/2018/09/12/learning/lesson-plans/freedom-of-speech-a-lesson-on-understanding-the-protections-and-limits-of-the-first-amendment.html [https://perma.cc/8QHS-B8F2] (encouraging individuals to grapple with the question of when or if the government should regulate speech in various situations).

[95] *See* Barry R. Schaller, *The First Amendment in the Digital Age: Protecting Free Speech (and Other Values)*, 25 SACRED HEART U. REV. 60, 66 (2009) (positing that because the meaning of the First Amendment has changed over time, courts and lawmakers should adapt the doctrine to fit modern-day situations, including concerns surrounding the internet). For example, it is nearly impossible for the fighting words exclusion to apply to cyber communications, as the parties involved may never

have taken the communications in question outside of free speech protection and into the realm of criminal culpability.[96] The question remaining is whether this is the correct, and constitutional, approach.[97]

II. Addressing the Clash: What Is the First Amendment's Place in *Commonwealth v. Carter*?

In 2016, in *Commonwealth v. Carter*, the Massachusetts Supreme Judicial Court convicted Michelle Carter of involuntary manslaughter and sentenced her to fifteen months in prison.[98] The Commonwealth of Massachusetts argued that Carter's wanton or reckless conduct—her text messages and phone calls—caused Conrad Roy's death.[99] Carter's lawyers fought back, arguing that words alone cannot ever rise to this level of wantonness or recklessness.[100] The Supreme Judicial Court acknowledged that this was, in a sense, a case of first impression because the court had never been asked to rule on a manslaughter charge where the conduct at issue was speech alone.[101] The court ultimately sided with the Commonwealth and held that speech can, in fact, overcome a person's will to live without running afoul of the First Amendment to the U.S. Constitution; Carter's text messages and phone calls did just that.[102]

This Part first describes two cases involving suicide-encouraging texts—*Commonwealth v. Carter* and *Commonwealth v. You*—and later discusses the arguments that both support and undermine the Massachusetts Supreme Judicial Court's decision in *Carter* on First Amendment grounds.[103] More specifically, Section A details the key similarities and differences between the two cases, including the important First Amendment implications.[104] Section B then examines the criticism that the *Carter* decision received, both from the defense and outside commentators.[105] Finally, Section C delves into the Su-

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come face-to-face. *See* Chaplinsky v. New Hampshire., 315 U.S. 568, 573 (1942) (illustrating the face-to-face nature of fighting words unprotected by the First Amendment).

[96] *See Carter I*, 52 N.E.3d at 1064–65 (convicting Carter of involuntary manslaughter for causing her boyfriend's suicide by text message); Press Release, Algarin 1, *supra* note 6 (announcing charges brought against Inyoung You for her role in Alexander Urtula's suicide).

[97] *See infra* notes 98–226 and accompanying text.

[98] *Carter I*, 52 N.E.3d at 1064–65.

[99] *Id.* at 1060–61.

[100] *Id.* at 1061.

[101] *Id.* at 1061–62.

[102] Commonwealth v. Carter (*Carter II*), 115 N.E.3d 559, 570 (Mass. 2019), *cert. denied*, 140 S. Ct. 910 (2020); *Carter I*, 52 N.E.3d at 1063.

[103] *See infra* notes 108–179 and accompanying text.

[104] *See infra* notes 108–137 and accompanying text.

[105] *See infra* notes 138–166 and accompanying text.

preme Judicial Court's reasoning that led to Carter's conviction.[106] Notably, the focus of this Part is on *Carter*, as *You* is still pending.[107]

A. Texts Under Fire: Two Tales of Four Teens

The *Carter* and *You* cases both challenge the outer limits of First Amendment protection, especially as it pertains to the age of digital communications.[108] Importantly, however, these cases are unlikely to be the only ones raising similar First Amendment concerns.[109]

Carter and Roy met in 2012 while both teens were on family vacations.[110] Although the teens had met five times face-to-face, most of their romantic relationship developed over text messages and phone calls.[111] After authorities found Roy unresponsive in his parked truck on July 13, 2014, a medical examiner concluded that the cause of death was suicide by carbon monoxide poisoning.[112]

The investigation into Roy's apparent suicide led police to Carter.[113] After looking further into the text messages between Roy and Carter in the weeks leading up to Roy's death, it became clear that Carter was acutely aware of Roy's history of mental illness and prior suicide attempts.[114] Beyond this, the texts also indicated that Carter actually encouraged Roy to commit suicide by talking to him about how to do it, calming his fears about leaving his family

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[106] *See infra* notes 167–179 and accompanying text.

[107] *See infra* notes 108–179 and accompanying text; *see also* Press Release, Algarin 1, *supra* note 6 (illustrating the details currently available to the public). On January 15, 2021, the Suffolk County District Attorney issued a press release stating that the office is preparing for trial. The announcement followed the Massachusetts Superior Court's decision to deny Inyoung You's motion to dismiss on the theory that she may have caused Alexander Urtula's death. *Id.* The court did, however, agree that You did not cause Urtula's death by failing to seek help. *Id.*

[108] *See* Commonwealth v. Carter (*Carter II*), 115 N.E.3d 559, 570–72 (Mass. 2019) (addressing the case's free speech issues), *cert. denied*, 140 S. Ct. 910 (2020); Press Release, Algarin 1, *supra* note 6 (highlighting You's speech that led to Urtula's suicide).

[109] *See* Vitelli, *supra* note 88 (illustrating the increasing instances of online bullying and the rising rates of resulting suicides).

[110] Gabrielle Bruney, *Michelle Carter Was Convicted of Encouraging Her Boyfriend to Kill Himself. Here's What Happened Next.*, ESQUIRE (Oct. 7, 2019), https://www.esquire.com/entertainment/tv/a28339149/where-michelle-carter-is-now-jail-i-love-you-now-die-true-story/ [https://perma.cc/XAW2-NTYU].

[111] *Id.*

[112] Commonwealth v. Carter (*Carter I*), 52 N.E.3d 1054, 1056 (Mass. 2016), *aff'd*, 115 N.E.3d 559 (Mass. 2019).

[113] *Id.* at 1057. After looking into Conrad Roy's text messages, police decided to examine his relationship with Michelle Carter more closely. *Id.*

[114] *Id.* at 1057–58. Both teens had a history of mental health concerns, and they knew of the other's struggles. Bruney, *supra* note 110. Carter had suffered from an eating disorder and Roy made prior suicide attempts. *Id.* The teens talked about their mental illnesses, including depression. *Id.* In addition to the text messages sent by Carter to Roy encouraging him to follow through with his suicide, Carter had urged Roy to go to a mental health hospital for help earlier in their relationship. *Id.* Investigators learned that much of the correspondence between Carter and Roy focused on Roy's suicide. *Carter I*, 52 N.E.3d at 1057.

behind, and scolding him for delaying the process.[115] Records also demonstrated that Carter and Roy had been on the phone minutes prior to Roy's suicide, and that Carter later confessed to a friend that she told Roy to get back into the car when he expressed apprehension.[116]

For Carter's role in Roy's suicide, the Commonwealth of Massachusetts brought involuntary manslaughter charges against her.[117] In response to the charges, her defense lawyers argued that because Carter was not physically present at the time of Roy's suicide and did not provide him with a physical instrument, Carter could not be convicted of involuntary manslaughter.[118] The Massachusetts Supreme Judicial Court disagreed with Carter's defense and held in *Carter* that, as a matter of law, verbal conduct *can* overcome a person's will to live and be the cause of that person's suicide.[119] The Supreme Judicial Court also pointed to the circumstances surrounding Carter's words—prior conversations on the topic of suicide, Carter's virtual presence, and Roy's known mental state—as relevant factors of the inquiry.[120] Ultimately, the court concluded that the coercive nature of Carter's speech and the final direction to "get back in" the car were sufficient to show probable cause.[121]

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[115] *Carter I*, 52 N.E.3d at 1057–59. In 2016, in *Commonwealth v. Carter*, the Massachusetts Supreme Judicial Court was struck by the text that Carter repeated four times to Roy: "You just [have] to do it." *Id*. at 1059 (alteration in original). Other texts indicating Carter's encouragement include "Do it now like early" and "You're ready and prepared. All you have to do is turn the generator on and you bee [sic] free and happy. No more pushing it off, no more waiting." Exhibit 30, *supra* note 1, at 174.

[116] *Carter I*, 52 N.E.3d at 1059. In addition to learning that she had texted a friend confessing her role in Roy's suicide and fearing she would be punished, police also discovered that Carter deleted relevant text messages from her phone. *Id.*

[117] *Id.* at 1056. In the Commonwealth of Massachusetts, there are two theories that can prove involuntary manslaughter—wanton or reckless *conduct* or *failure to act*. *Id.* at 1060. Conduct rises to the level of wantonness or recklessness when it is intentional and a reasonable person would realize the intense likelihood of grave danger. *Id.*

[118] *Id.* at 1061, 1062. Carter's main defense was that verbal conduct never rises to the level of wantonness or recklessness needed to satisfy an involuntary manslaughter charge. *Id.* at 1061.

[119] *Id*. at 1061, 1063. In making this determination, the court pointed to two cases where an individual caused another person's suicide. *Id.* at 1062–63. The first, *Commonwealth v. Atencio* in 1963, involved a "'game' of 'Russian roulette'" where the two surviving players were convicted of involuntary manslaughter. 189 N.E.2d 223, 225–26 (Mass. 1963). The second, *Persampieri v. Commonwealth* in 1961, involved a defendant, a husband, who was charged with involuntary manslaughter after helping his wife load a gun and calling her a "chicken" if she did not pull the trigger after knowing she was suicidal. 175 N.E.2d 387, 389–90 (Mass. 1961). The *Persampieri* court reasoned that because the defendant "showed a reckless disregard of his wife's safety and the possible consequences of his conduct," he could be found guilty of involuntary manslaughter following his wife's suicide. *Id.* at 390.

[120] *Carter I*, 52 N.E.3d at 1063.

[121] *Id.* at 1063, 1059 n.8 (illustrating Michelle Carter's text to Samantha Boardman). Following Roy's death, Carter texted her friend, Samantha:

> [Roy'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 car because it was working and he got scared and I f[**]king told him to get back in . . . because I knew he would do it all over again the

On appeal, Carter's defense raised, and the Massachusetts Supreme Judicial Court addressed, the First Amendment concerns at play.[122] In 2019, in reaffirming the conviction in *Commonwealth v. Carter*, the court first called attention to the true threats and speech integral to criminal conduct categorical exclusions.[123] Next, the court applied the strict scrutiny balancing test, pointing to the Commonwealth's interest in preserving an individual's life.[124] The Supreme Judicial Court reasoned that the speech restriction was narrowly tailored because it only targeted Carter's speech that overpowered Roy's will to live, and therefore caused his suicide.[125] As a result of these findings, the judge found Carter guilty of involuntary manslaughter and sentenced her to fifteen months in jail.[126]

A second case in Massachusetts quickly proved that *Carter* was not a one-time circumstance.[127] Inyoung You and Alexander Urtula dated for eighteen months before Urtula jumped to his death in 2019.[128] An inquiry into cellphone records and text messages showed You's abusive and threatening conduct towards Urtula leading up to his suicide.[129] Even though You was aware of the impact her speech was having on Urtula's mental well-being, according to the

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> next day and I couldn't have him live the way he was living anymore I couldn't do it I wouldn't let him.

Commonwealth v. Carter (*Carter II*), 115 N.E.3d 559, 5765 (Mass. 2019), *cert. denied*, 140 S. Ct. 910 (2020).

[122] *Carter II*, 115 N.E.3d at 570–72.

[123] *Id*. at 571.

[124] *Id.* at 572.

[125] *Id.* In 2019, in *Commonwealth v. Carter*, according to the Massachusetts Supreme Judicial Court, the final phone conversation telling Roy to get back in the truck when he was expressing concerns about going through with his suicide was the deciding factor for Carter's conviction. *Id*. at 567–68.

[126] Kate Taylor, *What We Know About the Michelle Carter Suicide Texting Case*, N.Y. TIMES (July 9, 2019), https://www.nytimes.com/2019/07/09/us/michelle-carter-i-love-you-now-die.html [https://perma.cc/MLV4-UMNX]. On January 13, 2020, the U.S. Supreme Court announced it would not hear Carter's appeal, thus upholding her conviction. Pete Williams, *Supreme Court Won't Hear Appeal of Michelle Carter, Convicted of Encouraging Boyfriend's Death by Suicide with Text Messages*, NBC NEWS (Jan. 13, 2020), https://www.nbcnews.com/politics/supreme-court/supreme-court-will-not-consider-michelle-carter-appeal-urging-boyfriend-n1114381 [https://perma.cc/T6UU-SVNW]. The Bristol County Dartmouth Women's Correctional Facility released Carter after she served less than twelve months of her fifteen-month sentence on January 23, 2020, in accordance with state law. Gal Tziperman Lotan & Emily Sweeney, *Michelle Carter Released from Jail*, BOS. GLOBE (Jan. 23, 2020), https://www.bostonglobe.com/2020/01/23/metro/michelle-carter-released-jail/ [https://perma.cc/8XRC-3K9K].

[127] Julia Jones, *Girlfriend Charged in Boston College Student's Death After Telling Him 'Hundreds of Times' to Kill Himself, Prosecutors Say*, CNN (Oct. 29, 2019), https://www.cnn.com/2019/10/28/us/boston-college-student-suicide-charges/index.html [https://perma.cc/7C86-DDV5] (highlighting the comparison that has been drawn between *Commonwealth v. Carter* and *Commonwealth v. You* for their similar fact patterns).

[128] *Id.*

[129] Press Release, Algarin 1, *supra* note 6.

Suffolk County District Attorney's press release, You continued to abuse Urtula and even encouraged him to take his own life.[130]

Unlike Carter, You was physically present when Urtula jumped from a parking garage.[131] But there are strong similarities that exist between the *Carter* and *You* cases that the Suffolk County District Attorney highlighted when bringing forth the involuntary manslaughter charges against You.[132] First, the Commonwealth accused each defendant of overpowering her significant other's will to live.[133] Second, both Carter and You, respectively, knew of Roy's and Urtula's troubled mental states, yet they continued with the abuse.[134] Finally, a large portion of the communication was made over text message, not face-to-face, thus even further complicating the free speech question.[135] Although these factual distinctions exist, these cases, when read together, underscore the need to address the First Amendment's role in relation to suicide-encouraging speech.[136] *Carter* was the first case of its kind, but *You* proved that it definitely will not be the last.[137]

B. A Word from the Critics: Was Michelle Carter's Speech Protected?

Although many view the actions of both defendants as morally wrong, when Carter's conviction hit the media, it outraged staunch defenders of the First Amendment.[138] *The New York Times* published an opinion piece titled

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[130] *Id.* The speech emphasized by the District Attorney included You's telling Urtula to "'go kill himself' to 'go die' and that she, his family, and the world would be better off without him." *Id.*

[131] *Compare id.* (stating that You was present when Urtula jumped from the Renaissance Parking Garage in Roxbury, Massachusetts), *with* Commonwealth v. Carter (*Carter I*), 52 N.E.3d 1054, 1063 (Mass. 2016) (noting Carter, on the other hand, was only virtually present, by communicating with Roy up until his death), *aff'd*, 115 N.E.3d 559 (Mass. 2019).

[132] *Carter I*, 52 N.E.3d at 1057–58 (indicating the large volume of abusive texts between the defendant and the deceased); Press Release, Algarin 1, *supra* note 6 (emphasizing a similarly large number of abusive texts).

[133] *See* Commonwealth v. Carter (*Carter II*), 115 N.E.3d 559, 572 (Mass. 2019) (holding that Carter's pressuring was wanton and reckless because it overpowered Roy's will to live), *cert. denied*, 140 S. Ct. 910 (2020); Press Release, Algarin 1, *supra* note 6 (emphasizing You's wanton and reckless behavior that created a life-threatening situation and overpowered Urtula's will to live).

[134] *See Carter II*, 115 N.E.3d at 562 (stating that a large part of Carter's conversations with Roy were about his mental health problems); Press Release, Algarin 1, *supra* note 6 (claiming that You encouraged Urtula's suicide and continued to abuse him even though she knew of his fragile mental state).

[135] *See Carter II*, 115 N.E.3d at 562 (noting the "numerous text messages" exchanged between Carter and Roy in the days leading up to his suicide); Press Release, Algarin 1, *supra* note 6 (revealing that You and Urtula exchanged over 75,000 texts).

[136] *See Carter II*, 115 N.E.3d at 562; Press Release, Algarin 1, *supra* note 6.

[137] *See Carter II*, 115 N.E.3d at 569–70 (depicting cases on which the court relied that had factual differences from the *Carter* case, including the physical presence of the defendant and the act of providing a weapon); Press Release, Algarin 1, *supra* note 6.

[138] *See, e.g.*, Veronika Bondarenko, *20-Year-Old Who Repeatedly Urged Friend to Commit Suicide Found Guilty of Involuntary Manslaughter*, BUS. INSIDER (June 16, 2017), https://www.business

"Michelle Carter Didn't Kill with a Text" and the American Civil Liberties Union of Massachusetts released a statement indicating that the decision was an abandonment of "the protections of our constitution."[139] This Section provides an examination of the various arguments put forth by those who criticized the Massachusetts Supreme Judicial Court's decision in *Carter* on First Amendment grounds.[140]

First and foremost, critics have emphasized the government's inability to restrict speech it deems morally reprehensible.[141] The most basic understanding of the First Amendment is that the government is unable to restrict speech "because of its message, its ideas, its subject matter, or its content."[142] The U.S. Supreme Court has underscored its commitment to protecting speech, especially when society finds the speech to be "offensive or disagreeable."[143]

It would be difficult to argue that Carter's texts were not offensive or morally wrong because of her blatant encouragement of Roy's suicide.[144] As critics have noted, however, the law does not punish morally reprehensible conduct on those grounds alone, and the First Amendment has historically provided substantial protection for disagreeable speech.[145] Therefore, by punishing speech as the Massachusetts Supreme Judicial Court did, some argue that it undermined the important historic protections of the First Amendment.[146]

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insider.com/michelle-carter-texting-suicide-guilty-conrad-roy-2017-6 [https://perma.cc/SQ7K-QY6D] (stating that the outcome of the case has left legal scholars divided on whether Carter's conduct was punishable by law); Soave, *supra* note 22 (describing Carter's conduct as "morally reprehensible," and her criminal conviction as "unjust").

[139] Soave, *supra* note 22 (statement of Matthew Segal, the American Civil Liberties (ACLU) of Massachusetts Director); *see also* Press Release, Matthew Segal, Legal Dir., ACLU of Mass., Statement on Michelle Carter Guilty Verdict (June 16, 2017), https://www.aclum.org/en/press-releases/aclu-massachusetts-statement-michelle-carter-guilty-verdict [https://perma.cc/ST3R-BYUK]. The ACLU also filed a brief in support of Carter's appeal. Dan Glaun, *Michelle Carter Case: ACLU, State Public Defender Agency File Brief in Support of Teenager Accused of Encouraging Boyfriend to Kill Himself*, MASS LIVE (Jan. 7, 2019), https://www.masslive.com/news/2016/04/michelle_carter_case_aclu_stat.html [https://perma.cc/Q7E9-6YTT]. In its brief, the ACLU argued both that minors should not be held to the same standard as adults and that encouraging another person to commit suicide does not violate Massachusetts law. Brief of the Youth Advocacy Division of the Committee for Public Counsel Services and the American Civil Liberties Union of Massachusetts as Amici Curiae in Support of the Appellant at 1, Commonwealth v. Carter (*Carter I*), 52 N.E.3d 1054 (Mass. 2016) (No. SJC-12043), *aff'd*, 115 N.E.3d 559 (Mass. 2019).

[140] *See infra* notes 141–166 and accompanying text. This Section focuses on *Commonwealth v. Carter* because a resolution in *Commonwealth v. You* remains pending as of the publication date of this Note. *See infra* notes 141–179 and accompanying text.

[141] Soave, *supra* note 22.

[142] Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972).

[143] Texas v. Johnson, 491 U.S. 397, 414 (1989).

[144] *See* Soave, *supra* note 22 (stating that Carter's conduct was "morally reprehensible").

[145] *Id.* Robby Soave emphasizes that morally wrong behavior is distinct from criminal behavior; Carter's behavior, Soave argues, was the former. *Id.*

[146] *Id.* In Massachusetts, an individual can be convicted of criminal harassment when that person "willfully and maliciously engages in a knowing pattern of conduct or series of acts over a period of

Second, Massachusetts lacks a statute criminalizing suicide, assisted suicide, or encouraging suicide.[147] Although some critics have admitted that the *Carter* case could have been simple had such a statute existed, that was not the situation in which the Massachusetts Supreme Judicial Court found itself.[148] Stated otherwise, because assisting another's suicide in Massachusetts is not a crime, some contend, Carter's speech could not have been fallen into the carveout of speech integral to criminal conduct on that basis.[149]

Furthermore, some have argued that the Massachusetts Supreme Judicial Court also incorrectly applied this First Amendment carveout because of the criminal charge itself.[150] Critics have noted that the more fitting crime with which to charge Carter would have dealt with harassment or bullying, but not homicide.[151] Therefore, when the Supreme Judicial Court stated that "wanton or reckless pressuring" overpowered Roy's will to live, some have argued that the court misconstrued an already controversial exception to the First Amendment.[152]

Third, the Supreme Judicial Court arguably established a new precedent when it upheld Carter's conviction.[153] In Massachusetts, involuntary manslaughter is defined as the unintentional killing of another caused by wanton or

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time directed at a specific person, which seriously alarms that person and would cause a reasonable person to suffer substantial emotional distress." MASS. GEN. LAWS ANN. ch. 265, § 43A(a) (West 2020). This statute includes electronic communications. *See id.* (listing the use of an electronic communication device as a possible means of conducting criminal acts).

[147] Guyora Binder & Luis Chiesa, *The Puzzle of Inciting Suicide*, 56 AM. CRIM. L. REV. 65, 74 (2019); Press Release, Segal, *supra* note 139.

[148] *See* Shawnee Melnick, *Prosecution for Encouraging Suicide: How the Massachusetts Supreme Court Ignored the First Amendment*, 28 KAN. J.L. & PUB. POL'Y 282, 295, 300–01 (2019) (criticizing the Supreme Judicial Court given that Massachusetts does not have a law regarding suicide or assisted suicide).

[149] *See id.*; *see also* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (establishing that the First Amendment to the U.S. Constitution does not protect speech integral to violating a criminal statute).

[150] Melanie Eversley, *Girlfriend Suicide Texting Case Sets Wrong Precedent, Legal Experts Say*, USA TODAY (Aug. 4, 2017), https://www.usatoday.com/story/news/2017/08/03/michelle-carter-texting-suicide-case-sets-bad-precedent-experts-say/538794001/ [https://perma.cc/5XU5-4WFW].

[151] *See* Sean Sweeney, Note, *Deadly Speech: Encouraging Suicide and Problematic Prosecutions*, 67 CASE W. RSRV. L. REV. 941, 974 (2017) (arguing that Carter's conduct was more aligned with anti-bullying statutes than a homicide charge).

[152] *See* Commonwealth v. Carter (*Carter II*), 115 N.E.3d 559, 572 (Mass. 2019) (holding that Carter's pressuring was wanton and reckless because it overpowered Roy's will to live), *cert. denied*, 140 S. Ct. 910 (2020); Kaitlin M. Phillips, Note, *Sticks and Stones May Break Your Bones, but Words Can Also Kill: Limiting Criminal Liability for Words*, 2019 U. ILL. L. REV. 1741, 1743 (noting the Massachusetts Supreme Judicial Court's controversial use of the involuntary manslaughter statute to uphold Carter's conviction); Sweeney, *supra* note 151, at 954, 957 (underscoring the challenge and uncertainty regarding whether Carter's conduct truly was the proximate cause of Roy's death, as required by an involuntary manslaughter charge).

[153] Melnick, *supra* note 148, at 289.

reckless conduct.[154] Prior to Carter's conviction, there had never been a case in Massachusetts where a court convicted an individual of homicide when the suicidal encouragement was limited to words alone.[155] Furthermore, Carter's "virtual presence" presented another new dimension for the court to consider when examining causation.[156]

In upholding the conviction, and rejecting these challenges, the Massachusetts Supreme Judicial Court relied upon two cases in which the conduct of one person led to another's suicide.[157] As a number of critics argue, *Carter* was distinct from the cases cited as precedent because Carter did not provide the physical weapon used nor was she physically present for the suicide.[158] Thus, critics argue that Carter may have been entitled to First Amendment protection because her only conduct at issue was speech, and criminal law typically only punishes when a physical act is involved.[159]

Finally, as critics have noted, the Supreme Judicial Court convicted Carter based on the content of her messages.[160] Therefore, they have argued that strict scrutiny was the appropriate standard of review, requiring that a restriction of speech be narrowly tailored to serve a compelling state interest.[161] In this case,

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[154] *Model Jury Instructions on Homicide: VII. Involuntary Manslaughter*, MASS.GOV (Apr. 25, 2018), https://www.mass.gov/info-details/model-jury-instructions-on-homicide-vii-involuntary-manslaughter [https://perma.cc/KMX3-W6J4]. Wanton or reckless conduct can be an affirmative act that creates a high likelihood that substantial harm to another will result. *Id.* It can also be failure to act when the defendant has a duty to do so. *Id.* The causation element requires that the defendant's conduct be within the natural chain of events that led to the victim's death, meaning that without the defendant's conduct, the death would not have occurred. *Id.*

[155] Binder & Chiesa, *supra* note 147, at 66. Typically, in the rare instance when a person is charged for another's suicide, a more concrete tie to the killing exists beyond just words. *Id.* The Massachusetts Supreme Judicial Court referenced *Commonwealth v. Atencio* and *Persampieri v. Commonwealth*, where the defendants were charged with involuntary manslaughter following another's suicide, but in both cases, the defendants handed the victim the gun. Commonwealth v. Carter (*Carter I*), 52 N.E.3d 1054, 1062 (Mass. 2016), *aff'd*, 115 N.E.3d 559 (Mass. 2019); Binder & Chiesa, *supra* note 147, at 76.

[156] *Carter I*, 52 N.E.3d at 1063; Binder & Chiesa, *supra* note 147, at 66.

[157] *See Carter II*, 115 N.E.3d at 569, 570–74; *see also Commonwealth v. Atencio*, 189 N.E.2d 223, 224 (Mass. 1963) (holding that the defendants were guilty of involuntary manslaughter for the death of another person with whom they were playing a "'game' of 'Russian roulette'"); *Persampieri v. Commonwealth*, 175 N.E.2d 387, 390 (Mass. 1961) (concluding that the defendant was wanton and reckless when taunting his wife with the idea of killing herself when he knew she was suicidal).

[158] Melnick, *supra* note 148, at 289.

[159] *Id.* For instance, in *Persampieri*, a physical act—the handing of a gun—accompanied the harmful, taunting speech. 175 N.E.2d at 389; Melnick, *supra* note 148, at 289. Carter, on the other hand, never provided Roy with a weapon. *See Carter I*, 52 N.E.3d at 1062–63 (drawing parallels between cases involving a physical act, but still finding that Carter's actions through words supported the involuntary manslaughter charge).

[160] Melnick, *supra* note 148, at 296–97.

[161] *Id.*

the compelling state interest was the preservation of Roy's life, but whether it was the most narrowly tailored regulation has been subject to debate.[162]

Generally speaking, it is rare that a content-based regulation can survive a strict scrutiny inquiry.[163] Although the Massachusetts Supreme Judicial Court noted that the regulation of speech would not hinder end-of-life discussions and other conversations related to suicide, critics have indicated that is a slippery slope to endorse.[164] Furthermore, the defense argued that the government did not satisfy its burden of proof by demonstrating the regulation constituted the least restrictive means of accomplishing its goal of protecting life.[165] The Supreme Judicial Court firmly rejected this argument, stating that the government still prevailed under strict scrutiny, and the U.S. Supreme Court solidified the holding when it denied Carter's appeal in 2020.[166]

C. A Look from the Court: Why a First Amendment Violation Does Not Exist in Carter

When Carter and her lawyers pressed the First Amendment issues presented by her conviction, the Massachusetts Supreme Judicial Court did not shy away from addressing those concerns.[167] In fact, in affirming its initial decision following the grant of an application for direct appellate review, the Massachusetts Supreme Judicial Court specifically addressed the First Amendment assertions raised by the defense.[168]

First, in 2019, the Massachusetts court turned directly to the U.S. Supreme Court's precedential 1949 decision in *Giboney v. Empire Storage & Ice Co.*[169] In *Giboney*, the Court held that the First Amendment does not protect

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[162] *See Carter II*, 115 N.E.3d at 571–72 (emphasizing the state's compelling interest to preserve an individual's life); Melnick, *supra* note 148, at 296 (discussing the Massachusetts Supreme Judicial Court's scrutiny inquiry).

[163] Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 799 (2011).

[164] *See Carter II*, 115 N.E.3d at 572 (acknowledging specifically that physician-assisted suicides and related discussions were outside the scope of the Massachusetts court's decision); Press Release, Segal, *supra* note 139 (stating that the potentially broad reach of the *Carter* decision could enter into other suicide-related discussions, including those between a doctor and adult patient).

[165] *See* United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 813 (2000) (holding that content-based restrictions must be the least restrictive means possible to satisfy strict scrutiny); *Carter II*, 115 N.E.3d at 571.

[166] *See Carter II*, 115 N.E.3d at 572; Travis Andersen et al., *Supreme Court Won't Hear Michelle Carter Case*, BOS. GLOBE (Jan. 13, 2020), https://www.bostonglobe.com/2020/01/13/metro/supreme-court-wont-hear-michelle-carter-case/ [https://perma.cc/T8DZ-LDM4].

[167] *See Carter II*, 115 N.E.3d at 570–72 (dedicating an entire section in the opinion to addressing the First Amendment claims raised by Carter's defense team).

[168] *See id.* at 562.

[169] *Carter II*, 115 N.E.3d at 570–71 (citing MASS. GEN. LAWS ANN. ch. 265, § 13 (West 2019)); *see* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 495, 498 (1949) (holding that states have the power to restrict speech and expression when they cause others to commit crimes). In 1949, in *Giboney v. Empire Storage & Ice Co.*, members of an ice peddler union picketed their place of busi-

speech that is an integral part of conduct that leads to violation of a criminal statute.[170] In *Carter*, the statute in question was involuntary manslaughter.[171] The court reasoned that because the pressuring messages and phone calls overwhelmed Roy's willpower to live, Carter's speech was the coercive conduct that led to his death by suicide.[172] To the Massachusetts Supreme Judicial Court, Carter's conduct fit within a well-established First Amendment carveout.[173]

The court's analysis, however, continued by addressing the strict scrutiny arguments also raised by Carter's defense.[174] Because both Carter and the Commonwealth of Massachusetts acknowledged the compelling state interest of preserving life, the court was only forced to confront the "narrowly tailored" prong of the strict scrutiny test.[175] The court made it clear that it was not targeting all end-of-life conversations.[176] Rather, it saw *Carter* as a very specific situation in which one person pressured another to commit suicide by overpowering that person's will to live.[177] Therefore, the court held that, even in the absence of a First Amendment carveout, the regulation of Carter's speech could survive a strict scrutiny challenge.[178] Consequently, affirming the conviction signified the first time the Massachusetts Supreme Judicial Court has ever found that *words alone* can amount to an involuntary manslaughter conviction.[179]

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ness to force the plaintiff, Empire Storage and Ice Company, to stop selling to non-union members. 336 U.S. at 492. Because Missouri had a statute that prohibited the creation of agreements restricting trade, the defendants' conduct could be restricted without running afoul of the First Amendment, as the U.S. Supreme Court viewed the conduct as leading to a violation of a criminal statute. *Id.* at 492–93, 495, 504.

[170] 336 U.S. at 502.

[171] MASS. GEN. LAWS ANN. ch. 119, § 54 (West 2020) (containing Massachusetts' statute pertaining to youthful offenders who are charged as adults); *id*. ch. 265, § 13 (stating Massachusetts' involuntary manslaughter statute); Commonwealth v. Carter (*Carter I*), 52 N.E.3d 1054, 1056 (Mass. 2016), *aff'd*, 115 N.E.3d 559 (Mass. 2019).

[172] MASS. GEN. LAWS ANN. ch. 265, § 13; *Carter II*, 115 N.E.3d at 570.

[173] *See Carter II*, 115 N.E.3d at 570 (holding that First Amendment concerns are not valid because of the *Giboney* precedent establishing a carveout for speech integral to criminal conduct).

[174] *Id.* at 571–72.

[175] *Id.* at 571.

[176] *Id.* at 572.

[177] *Id.*; *see* Gora, *supra* note 12, at 65 (emphasizing the Supreme Court's willingness to heavily protect speech in many settings, and its general unwillingness to categorize speech as unprotected).

[178] *Carter II*, 115 N.E.3d at 572.

[179] *See id.* at 572, 574 (holding that Carter's wanton and reckless words caused Roy's death by suicide); Phillips, *supra* note 152, at 1768–69 (arguing that Carter's conviction was the "first of its kind" in that the court held that words can be considered an "overt act" in relation to an involuntary manslaughter charge).

III. RIGHT OUTCOME, WRONG APPROACH: CONSTITUTIONAL ALTERNATIVES TO CRIMINALIZING SPEECH THAT ENCOURAGES SUICIDE

Commonwealth v. Carter was the first of its kind, with *Commonwealth v. You* following closely on its heels.[180] This Part argues in favor of the Massachusetts Supreme Judicial Court's outcome in *Carter* but considers alternative rationales that could have minimized the surrounding First Amendment challenges.[181] Section A begins with a discussion of the workability of current First Amendment doctrine in the wake of technological changes, calling on the U.S. Supreme Court for assistance.[182] Section B then explains the opportunity missed by the Massachusetts Supreme Judicial Court when it failed to emphasize the purely private nature of the speech in question and chose not to apply additional First Amendment carveouts that may have been appropriate.[183] Lastly, Section C concludes with a strict scrutiny analysis of proposed legislation that could eliminate the gray area surrounding suicide-encouraging text messages for future cases.[184]

A. Free Speech and Technology: Can the First Amendment Adequately Handle the Changing Times?

Technology presents new challenges for the First Amendment, and *Carter* forced the Massachusetts Supreme Judicial Court to confront these concerns.[185] Furthermore, *You* serves as a warning that *Carter* is not the only of its kind, and similar clashes between the First Amendment and technology are likely to persist.[186] These continuing clashes challenge whether the First Amendment to the U.S. Constitution can adapt to the changing technological world in which we live.[187]

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[180] Tiernan, *supra* note 9.

[181] *See infra* notes 185–226 and accompanying text.

[182] *See infra* notes 185–194 and accompanying text.

[183] *See infra* notes 195–212 and accompanying text.

[184] *See infra* notes 213–226 and accompanying text.

[185] Tiernan, *supra* note 9.

[186] *See id.* (quoting the opinion of Harvey Silverglate, a civil liberties and constitutional law expert, who believes the U.S. Supreme Court needs to issue a decision tackling the First Amendment questions raised in the *Commonwealth v. Carter* and *Commonwealth v. You* cases to avoid further uncertainty surrounding the intersection of speech, technology, and criminal conduct).

[187] *See* AJ Willingham, *The First Amendment Doesn't Guarantee You the Rights You Think It Does*, CNN POL. (Sept. 6, 2018), https://www.cnn.com/2017/04/27/politics/first-amendment-explainer-trnd/index.html [https://perma.cc/LPX5-7BC5] (providing examples of when the First Amendment to the U.S. Constitution does and does not offer protection in a number of modern-day situations). For instance, a social media company, because it is private, can remove an account without running afoul of the First Amendment. *Id.* The President, on the other hand, violates the First Amendment when blocking a user on Twitter. Charlie Savage, *Trump Can't Block Critics from His Twitter Account, Appeals Court Rules*, N.Y. TIMES (July 9, 2019), https://www.nytimes.com/2019/07/09/us/politics/trump-twitter-first-amendment.html [https://perma.cc/RMQ5-L2TV]. The U.S. Court of Appeals for

In 2010, the U.S. Supreme Court in *United States v. Stevens* underscored its reluctance to establish new categories of First Amendment carveouts.[188] The Court emphasized the long-established categories well-known to the courts, thus indicating that new categories were unlikely to be established.[189] The Court did not, however, foreclose the possibility completely.[190]

It is important to remember the ways in which the First Amendment carveouts first emerged.[191] Simply put, the Supreme Court continued to chip away at the absolute guarantee of free speech in response to societal needs.[192] With the evolution of technology, including the ability to be virtually present through social media, texting, and other forms of communication, the Supreme Court can follow its original approach to create new categories of unprotected speech in response to present-day needs.[193] Consequently, the Court could more adequately serve the government's interest in protecting life in the digital age, an interest that only emerged in response to technology.[194]

B. The Massachusetts Court's Missed Opportunities

Even absent an overarching development from the U.S. Supreme Court, the Massachusetts Supreme Judicial Court failed to support its 2019 *Commonwealth v. Carter* holding in two important ways.[195] First, Michelle Carter's purely private speech was not entitled to the highest level of protection.[196] Second, existing carveouts, besides speech integral to criminal conduct, were potentially relevant to, or at least supportive of, the court's analysis.[197]

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the Second Circuit concluded that because President Trump used Twitter to conduct governmental business, his silencing a person based on viewpoint was unconstitutional. *Id.*

[188] *See* 559 U.S. 460, 472 (2010) (stating that the U.S. Supreme Court is unlikely to add new categories to its list of First Amendment exceptions).

[189] *Id.* at 468.

[190] *Id.* at 472.

[191] *See* Schenck v. United States, 249 U.S. 47, 51–52 (1919) (placing limitations on free speech principles in response to a wartime crisis). Although exclusions are historical now, they have not always been that way. *See id.* (illustrating that the *Schenck v. United States* exclusion is now historic and well-established, but noting it was new in 1919).

[192] Beausoleil, *supra* note 11, at 2143–44.

[193] *See id.* (arguing that the traditional response of the Court when it comes to regulating speech requires looking at the present-day need).

[194] *See* Commonwealth v. Carter (*Carter II*), 115 N.E.3d 559, 571 (Mass. 2019) (denoting the state's compelling interest in preserving life), *cert. denied*, 140 S. Ct. 910 (2020); Commonwealth v. Carter (*Carter I*), 52 N.E.3d 1054, 1063 (Mass. 2016) (describing Michelle Carter as being virtually present through her electronic communications to Conrad Roy), *aff'd*, 115 N.E.3d 559 (Mass. 2019); Beausoleil, *supra* note 11, at 2114 (implying that online communications present a new reality that requires attention from the law).

[195] *See infra* notes 195–212 and accompanying text.

[196] *See infra* notes 198–204 and accompanying text.

[197] *See infra* notes 205–212 and accompanying text.

First, it has long been established that purely private matters do not warrant the same level of protection as matters of public concern.[198] The rationale behind this principle is that private matters do not threaten debate of public issues or discussion of ideas, and the threat of chilling speech is less worrisome.[199] Carter's speech was undoubtedly a purely private matter.[200] It did not relate to any concerns of the community, it was not a news item, and it did not address matters of general interest.[201] She directed her texts specifically towards Conrad Roy and his contemplated suicide.[202] Therefore, the Massachusetts Supreme Judicial Court missed an important opportunity to illustrate the private nature of the speech at issue.[203] Had the court done so, it could have better demonstrated that there was no free speech concern because Carter's speech was not the kind of public-concerning speech that the First Amendment seeks to protect.[204]

Second, Massachusetts's lack of an assisted suicide statute made it especially difficult to fit Carter's speech in question into the speech integral to criminal conduct exception, which was the Supreme Judicial Court's focus.[205] As critics have noted, this forced the court to creatively categorize Carter's conduct as involuntary manslaughter in order to make the exception fit.[206] Had the court considered other First Amendment carveouts, such as the fighting

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[198] *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759 (1985) (holding that speech concerning purely private matters is of less importance regarding First Amendment protection).

[199] Snyder v. Phelps, 562 U.S. 443, 452 (2011).

[200] *See id.* at 453 (explaining that when determining if speech is of public or private concern, a court must look at the content, form, and context); Commonwealth v. Carter (*Carter II*), 115 N.E.3d 559, 562–64 (Mass. 2019) (illustrating the private topics of conversation frequently discussed between Carter and Roy), *cert. denied*, 140 S. Ct. 910 (2020). In *Commonwealth v. Carter*, the speech at issue was of purely private concern given that Carter sent the texts to one person, Roy, and the content was targeted at a specific situation, his suicide. *See Snyder*, 562 U.S. at 452; *Carter II*, 115 N.E.3d at 562–64 (detailing the private phone calls and text messages between Carter and Roy that included conversations about his mental health and how his suicide would impact his family); Commonwealth v. Carter (*Carter I*), 52 N.E.3d 1054, 1057–59 (Mass. 2016), *aff'd*, 115 N.E.3d 559 (Mass. 2019). Undoubtedly, these are private, personal matters, and not of public concern. *See Snyder*, 562 U.S. at 452; *Carter II*, 115 N.E.3d at 562–64; *Carter I*, 52 N.E.3d at 1057–59.

[201] *See Snyder*, 562 U.S. at 453; *Carter II*, 115 N.E.3d at 562–64; *Carter I*, 52 N.E.3d at 1057–59.

[202] *Carter II*, 115 N.E.3d at 562–64; *see also* Exhibit 30, *supra* note 1, at 172–75 (providing a transcript of the text messages sent between Carter and Roy during the days leading up to Roy's suicide).

[203] *See generally Carter II*, 115 N.E.3d at 570–72 (lacking any reference to the private versus public nature of Carter's speech).

[204] *See Snyder*, 562 U.S. at 452 (articulating that public speech is entitled to the highest level of protection); *Carter II*, 115 N.E.3d at 570–72.

[205] *See Carter II*, 115 N.E.3d at 570–71 (emphasizing that Carter's speech that was integral to a criminal act—the wanton or reckless killing of Roy—was being punished by the court); Press Release, Segal, *supra* note 139 (noting the lack of a suicide statute in Massachusetts which, the ACLU argued, made Carter's conviction unconstitutional under the theory employed by the court).

[206] Melnick, *supra* note 148, at 300–01; Eversley, *supra* note 150.

words and true threats exceptions, it could have potentially avoided some of the related criticism it received.[207] Although the fighting words exception is also not a perfect match, in today's world in which communication often does not occur face-to-face, the court could have expanded the exception to include communications that are just as violence-inducing, even when a screen separates the parties.[208]

Similarly, the true threats exception is also not a perfect fit, but the Massachusetts Supreme Judicial Court should still have more fully considered it.[209] In 2003, the U.S. Supreme Court in *Virginia v. Black* articulated that placing another person in fear of bodily harm or death constitutes a true threat.[210] Carter's texts did just that—they intimidated Roy so much that they overpowered his own will to live.[211] Although Carter herself did not intend to harm Roy physically, her abusive and threatening speech constituted an act of violence.[212]

C. The Limit Must Exist: A Look at Proposed Legislation

With the U.S. Supreme Court's denial of certiorari for *Commonwealth v. Carter* and the strikingly similar fact pattern in *Commonwealth v. You*, legislation appears to be the surest way of constitutionally criminalizing suicide-encouraging speech and leaving significantly less room for uncertainty.[213] With the proposal of Conrad's Law, the Massachusetts legislature has already begun this process.[214]

If passed, Conrad's Law would make it a separate crime to coerce another person into committing suicide.[215] First, it would make it illegal to overcome another person's will to live through substantial control, manipulation, or undue influence.[216] Second, it would criminalize enabling another person to

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[207] *See Carter II*, 115 N.E.3d at 570–72 (providing the court's analysis of the free speech claims raised by the defense and dismissing those arguments).

[208] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (articulating the fighting words exception as it currently stands).

[209] *See* Virginia v. Black, 538 U.S. 343, 359–60 (2003) (defining the true threats exception to free speech protection); *Carter II*, 115 N.E.3d at 571 (noting the existence of the true threats exception, but then failing to elaborate on its potential relevance).

[210] 538 U.S. at 360.

[211] *See Carter II*, 115 N.E.3d at 568 (emphasizing Carter's conduct and speech that overpowered Roy's will to live through abusive phone calls and texts that encouraged his suicide).

[212] *See Black*, 538 U.S. at 360 (holding that true threats include acts of violence); *Carter II*, 115 N.E.3d at 571. In 2003, in *Virginia v. Black*, the U.S. Supreme Court did not specify that the acts of violence were required to be physically violent. *See* 538 U.S. at 360.

[213] Mass. S.B. 2382, 191st Gen. Ct., Reg. Sess. (Mass. 2019); Eric Levenson, *Massachusetts Lawmakers to Debate 'Conrad's Law' to Make Coerced Suicide a Crime*, CNN (Nov. 12, 2019), https://www.cnn.com/2019/11/12/us/conrads-law-suicide-michelle-carter/index.html [https://perma.cc/8YLA-PKVF].

[214] Mass. S.B. 2382; Levenson, *supra* note 213.

[215] Levenson, *supra* note 213.

[216] Mass. S.B. 2382.

commit suicide either by providing the physical means (such as a weapon) or the knowledge, or participating in a physical act that causes a suicide or suicide attempt.[217]

Because courts will likely view this law as a content-based restriction on free speech in certain situations such as *Carter* and *You*, the hurdle will be surviving a constitutional challenge that invokes a strict scrutiny inquiry.[218] Strict scrutiny mandates a compelling governmental interest and requires that the speech restriction be narrowly tailored to achieve the government's objective—in this case, preserving life in the digital age.[219]

Cyberbullying statutes, which have recently been under scrutiny for violating the First Amendment, are a helpful guide because they similarly address speech in cyberspace.[220] Typically, critics have asserted that cyberbullying statutes are often overly broad or too vague, which fails the second prong of strict scrutiny analysis.[221] Although states do have a legitimate interest in protecting children in particular from the harms of cyberbullying, courts have taken issue with the lack of a clear definition for what constitutes cyberbullying, and they have also invalidated statutes that effectively criminalize constitutionally protected speech by adults.[222]

Conrad's Law, on the other hand, provides clear definitions and sets much more narrowly tailored limitations on speech that the statute may restrict.[223] For example, the bill specifically notes that it does not extend to physician-assisted suicide and related conversations, and the statute requires actual knowledge by the speaker of the other person's suicidal ideation before assigning criminal culpability.[224] Therefore, Conrad's Law arguably has a higher likelihood of surviving a strict scrutiny inquiry than cyberbullying statutes that courts have deemed unconstitutional for overbreadth or vagueness.[225] It remains unclear how *You*

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[217] *Id.*

[218] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (explaining the limited situations in which content-based restrictions can overcome the presumed invalidity). *See generally* Mass. S.B. 2382 (placing restrictions on speech that encourages another to commit suicide).

[219] *See* Reed v. Town of Gilbert, 576 U.S. 155, 163–64 (2015) (explaining the two-prong strict scrutiny balancing test for content-based speech restrictions); Commonwealth v. Carter (*Carter II*), 115 N.E.3d 559, 571 (Mass. 2019) (articulating the state's legitimate interest in protecting life), *cert. denied*, 140 S. Ct. 910 (2020).

[220] *See* David Hudson, Jr., *Is Cyberbullying Free Speech?*, ABA J. (Nov. 1, 2016), http://www.abajournal.com/magazine/article/is_cyberbullying_free_speech [https://perma.cc/35AH-U23F] (illustrating the First Amendment challenges to cyberbullying statutes).

[221] *See, e.g.*, People v. Marquan, 19 N.E.3d 480, 487 (N.Y. 2014) (holding that Albany's cyberbullying statute was overbroad and vague).

[222] *Id.*

[223] *See* Mass. S.B. 2382. The proposed bill clearly defines "[s]uicide," "[s]uicide attempt," "[s]uicidal ideation," and "[k]nowledge of suicidal ideation." *Id.*

[224] *Id.*

[225] *Compare id.* (defining terms and requiring a knowledge component on the part of the speaker), *with* Albany County, N.Y., Local Law No. 11, §§ 1–3 (Nov. 8, 2010) (lacking explicit definitions and

will conclude, but Conrad's Law—and others that take a similar position—will hopefully allow for fewer First Amendment questions in future cases.[226]

CONCLUSION

Conrad Roy's and Alexander Urtula's deaths, no doubt, are tragedies. This is not only because the circumstances leading to their deaths were morally wrong, but also because the conduct at issue was criminal. Neither Michelle Carter nor Inyoung You said what they did to add to the marketplace of ideas or contribute to public debate. They utilized their words—which were as harmful as physical actions—to coerce two other people into taking their owns lives by suicide. Allowing Carter and You to hide behind the First Amendment to the U.S. Constitution does not fulfil the purpose of free speech protection; rather, it allows them to get away with causing the death of another.

The Massachusetts Supreme Judicial Court did not reach its conclusion in *Commonwealth v. Carter* through perfectly sound reasoning, but the outcome was correct. The *Carter* and *You* cases present a unique opportunity for society, lawmakers, and the courts to rethink the First Amendment in today's modern world. The reality is that communication and speech are taking new forms, and the dangers are enormous without adequate laws or regulation. Whether the U.S. Supreme Court decides to join the conversation by creating a new category or expanding its long-established ones, or individual states pass statutes that protect against the emerging dangers that accompany technological developments, it is clear something must be done. This is not a question of morality; rather, it is a question of criminal culpability.

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broadening the scope of the statute to affect adults, when the legislature's purpose was to protect school-aged children from cyberbullying), *invalidated by* People v. Marquan, 19 N.E.3d 480 (N.Y. 2014).

[226] *See* Lauren Fox, *'Conrad's Law' Would Criminalize Suicide Coercion*, BOS. GLOBE (July 24, 2019), https://www.bostonglobe.com/metro/2019/07/24/conrad-law-would-criminalize-suicide-coercion/waHCc8W2lrgbfMjGFP5faL/story.html [https://perma.cc/ZY2F-ZD56] (describing the purpose and scope of Conrad's Law). Under this law, conduct and speech that encourages another to commit suicide would be criminal, thus leaving no room for questions in cases such as *Commonwealth v. Carter* and *Commonwealth v. You*. *See id.*