PROSECUTION FOR ENCOURAGING SUICIDE: HOW THE MASSACHUSETTS SUPREME COURT IGNORED THE FIRST AMENDMENT

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Cell phones are a ubiquitous necessity in our fast-paced twenty-first century lives. All one needs to do is look around at a bus stop, class room, or restaurant to see most Americans immersed in their handheld devices. Whether you believe this is a positive indication of the role of technology within our daily lives or not, the fact remains that most of us use our hand-held devices on a daily basis. So, what happens when that technology, or more specifically the content of the messages sent on the device, induces a person to take their own life?

This situation begs a secondary question—should the justice system hold individuals criminally liable for what they say over text message in the same way that they are held liable when they speak to someone in person? Recent case law indicates that at least some jurisdictions—the Massachusetts Supreme Judicial Court case of Michelle Carter as a prime example—are willing to prosecute individuals for the content of their text messages, particularly when it results in suicide. Yet this raises still more interesting questions loaded with First Amendment implications. Do we have freedom of speech rights on our hand-held devices? If our text messages lead another to harm themselves are we then criminally liable? Finally, if the speech in question does not fall into one of the traditionally unprotected categories of speech does the First Amendment preclude criminal prosecution?

With the emergence of ever younger children having access to the internet and hand-held devices, these questions deserve answers. Recently, teen deaths have been linked to text messages encouraging their suicide and, even more frightening, some have been found dead after participating in morbid "internet death challenges." While the societal desire for accountability is laudable, there must be judicial

consideration for First Amendment protections in the context of prosecuting individuals for what they have written, as opposed to what they have done. This Note takes the position that the Massachusetts supreme court failed to justify the recent Michelle Carter conviction under the lens of strict scrutiny.

A robust First Amendment demands that content-specific regulations controlling speech are narrowly tailored to fit a compelling state interest. The standard outlined by the United States Supreme Court own jurisprudence is not simply that such a compelling interest exists. The precedent that the Carter decision creates is dangerous and detrimental to the advancement of a free and focused First Amendment.

I. INTRODUCTION

On February 6, 2015, a grand jury indicted Michelle Carter, a 17-year-old high school student, on a single charge of involuntary manslaughter after police found her long-distance boyfriend, Conrad Roy III, dead in his pickup truck from an apparent suicide.[1] Seven months prior to the indictment, on July 13, 2014, Conrad Roy's body was discovered by an officer of the Fairhaven, Massachusetts police department.[2] Roy's mother had reported her son missing to authorities the night before.[3] She told police that Roy had gone to a friend's house and never returned home.[4]

Roy spent the day before his suicide on the beach with his family. During a long walk with his mother Roy discussed his nervousness about attending college and his insecurities about his future.[5] They joked together about bathing suits they saw.[6]

Roy's mother had no reason to think her son had been planning to kill himself for the past six days.[7] Yet when Fairhaven police investigated Roy's cell phone records, they found he had been planning his suicide, including detailed discussions about the most

[1] Commonwealth v. Carter, 52 N.E.3d 1054, 1056 (Mass. 2016).
[2] *Id.*
[3] Brief for Petitioner at 25, Commonwealth v. Carter, 52 N.E.3d 1054 (Mass. 2016) (No. 12043), 2016 WL 1562270 at * 25.
[4] *Id.*
[5] *Id.* at 5–6.
[6] *Id.* at 5.
[7] *Id.* at 6.

effective mode of suicide, with Carter for some time.[8] In fact, while at the beach with his family, the string of text messages with Carter continued and in them Roy stated his determination to end his own life.[9] Subsequently, Carter asked if he would delete his messages with her.[10] Roy consented with the caveat that Carter would keep messaging him up until his suicide.[11] Carter agreed, stating she would keep up communication with Roy until he turned on the generator.[12]

The medical examiner concluded Roy had died after inhaling carbon monoxide that was produced by a gasoline powered water pump located in the front seat of his truck.[13] Upon investigation, it was discovered that Roy had a history of mental illness and had tried to commit suicide in 2013 by ingesting a large amount of acetaminophen.[14] Carter was aware of Roy's previous suicide attempt and was charged with involuntary manslaughter for her role in encouraging Roy to attempt suicide yet again.[15]

In June 2017, Bristol County Juvenile Court Judge Lawrence Moniz found Carter guilty of involuntary manslaughter.[16] On August 3, 2017, Judge Moniz sentenced her to two and a half years in prison; however, only fifteen months of the sentence were mandatory.[17] The judge also sentenced Carter to five years of probation and banned her from using social media for that time.[18] Carter's sentence was stayed,

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[8] *Id.* ("Unbeknownst to his mother or any of the other people he was close to, for at least the past six days Conrad had been making plans to kill himself with carbon monoxide. Carter played an instrumental role: she talked him out of his doubts point-by-point, assured him that his family would understand why he did it, researched logistics and reassured him that he was likely to succeed, and pushed him to stop procrastinating and get on with it, mocking his hesitation and threatening to get him help if he did not carry through with his plans.").
[9] *Id.* at 8.
[10] *Id.*
[11] *Id.*
[12] *Id.* (""Did you delete the messages?" [R.403]. Conrad said he had, "But you're going to keep messaging me" [R.403]. Carter agreed: "I will until you turn on the generator").
[13] Commonwealth v. Carter, 52 N.E.3d 1054, 1056 (Mass. 2016).
[14] *Id.*
[15] *Id.* at 1057–58.
[16] *See* Kalhan Rosenblatt, *Michelle Carter, Convicted in Texting-Suicide Case, Sentenced to 15 Months in Jail*, NBC NEWS (Aug. 3, 2017, 2:34 PM), https://www.nbcnews.com/news/us-news/michelle-carter-convicted-texting-suicide-case-sentenced-15-months-jail-n789276 [https://perma.cc/TWF7-F4TH].
[17] *Id.*
[18] *Id.*

however, and she will not have to report to prison until her appeal process has been exhausted.[19]

This article analyzes the First Amendment implications of the Massachusetts Supreme Judicial Court decision and argues that the second prong of strict scrutiny was not met in the decision. Part I discusses the Massachusetts common law definition for involuntary manslaughter and how it applies to Carter. Part II dives into the First Amendment implications and categories of unprotected speech and explains why Michelle Carter's text messages fit none of the defined categories. Part III discusses the rising phenomenon of "internet death challenges" and the problematic issues of prosecution triggered by speech on the internet. Finally, this Note argues that the First Amendment protects speech conducted over electronic devices, even if that speech plays a role in the suicide of another. In convicting Carter, the Massachusetts supreme court set a dangerous and unwise precedent, which may have long-lasting implications for the freedom of speech within the United States.

II. INVOLUNTARY MANSLAUGHTER

Carter and Roy met in the summer of 2011 and began a romantic relationship that lasted up until Roy took his own life.[20] Because of the couples' young age and because they lived over an hour away from one another, most of their communications occurred over text messages and email.[21] Throughout this communication, Carter repeatedly urged Roy to end his life in the days leading up to his suicide:

On July 8, 2014, between 8:09 P.M. and 8:18 P.M., the defendant and victim exchanged the following text messages:

> Carter: "So are you sure you don't wanna [kill yourself] tonight?";
> Roy: "what do you mean am I sure?";
> Carter: "Like, are you definitely not doing it tonight?";
> Roy: "Idk yet I'll let you know";
> Carter: "Because I'll stay up with you if you wanna do it tonight";
> Roy: "another day wouldn't hurt";
> Carter: "You can't keep pushing it off, tho, that's all you keep doing"[22]

[19] *Id.*
[20] Brief for Petitioner, *supra* note 3, at 3–4.
[21] *Id.*
[22] Commonwealth v. Carter, 52 N.E.3d 1054, 1057 n.3 (Mass. 2016).

The State of Massachusetts alleged that Carter's behavior amounted to "wanton and reckless" conduct. The State successfully argued that her behavior satisfied one prong of the common law standard for involuntary manslaughter in Massachusetts and was a sufficient factual basis to support her indictment.[23]

In Massachusetts, there is no statutory definition for manslaughter. Instead, the common law defines manslaughter as "an unlawful homicide unintentionally caused by an act which constitutes such a disregard of probable harmful consequences to another as to amount to wanton or reckless conduct."[24] The Massachusetts supreme court held that Carter's conviction under involuntary manslaughter could be proved under two separate theories: (1) wanton or reckless conduct or (2) wanton or reckless failure to act.[25] Ultimately, however, Carter was indicted because of her "wanton or reckless" conduct.[26] The actions that prosecutors claimed amounted to "wanton and reckless" conduct occurred over a period of time. Carter was aware of Roy's vulnerable state, pressured him to take his own life through ongoing text messages, helped him come up with the mode of suicide, and finally, when Roy expressed trepidation because the carbon dioxide was starting to affect him inside his truck, Carter told him over the phone to "get back in."[27]

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[23] Brief for Petitioner, *supra* note 3, at 37 ("Evidence that a defendant encouraged and facilitated a vulnerable person in committing suicide satisfies this standard." (citing Persampieri v. Commonwealth, 343 175 N.E.2d 387 (Mass. 1961)).

[24] Commonwealth v. Life Care Centers of America, Inc., 926 N.E.2d 206, 211 (Mass. 2010) (quoting Commonwealth v. Gonzalez, 824 N.E.2d 843 (Mass. 2005)); *see also Carter*, 52 N.E.3d at 1060 (Mass. 2016) ("Whether conduct is wanton or reckless is 'determined based either on the defendant's specific knowledge or on what a reasonable person should have known in the circumstances.... If based on the objective measure of recklessness, the defendant's actions constitute wanton or reckless conduct ... if an ordinary normal [person] under the same circumstances would have realized the gravity of the danger.... If based on the subjective measure, i.e., the defendant's own knowledge, grave danger to others must have been apparent and the defendant must have chosen to run the risk rather than alter [his or her] conduct so as to avoid the act or omission which caused the harm.'").

[25] *Carter*, 52 N.E.3d at 1060 (quoting Commonwealth v. Life Care Centers of America, Inc., 926 N.E.2d 206, 211 (Mass. 2010)).

[26] *Id.*

[27] Brief for Petitioner, *supra* note 3, at 37–38 ("Carter's conduct in telling Conrad to get back in the truck (1) was clearly intentional; (2) was wanton and reckless, because she was ordering him to get into a truck that he was filling with carbon

A. Proximity, Committing a Physical Act, and Prosecution for Words Alone

Carter's wanton and reckless conduct did not manifest itself in an in-person physical act. Indeed, the conduct in question occurred over email and text message communication while Carter and Roy were separated by hundreds of miles.[28] It was her words, via text messages, that ultimately condemned her in the eyes of the court.[29] The Massachusetts supreme court acknowledged it had never before indicted someone for involuntary manslaughter based on words alone; however, the Court had never "required in the return of an indictment for involuntary manslaughter that a defendant commit a physical act in perpetrating a victim's death."[30] Further, the Court opined that it "need not—and indeed cannot—define where on the spectrum between speech and physical acts involuntary manslaughter must fall."[31]

The Massachusetts supreme court has affirmed convictions of involuntary manslaughter against a defendant when the death of the victim was self-inflicted on two prior occasions.[32] First, in *Commonwealth v. Atencio* three individuals engaged in a game of "Russian Roulette."[33] Two of the players survived and one was killed outright when he placed a loaded revolver to his temple and pulled the trigger.[34] The Court reasoned that Atencio—one of the survivors—was guilty of involuntary manslaughter because "the Commonwealth had an interest that the deceased should not be killed by the wanton or

monoxide for the purpose of poisoning himself, knowing that he was suicidally depressed, knowing that he was likely under the influence of both carbon monoxide fumes and Benadryl, and knowing that her opinion carried weight with him; and (3) can reasonably be concluded to have caused his death, in light of how frequently he had postponed suicide before, and of the fact that the partial success of this attempt had frightened him enough that he had gotten out of the truck. This by itself provided a sufficient factual basis to support the indictment."); *Carter*, 52 N.E.3d at 1063.

[28] *Carter*, 52 N.E.3d at 1057–58.

[29] *Id.* at 1061 ("Effectively, the argument is that verbal conduct can never overcome a person's willpower to live, and therefore cannot be the cause of a suicide. We disagree.").

[30] *Id.* at 1061–62.

[31] *Id.* at 1063.

[32] *See* Commonwealth v. Atencio, 189 N.E.2d 223, 226 (Mass. 1963); *see also* Persampieri v. Commonwealth, 175 N.E.2d 387, 390 (Mass. 1961).

[33] *Atencio*, 189 N.E.2d at 224.

[34] *Id.*

reckless conduct of himself and others."[35] Yet an integral part of the conduct at issue was the proximity of the defendants, the "atmosphere" created when all three decided to play the game, and the "mutual encouragement" to participate.[36]

The second instance in Massachusetts of a conviction of involuntary manslaughter where the death of the victim was self-inflicted occurred in *Persampieri v. Commonwealth*, where the defendant's conviction of involuntary manslaughter was affirmed by the Massachusetts supreme court when the victim shot herself in front of the defendant.[37] The defendant's wife threatened suicide after the defendant stated he was going to divorce her.[38] The defendant then taunted her calling her "chicken" and stated that she wouldn't do it.[39] After she retrieved a rifle, the defendant noted that the safety was off and helped her load the weapon.[40] She struggled to pull the trigger because the butt of the weapon was placed on the floor. The defendant stated that if she were to take off her shoe and use her toe she would be able to kill herself.[41] She eventually attempted this method and fired the weapon successfully, the bullet inflicted a serious wound and she died the next day.[42] At trial, a jury found that the defendant's actions amounted to reckless and wanton conduct, and the Massachusetts supreme court affirmed his conviction of involuntary manslaughter.[43]

B. Application of Involuntary Manslaughter to Carter

Both cases discussed above exemplify a court willing to uphold convictions of involuntary manslaughter where the victim's behavior resulted in suicide. Yet both cases are distinguishable from that of

[35] *Id.*
[36] *Id.* at 225.
[37] *See Persampieri*, 175 N.E.2d at 389–90.
[38] *Id.* at 389.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *See* Commonwealth v. Carter, 52 N.E.3d 1054, 1062 (Mass. 2016) ("We concluded that the jury were warranted in returning a verdict of involuntary manslaughter based on the theory of wanton or reckless conduct, noting that the defendant, "instead of trying to bring [the victim] to her senses, taunted her, told her where the gun was, loaded it for her, saw that the safety was off, and told her the means by which she could pull the trigger. He thus showed a reckless disregard of his wife's safety and the possible consequences of his conduct." (quoting *Persampieri*, 175 N.E.2d at 390)).

Carter. For example, in both *Atencio* and *Persampieri*, the defendants were inside the same room as the victim and in some way physically participated in the events that ended the lives of the victims.[44] Moreover, both defendants' "wanton and reckless" conduct involved physical action: in *Atencio*, both defendants created an "atmosphere" of "mutual encouragement," and the defendant in *Persampieri* loaded the weapon for his wife and explained how to fire it when she initially failed.[45]

Carter did not create an atmosphere of "mutual encouragement." Indeed, she often urged Roy to get help and threatened to tell his parents so they would get help for him.[46] Further, despite the state's claim—and the Massachusetts supreme court's holding—that Carter overcame Roy's will not to commit suicide with her words alone, Carter did not assist in the physical act of Roy's suicide.[47] This is distinguishable from both defendants in *Atencio* and *Persampieri* where the defendants handled the weapons used by the victims, and in the case of *Persampieri*, the defendant actually loaded the weapon while informing that the safety was off.[48] Yet even if Carter's speech did constitute sufficient encouragement of Roy's suicide to create an atmosphere of mutual encouragement, the fact remains that her only conduct was expression. Thus, she may have been entitled to a First Amendment defense.

III. FIRST AMENDMENT ANALYSIS

Whether Carter's speech over text messages can be criminalized implicates First Amendment concerns. On the one hand, speech that is integral to criminal activity may fall outside of First Amendment protection.[49] On the other hand, words that incite another to commit a

[44] Commonwealth v. Atencio, 189 N.E.2d 223, 224 (Mass. 1963); *Persampieri*, 175 N.E.2d at 389–90.
[45] *Atencio*, 189 N.E.2d at 225; *Persampieri*, 175 N.E.2d at 390.
[46] Brief for Defendant at 19, Commonwealth v. Carter, 52 N.E.3d 1054 (Mass. 2016) (No. 12043), 2016 WL 963901 at *19 (Michelle Carter: "But the mental hospital would help you. I know you don't think it would but I'm telling you, if you give them a chance, they can save your life.").
[47] *Id.*
[48] *Atencio*, 189 N.E.2d at 224; *Persampieri*, 175 N.E.2d at 390.
[49] *See generally* Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095 (2005) (discussing media and books directed at criminal behavior with such hypotheticals as the legality of "murder manuals").

criminal act and that do not fall within another traditional exception are protected unless they satisfy the strict requirements of *Brandenburg v. Ohio*.[50] Thus, if Carter's speech was otherwise protected speech, and did not satisfy *Brandenburg*, then punishing her for the content of that speech should trigger strict scrutiny.[51] The following sections analyze the arguments for and against free speech protection of Carter's texts to Roy.

A. Incitement

Traditionally, a two-prong test is utilized in order to determine whether an individual's speech falls into the unprotected category of incitement of illegal activity.[52] First, the speech must be "directed to inciting or producing imminent lawless action," and second, the speech must be "likely to incite or produce such action."[53] The United States Supreme Court's narrow reading of the second prong of the test is where most speech fails to reach the unprotected realm of incitement.[54] Further, emotional rhetoric, even when it may stir a person to rebel against authority, without imminent lawless behavior is still considered protected speech.[55]

Carter's texts fail to satisfy the second prong of the *Brandenburg* test; therefore, they fail to reach the level required for categorization as incitement.[56] The text messages between Carter and Roy specifically discussing modes and means of suicide were conducted

[50] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
[51] *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2222 (2015).
[52] *See Brandenburg*, 395 U.S. at 447.
[53] *Id.*
[54] *See* Hess v. Indiana, 414 U.S. 105, 108 (1973) (holding that a when an Indiana University protester said, "[w]e'll take the fucking street again," he was protected under the Brandenburg test, as the speech "amounted to nothing more than advocacy of illegal action at some indefinite future time.").
[55] *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982) ("Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech.").
[56] Because suicide itself is not a crime in Massachusetts, Michelle Carter's text messages may fail the test in its entirety.

over a series of months.[57] The "lawless action" of Roy's suicide[58] was never guaranteed to take place at all.

The prosecution argued that Carter knew that her words would push Roy over the edge.[59] Even if this were true, however, the immediacy of Roy's action was unknown. The court attempted to determine Roy's subjective state of mind and declared that the overarching reason for his suicide was Carter's actions. By doing so, the court dismissed Roy's previous attempts at suicide[60] and his history of mental illness, and instead focused on Carter's actions.[61] They also failed to consider the basic human impulses that must be overridden for someone to commit suicide.

Defending this reasoning, the Court relied on Carter's "virtual presence"[62] and her "previous constant pressure"[63] to justify reaching a finding of probable cause for her indictment of involuntary manslaughter. The Court went one step further and claimed that, by either a subjective or objective view point, Carter had "some control over [Roy's] actions."[64] However, it was never truly certain that Roy would follow through with his suicide, so the text messages sent by Carter fail the second prong of the *Brandenburg* test.

B. Fighting Words and True Threats

[57] Brief for Defendant, *supra* note 46, at 4. Evidence was submitted to the court that Michelle Carter and Conrad Roy had been discussing Roy's suicide for months before the actual act took place.
[58] Suicide itself is not a crime; however, assisting another is. *See* MASS. GEN. LAWS ANN. ch. 201D, § 12 (West 1990).
[59] *See* Commonwealth v. Carter, 52 N.E.3d 1054, 1059 (Mass. 2016) ("It was apparent that the defendant understood the repercussions of her role in the victim's death.").
[60] *See* Brief for Petitioner, *supra* note 3, at 11; *Carter*, 52 N.E.3d at 1057.
[61] *See Carter*, 52 N.E.3d at 1063 ("In our view, the coercive quality of that final directive was sufficient in the specific circumstances of this case to support a finding of probable cause . . . The grand jury could have found that an ordinary person under the circumstances would have realized the gravity of the danger posed by telling the victim, who was mentally fragile, predisposed to suicidal inclinations, and in the process of killing himself, to get back in a truck filling with carbon monoxide and "just do it."").
[62] *Id.*
[63] *Id.*
[64] *Id.*

Carter's speech also failed to satisfy the fighting words or true threats exceptions. Fighting words have been categorized by the Supreme Court as those words which, "inflict injury or tend to incite an immediate breach of the peace."[65] The Court in *Chaplinsky v. State of New Hampshire*, citing the marketplace of ideas justification for robust free speech protection, claimed that fighting words retained little to no social value.[66]

The Court further narrowed the fighting words doctrine by holding that the speech or expressive conduct must be directed to an individual who cannot escape the speech or conduct.[67] Consequently, the category of fighting words is actually quite small. Even inflammatory rhetoric that may offend or appall the listener must truly incite an immediate breach of the peace to qualify as fighting words.[68]

The Court has defined true threats as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[69] As broad as this statement may seem, the actual amount of speech or speech-related conduct is actually quite narrow because the threat must place the listener in imminent physical harm.[70] The true threat doctrine found its genesis in the United States Supreme Court case of *Watts v. United States.*[71] In *Watts*, the Court held that

[65] Chaplinsky v. State, 315 U.S. 568, 572 (1942).
[66] *Id.* ("It has been well observed that such utterances are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").
[67] *See* Cohen v. California, 403 U.S. 15, 21 (1971) ("The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner…Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes.").
[68] *See* Street v. New York, 394 U.S. 576, 592 (1969) ("Though it is conceivable that some listeners might have been moved to retaliate upon hearing appellant's disrespectful words, we cannot say that appellant's remarks were so inherently inflammatory as to come within that small class of 'fighting words' which are 'likely to provoke the average person to retaliation, and thereby cause a breach of the peace.'") (citation omitted).
[69] Virginia v. Black, 538 U.S. 343, 359 (2003).
[70] *Id.* at 365 (holding that if a prosecution relies on cross burning alone, without the intention to have imminent physical harm, or intimidation, "create[s] an unacceptable risk of the suppression of ideas.").
[71] Watts v. United States, 394 U.S. 705, 707 (1969).

the defendant could not be prosecuted for a statement made at a political rally which, when taken literally, threatened President Lyndon Johnson's life. Instead, the Court commented "[w]hat is a threat must be distinguished from what is constitutionally protected speech."[72] Since *Watts*, circuit courts have struggled with the application of when a threat is "true," and thus undeserving of First Amendment protection.[73]

The Supreme Court has held that fighting words and true threats cannot be regulated based purely on the viewpoint of the speech or conduct, no matter how repugnant the message may seem to some.[74] Such viewpoint-based regulations of a subset of a traditional exception can survive a constitutional examination only if the regulation passes strict scrutiny. That is to say that the statute must be written to serve a compelling state interest and is done so in the most narrowly tailored way possible.[75] Alternatively, a subset of unprotected speech may be regulated if it is particularly virulent or a dangerous example of the speech that the exception is designed to capture.[76] For example, the government may regulate threats against the President of the United States as a sub-set of true threats.

Carter's texts to Roy do not rise to the definitions of either fighting words or true threats. While her rhetoric in the texts may have been appalling, as she expressed disappointment and anger when Conrad failed to kill himself on more than on occasion,[77] there was no risk of

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[72] *Id.* at 708.

[73] *See* Jones v. State, 64 S.W.3d 728, 734–35 (Ark. 2002) ("[T]he First Circuit has held that the appropriate standard is 'whether [the defendant] should have reasonably foreseen that the statement he uttered would be taken as a threat by those to whom it is made.' U.S. v. Fulmer*,* 108 F.3d 1486, 1491 (1st Cir. 1997). However, the Second Circuit has announced its test that a true threat exists when the language 'on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate, and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution.' United States v. Francis*,* 164 F.3d 120, 122–23 (2d Cir. 1999). The Second Circuit has further said: "The test is an objective one—namely, whether 'an ordinary, reasonable recipient who is familiar with the context of the letter would interpret it as a threat of injury.' United States v. Malik*,* 16 F.3d 45, 49 (2d Cir.1994) (internal citation omitted).").

[74] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 413 (1992) (White, J., concurring).

[75] *Id.* at 377.

[76] *Id.*

[77] Brief for Petitioner, *supra* note 3, at 6 ("At 4 a.m. that morning, Carter had texted Conrad, "You said you were gonna do it. Like I don't get why you aren't . . .

an immediate breach of the peace, and her language did not communicate a serious expression of an intent to commit an act of unlawful violence against Conrad. If anything, she was aware that Conrad had his doubts about committing suicide[78] and, further, she never uttered a word that could be construed as intending to commit an unlawful act of violence. From most rational points of view, what Michelle Carter said over text messages to Conrad Roy was morally abhorrent. If the State of Massachusetts is to prosecute her because of the words she wrote, which they did, there is no escaping that the prosecution would be content-based, which is not within any traditional exception of free speech, and thus, deserving of strict scrutiny.

C. Speech Integral to Criminal Activity

The prosecution argued that the text messages did not constitute protected speech because they were used in the commission of a crime[79] and further reasoned that all conduct made to express an idea is not protected speech.[80] A sweeping danger lies in declaring that all speech related to the commission of crimes is not protected by the First Amendment.[81] In his article on crime-facilitating speech, Eugene Volokh outlines the problem by claiming it may be easy, and almost comforting, to deny First Amendment protections to those materials that facilitate the commission of a crime.[82] Yet, he argues that a broad prohibition would have the unintended consequence of chilling

So I guess you aren't gonna do it then. All that for nothing . . . You kept pushing it off and you say you'll do it, but you never do. It's always gonna be that way if you don't take action.").

[78] *Id.* at 7 ("He [Conrad] wrote, 'I don't know why I'm like this . . . Like, why am I so hesitant lately. Like two weeks ago I was willing to try everything and now I'm worse, really bad, and I'm LOL not following through. It's eating me inside.'").

[79] *Id.* at 45 ("To that end, speech generated in connection with illegal activities is not entitled to constitutional protection.") (quoting United States v. Williams, 553 U.S. 285, 303 (2008)).

[80] *Id.* ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.") (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968)).

[81] *See generally* Volokh, *supra* note 49 (warning of unintended consequences such as chilling legitimate expression through broad prohibition of crime facilitating speech).

[82] *Id.* at 1104.

legitimate speech that deals with the same or similarly situated subject matter:

> It may be appealing, for instance, to categorically deny First Amendment protection to murder manuals or to bomb-making information, on the ground that the publishers know that the works may help others commit crimes, and such knowing facilitation of crime should be constitutionally unprotected. But such a broad justification would equally strip protection from newspaper articles that mention copyright-infringing Web sites, academic articles that discuss computer security bugs, and mimeographs that report who is refusing to comply with a boycott.[83]

Volokh expands upon this concept by suggesting that if the state were to outlaw certain types of crime-facilitating speech, the rule would have to be narrowly tailored and would need to distinguish between different types of speech—those that knowingly cause harm and those that do not.[84] He suggests such a rule with one of the caveats being that all crime-facilitating speech be constitutionally protected unless the speaker knows that his audience is likely to commit a crime based upon that speech.[85] If such a rule existed in Massachusetts, then the state might have a stronger, and perhaps more constitutionally sound, argument that Carter's speech was going to be used for criminal purposes. Again, since suicide is not a criminal offense in Massachusetts, this rule would still face an uphill constitutional climb.

The Massachusetts supreme court held that Carter's texts messages were not protected by the First Amendment because the state had a compelling interest in preventing speech that had a direct causal link in another person's suicide.[86] The court's ruling begs an important

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[83] *Id.*

[84] *Id.* at 1105.

[85] *Id.* at 1106 ("Building on this analysis, Part III.G provides a suggested rule: that crime-facilitating speech ought to be constitutionally protected unless (1) it's said to a person or a small group of people when the speaker knows these few listeners are likely to use the information for criminal purposes, (2) it's within one of the few classes of speech that has almost no noncriminal value, or (3) it can cause extraordinarily serious harm (on the order of a nuclear attack or a plague) even when it's also valuable for lawful purposes.").

[86] Commonwealth v. Carter, 52 N.E.3d 1054, 1064 n.17 (Mass. 2016) ("The speech at issue in this case is not protected under the First Amendment to the United States Constitution or art. 16 of the Massachusetts Declaration of Rights because the Commonwealth has a compelling interest in deterring speech that has a direct, causal link to a specific victim's suicide.").

question, however: "under the First Amendment, can the crime of causing another person's suicide be committed by speech alone?" The application of the law against assisting or causing suicide of another must satisfy strict scrutiny, and the means by which this goal must be accomplished must be narrowly tailored.[87] This analysis is left incomplete, as the Massachusetts supreme court failed to address the second prong of this test.

D. Strict Scrutiny

Traditionally, content-based regulations will survive a constitutional examination only if the regulation passes strict scrutiny. The regulation must be written to serve a compelling state interest, and done so in the most narrowly tailored way possible.[88] Conversely, content-neutral regulations can only survive a constitutional inquiry if they pass intermediate scrutiny, where the regulations need only be substantially related to the accomplishment of an important governmental purpose.[89] Carter's conviction rested solely on the content of her text messages; therefore, when looking at the constitutionality of her conviction based on her content-specific speech,[90] strict scrutiny applies.

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[87] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 413 (1992) (White, J., concurring); *see also* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 62 (1981) (noting that a law is impermissibly overbroad if a less restrictive intrusion on protected speech is available).

[88] *See R.A.V.*, 505 U.S. at 377–78; Mendoza v. Licensing Board of Fall River, 827 N.E.2d 180, 188 n.12 (Mass. 2005) (holding that content-based restrictions on expressive conduct must satisfy "strict scrutiny" standard, meaning government must "demonstrate that the restriction is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."); Reed v. Town of Gilbert, 135 S. Ct. 2218, 2228 (2015) ("Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny.").

[89] Turner Broadcasting System Inc. v. FCC, 512 U.S. 622, 624 (1994) ("Under *O'Brien*, a content-neutral regulation will be sustained if it furthers an important governmental interest that is unrelated to the suppression of free expression and the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

[90] Brief for Petitioner, *supra* note 3, at 38 (noting that in text message communications, "Carter had been instrumental in bringing Conrad to the point where he was parked in the K-Mart lot filling his truck with carbon monoxide. She had reasoned him out of each of his grounds for postponing suicide, mocked him for his repeated delays, and pushed him to put his plan in motion. She also assisted

Narrowly tailored regulations are ones that leave open adequate additional avenues to express the same idea or content.[91] They also are not overbroad, as will be discussed in the following section.[92] Here, the Massachusetts supreme court failed to consider any other avenues to express Carter's ideas. Moreover, prosecution of Carter for her speech may chill other speakers who may discuss or encourage suicide. This may be a facially desirable goal that squares with the states' compelling interest in preventing suicide; however, it runs afoul of the Supreme Court's jurisprudence.[93] Even morally abhorrent acts may be discussed freely, absent an applicable speech exception. The line between protected speech and unprotected speech that is integral to a crime may at times be difficult to draw, but the First Amendment requires that this line drawing be done mindful of the Constitution.[94]

E. Vagueness and Overbreadth

The Supreme Court has held that held that a statute is void for vagueness when "the language of the ordinance leaves the person of ordinary intelligence having to guess at its meaning."[95] For example, in *Coates v. Cincinnati*, the Court invalidated an ordinance for vagueness that prohibited more than three persons from assembling and engaging in "annoying conduct on public property."[96] The Court opined that conduct that may be annoying to some may not be annoying to others.[97] Therefore, the statutory language left enough

him in planning the logistics of his suicide, knowing that he intended to die thereby.").

[91] Holder v. Humanitarian Law Project, 130 S.Ct. 2705, 2710 (2010) (holding that the material-support provision of 18 U.S.C. § 2339B does not violate the First Amendment because "the statute does not prohibit independent advocacy or other expression of any kind. Plaintiffs are free to say what they want about the PKK and LTTE. They are also free to become members of the organizations. Congress has not sought to suppress ideas or opinions. Rather, it has prohibited "material support" which often does not take the form of speech at all." In other words, the Plaintiffs were free to express their ideas in other ways that did not constitute "material support." Sufficient other avenues were still left open for their expression).

[92] *See infra* Section E.

[93] *See R.A.V.*, 505 U.S. at 402.

[94] Volokh, *supra* note 49, at 1130–32.

[95] Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).

[96] *Id.* at 615.

[97] *Id.*

ambiguity in the conduct required to violate its provisions that a person of ordinary intelligence would have to guess at what conduct an officer would consider annoying.[98]

In *Schad v. Borough of Mount Ephraim*, the Supreme Court held that a law is impermissibly overbroad if a less restrictive intrusion on protected speech is available.[99] For example, in *Schad*, the Court held that when the Borough of Mount Ephraim prohibited all forms of commercial live entertainment within a particular area, the ordinance ran afoul of the First Amendment.[100] Schad, an owner of an adult bookstore, installed coin-operated devices allowing customers to watch live nude dancing.[101] He sued when the Borough of Mount Ephraim claimed his coin operated machines violated commercial zoning laws against live entertainment.[102]

The Court found that the justifications for the broad prohibition—the harmful effects associated with live entertainment, such as parking and trash—ran afoul of the First Amendment because: (1) live nude dancing was protected by the First Amendment; and (2) no evidence was presented to the Court suggesting that live entertainment produces any more harmful effects than permitted commercial uses.[103] The Court admitted that it was possible that certain types of live entertainment could uniquely produce harmful effects; however, the broad prohibition on all forms of live entertainment overstepped the bounds of the First Amendment.[104] Further, the Court held that Mount Ephraim failed to meet its burden of showing that a less-restrictive regulation would not have satisfied its interests.[105] Finally, in *Coates,* the Supreme Court held that when a statute unduly infringes upon a

[98] *Id.*
[99] Schad v. Borough of Mount Ephraim, 452 U.S. 61, 62 (1981); *see also* Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 569 (1987) (holding that a resolution expressly prohibiting all First Amendment activities violates the overbreadth doctrine and is unconstitutional on its face if it is not subject to a judicially limiting construction).
[100] *Schad*, 452 U.S. at 62.
[101] *Id.*
[102] *Id.* at 63.
[103] *Id.* at 62, 73.
[104] *Id.* at 71.
[105] *Id.* at 74.

protected right, like freedom of assembly, that statute may be overbroad and unconstitutional.[106]

As stated above, there is no statutory definition for involuntary manslaughter in Massachusetts.[107] Instead, the common law states that involuntary manslaughter is "an unlawful homicide unintentionally caused by an act which constitutes such a disregard of probable harmful consequences to another as to amount to wanton or reckless conduct."[108] The vagueness doctrine is concerned with ambiguities in applications of the statute.[109] In other words, the same conduct should, theoretically, have the same consequences under a particular statute and be easily understood as such.[110]

Here, applying the Massachusetts involuntary manslaughter statute to Michelle Carter's text messages to Conrad Roy is vague and overbroad. Carter was prosecuted because of her content-based speech; therefore, a greater degree of specificity in conduct is required of the involuntary manslaughter statute.[111] Massachusetts has never before prosecuted a person for involuntary manslaughter for the text messages that they sent to a person who killed themselves.[112] Such novelty is not necessarily grounds for unconstitutional vagueness;

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[106] Coates v. City of Cincinnati, 402 U.S. 611, 615–16 (1971) (holding that an ordinance that prohibits more than three persons from assembling and engaging in annoying conduct on public property is unconstitutionally vague and impermissibly infringes upon the constitutional right to free assembly).

[107] *See* Commonwealth v. Life Care Centers of America, Inc., 926 N.E.2d 206, 211 (Mass. 2010).

[108] *Id.* (quoting Commonwealth v. Gonzalez, 824 N.E.2d 843, 852 (Mass. 2005))).

[109] Commonwealth v. Abramms, 849 N.E.2d 867, 873 (Mass. App. Ct. 2006) ("[T]he vagueness doctrine also prohibits such imprecision as might give rise to arbitrary enforcement of laws.").

[110] Commonwealth v. Pagan, 834 N.E.2d 240, 250 (Mass. 2005) ("The concept of the vagueness in the due process context is based in part on the principle that a penal statute should provide comprehensible standards that limit prosecutorial and judicial discretion.").

[111] *Abramms*, 849 N.E.2d at 873 ("An additional principle to be noted is that '[w]here a statute's literal scope . . . is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts.'" (quoting Smith v. Goguen, 415 U.S. 566, 573 (1974))).

[112] Brief for Defendant, *supra* note 46, at 29–30 ("The Commonwealth is alleging an unprecedented claim that by encouraging Roy to commit suicide she, a juvenile, committed the crime of involuntary manslaughter. As stated previously, the actual manslaughter statute is silent on this type of conduct."); Commonwealth. v. Carter, 52 N.E.3d 1054, 1061–62 (Mass. 2016).

however, because the criminal statute did not provide explicit language criminalizing the encouragement of someone to commit suicide via text messages or words alone, the statute is unconstitutionally vague.

In its brief, the State of Massachusetts rebutted the claim of vagueness by analogizing Carter's behavior to that of the defendant in *Persampieri*.[113] Yet, as discussed above,[114] the behavior of the defendant in *Persampieri* is distinguishable from that of Carter. Carter was not physically present when Roy killed himself, and the defendant in *Persampieri* loaded the weapon while noting that the safety was off before taunting his wife.[115] Further, the State argued that the common law statute was not vague because Carter lied about her involvement with police and sent an incriminating message to a friend claiming that if the police saw her texts with Roy she would go to jail.[116]

Carter's attorneys countered this claim with the salient point that since Massachusetts has no direct law prohibiting suicide, or even assisted suicide, to prosecute Carter for essentially "encouraging" Roy's suicide is complicated by the lack of exact statutory language prohibiting the behavior.[117] Continuing this line of logic, Carter's attorneys opined that even if the Court believed the statute was not vague, they could not simply retroactively change the meaning of the common law for involuntary manslaughter to fit the facts in any given

[113] *Carter*, 52 N.E.3d at 1060 n.11 (citing Persampieri v. Commonwealth, 175 N.E.2d 387, 390 (Mass. 1961)).
[114] *See supra* Section II.A.
[115] *Id.*
[116] Brief for Petitioner, *supra* note 3, at 48 ("Moreover, Carter was aware that her conduct was prohibited: She lied to police about her conversations with Conrad [R.334]; asked him to delete her texts [R. 403]; and told Samantha that if the police discovered the texts, she could go to jail [R.287]"); *Carter*, 52 N.E.3d at 1059.
[117] Brief for Defendant, *supra* note 46, at 30 ("At the present time, there is no criminal statute in Massachusetts specifically prohibiting suicide or even assisting or encouraging suicide. Despite the legislature's decision not to enact such a law, the Commonwealth decided to charge Carter with an even more serious crime: a form of homicide. Given that the manslaughter statute, nor any proscribed law in the Commonwealth, do not provide a sufficiently explicit warning to someone of ordinary intelligence - let alone a juvenile - in the defendant's position that encouraging suicide is prosecutable under existing law, G.L. c. 265, § 13 is hopelessly confusing and vague as applied to Carter and has led to an arbitrary enforcement of this law by the Commonwealth.").

case.[118] On appeal, the issue of vagueness is likely to be brought up and settled, and those who wish a robust and full First Amendment will look toward the Court for a favorable ruling declaring the statute vague as applied to the facts presented here.

Additionally, the common law statute is overbroad because it may prohibit speech that the Massachusetts legislature cannot criminalize.[119] This principle comes into sharper focus when again considering the fact that suicide, and even assisted suicide, is not statutorily prohibited in Massachusetts.[120] Despite this striking incongruity, the State of Massachusetts went one step further and prosecuted Michele Carter not for assisted suicide, but instead for the much more serious offense of involuntary manslaughter, which is a form of homicide.[121] To the extent that the court interprets the involuntary manslaughter statute to embrace her speech and that of others, the statute is unconstitutionally overbroad. It is also, for the reasons supplied above, unconstitutional as applied to Carter.

Again, Carter's prosecution rested on the content of her text messages and, as such, the First Amendment is implicated. The State claimed, and the court agreed, it had a compelling interest in deterring speech that has a direct, causal link to a specific victim's suicide.[122] However, this fails to consider the possible overbreadth of the statute when it comes to other protected speech.

For example, assume that a high school student texts a classmate, "I hope you kill yourself" in reference to a schoolyard quarrel. Subsequently, the recipient of that message actually goes home and kills himself. Is the sender of that message now the "direct causal link"

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[118] *Id.* at 30–31 (citing Commonwealth v. Quincy Q., 434 Mass. 859, 864–66 (2001); Commonwealth v. Hampton, 831 N.E.2d 341, 346 (Mass. App. Ct. 2005); Schriro v. Summerlin, 542 U.S. 348, 352–54 (2004)) ("Finally, should this Court conclude that the doctrine of lenity does not apply where involuntary manslaughter is a common law crime and is not specifically defined in the language of the statute, the principle behind the rule most certainly does apply. That is, a criminal offense may not be redefined retroactively in a manner that makes conduct criminal that was not so before.").

[119] Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 66 (1981).

[120] Brief for Defendant, *supra* note 46, at 30.

[121] *Id.*

[122] Commonwealth v. Carter, 52 N.E.3d 1054, 1064 n.17 (Mass. 2016) ("The speech at issue in this case is not protected under the First Amendment to the United States Constitution or art. 16 of the Massachusetts Declaration of Rights because the Commonwealth has a compelling interest in deterring speech that has a direct, causal link to a specific victim's suicide.").

to that person's suicide? According to the Massachusetts supreme court, the answer would be yes. This sets a dangerous precedent for those who wish for a protected and robust First Amendment.

Imagine the same scenario, but the text instead reads, "You're a jerk and nobody likes you." The recipient of the text now goes home and kills himself because he is suffering from depression, unbeknownst to the sender of the message or anyone else. Where the person in the first scenario may have more culpability because of the directness of the command "I hope you kill yourself," does the second person share the same responsibility? What if the person who sent the message was not aware that the person who received it was depressed? What if the text message was sent to the wrong number? Under the ruling in the Michelle Carter case, these distinctions would not matter. Or, at the very least, there would be an argument that both messages could have been the direct, causal link to a specific victim's suicide. This is exactly the kind of disparate impact that the vagueness and overbreadth doctrines attempt to avoid.

F. Public Forum

Content-based speech restrictions in public fora that have been historically and traditionally open to the public can only survive constitutional analysis if they pass strict scrutiny.[123] The Supreme Court's jurisprudence holds that parks and sidewalks are traditionally protected public fora.[124] Since the advent of the digital age, the Supreme Court has also held that the government may not regulate the transmission and display of content on the internet unless it does so for a compelling purpose and uses means that are narrowly tailored to that purpose—in other words: unless it meets strict scrutiny.[125]

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[123] *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."); *see also* Schneider v. New Jersey, 308 U.S. 147, 165 (1939) (holding that although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion).

[124] *Id.*

[125] Reno v. ACLU, 521 U.S. 844, 869–70 (1997).

According to the Pew Research Center, as of 2017, upward of 95% of Americans own cellphones.[126] The ubiquitous nature of the cell phone raises the question: are text messages and cell phones a space that should now be considered a quintessential public forum allotted the highest First Amendment protections? Smartphones connect to the internet, to which the Supreme Court has awarded the highest First Amendment protections.[127] Additionally, 77% of Americans owned smartphones as of January 10, 2018.[128] Given the urban nature of the 21st century, it seems doubtful that 77% of Americans have access to parks. In fact, many people get their news, have social interactions, and pursue romantic endeavors on the internet via the use of their smartphones.[129] This public forum of social media and the internet is also not age discriminate (much like sidewalks and parks) and almost anyone can access the internet or create a social media presence (although most social media sites do claim to want users at least over the age of thirteen).[130]

If the Court were to decide that cell phones, particularly with their ability to access the internet, were now a quintessential public forum, then cases like that of Carter would be further complicated. As mentioned above, the Massachusetts supreme court identified its compelling interest in deterring speech that has a direct, causal link to a specific victim's suicide.[131] However, if the Court had to satisfy strict scrutiny for all content regulation of cell phones, it would need to do so in a narrowly tailored fashion that did not infringe upon other

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[126] *Mobile Fact Sheet*, PEW RESEARCH CENTER (Feb. 5, 2018), http://www.pew internet.org/fact-sheet/mobile/ [https://perma.cc/TT9E-ZEH7].
[127] *Reno*, 521 U.S. at 863.
[128] *Mobile Fact Sheet, supra* note 126.
[129] *Social Media Fact Sheet*, PEW RESEARCH CENTER (Feb. 5, 2018), http://www.pewinternet.org/fact-sheet/social-media/ [https://perma.cc/DT5B-FF TF] ("Today around seven-in-ten Americans use social media to connect with one another, engage with news content, share information and entertain themselves.").
[130] Facebook, LinkedIn, Pinterest, and Twitter are accessible to users under the age of 18 in the United States. *See Terms of Service*, FACEBOOK, (April 19, 2018), https://www.facebook.com/terms.php [https://perma.cc/3NNC-PE4P] (minimum age 13); *User Agreement*, LINKEDIN (May 8, 2018), https://www.linkedin.com/ legal/user-agreement [https://perma.cc/3PQW-AC3C] (minimum age 16); *Terms of Service*, PINTEREST (May 1, 2018), https://policy.pinterest.com/en/terms-of-service [https://perma.cc/X567-7KGF] (minimum age 13); *Twitter Privacy Policy*, TWITTER (May 25, 2018), https://twitter.com/en/privacy [https://perma.cc/3Z8U-MU2F] (minimum age 13).
[131] Commonwealth v. Carter, 52 N.E.3d 1054, 1064 n. 17 (Mass. 2016).

protected speech.[132] In other words, cell phones would receive the same constitutional protections as the internet. This may be an equitable move considering the pervasive nature of the cell phone in 2018. This could create statutory drafting issues, however, because the kind of speech that fits into the compelling interest mentioned by the State in Carter's case would have to be quite narrow. Jokes, petty cruelty, and online trolling could be criminalized unintentionally, leading to a clogging of the courts and, perhaps, frivolous prosecutions.

Moreover, any legislation granting constitutional protections to cell phone usage must consider the balancing test employed in *Sable Communications of California, Inc. v. FCC*.[133] In *Sable*, a federal regulation banned obscene interstate commercial telephone messages, commonly known as "dial-a-porn."[134] The court reasoned that "[the] ban on indecent telephone messages violates the First Amendment since the statute's denial of adult access to such messages far exceeds that which is necessary to serve the compelling interest of preventing minors from being exposed to the messages."[135] Under this test, the ban on constitutionally protected text messages, if the Court allowed the public forum analogy, would almost certainly be considered to violate the First Amendment because it would chill associations with anyone who was discussing suicide over the cell phone.

A conceivable, and possibly fatal, flaw in this argument is that public fora are meant, within the context of the marketplace of ideas, to reach the ears of passersby or the public at large. Here, there is no indication that Carter's text messages were intended for anyone other than Roy. As such, declaring cell phones "public fora" for constitutional analysis dealing with the First Amendment may abridge the fundamental privacy rights of those who choose to communicate

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[132] *See* Schneider v. New Jersey, 308 U.S. 147, 164–65 (1939) (invalidating an ordinance that read, "No person except as in this ordinance provided shall canvass, solicit, distribute circulars, or other matter, or call from house to house in the Town of Irvington without first having reported to and received a written permit from the Chief of Police or the officer in charge of Police Headquarters." The Court held that prohibiting all handbills, unless first obtaining a license, was offensive to First Amendment Principals because, "To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees.").

[133] *See generally* Sable Commc'n of Cal., Inc. v. FCC, 492 U.S. 115 (1989).

[134] *See id.* at 120–23.

[135] *Id.* at 116.

on the digital platform. Again, there was no indication that Carter intended her communication to be "public" in any way. Despite this flaw, the prevalence of hand-held technology, coupled with the Supreme Court's jurisprudence dealing with free speech and the internet, makes the proposition of constitutional protections for cell phones not so outlandish.

IV. BEYOND CELLPHONES AND THE INCITEMENT OF SUICIDE OF ANOTHER

In 2016, two teen suicides in the United States were linked to something called the "Blue Whale Challenge."[136] This challenge is another example of a person inducing someone to commit suicide with words alone; yet, this time the speech occurred over the internet.[137] First, a 16-year-old girl from Georgia named "Nadia" (her family wished to keep her anonymous according to reports) committed suicide while participating in the challenge, and second, a fifteen-year-old boy from Texas named Isaiah Gonzalez hanged himself at the conclusion of his Blue Whale Challenge.[138]

To participate in the "Blue Whale Challenge" a person must first find a "curator" on one of several social media sites.[139] This curator is located when the "player" sends out messages via social media sites like Twitter and Instagram that trigger a curator's interest.[140] Once the curator has contacted the player, a series of challenges are dispensed over a fifty-day period.[141] These challenges consist of varying degrees of self-harm, and photographic evidence is then privately messaged to

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[136] Jaide Timm-Garcia & Kaylee Hartung, *Family Finds Clues to Teen's Suicide in Blue Whale Paintings*, CNN (July 17, 2017, 5:50 AM), http://www.cnn.com/2017/07/17/health/blue-whale-suicide-game/ [https://perma.cc/8XQL-X6TR].

[137] *Id.*

[138] *Id.*; *see also* Amber Ferguson & Kyle Swenson, *Texas Family Says Teen Killed Himself in Macabre 'Blue Whale' Online Challenge that's Alarming Schools*, WASH. POST (July 11, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/07/11/texas-family-says-teen-killed-himself-in-macabre-blue-whale-online-challenge-thats-alarming-schools/?utm_term=.2b3f62f13ca9 [https://perma.cc/XN9K-J293].

[139] Timm-Garica & Hartung, *supra* note 136.

[140] Ferguson & Swenson, *supra* note 138 ("People who are interested throw out postings on social media — Twitter and Instagram, for example — asking for a 'curator.' A number of different hashtags— #bluewhalechallenge, #curatorfindme, #i_am_whale — act like homing signals for the anonymous curators.")

[141] *Id.*

the curator as proof of the daily task's completion.[142] Finally, the player is tasked with killing themselves on the fiftieth day of the challenge.[143] All of the communication takes place online, where the player and the curator have an anonymous relationship, never interact face to face, and the player is usually unaware who the curator is or where they are located.[144]

While some officials in the United States have dealt with the internet death challenge with a certain degree of skepticism, internationally, there has been an outcry against it, culminating in the prosecution of Philip Budeikin, a Russian citizen.[145] Budeiken was arrested in St. Petersburg and charged for "incitement to suicide" after it was found that fifteen young women killed themselves during a Blue Whale-type death group that he curated.[146] All of the young women were under the age of eighteen and described as having been encouraged and incentivized to commit suicide.[147] Budeiken pleaded guilty to incitement to suicide and is awaiting sentencing.[148] Much like Michelle Carter, Budeiken communicated with a person who was susceptible to mental pressure, and through words alone successfully urged them to kill themselves.[149]

The Blue Whale Challenge continued in Russia after Budeiken's arrest with a staggering 130 reported cases of suicide linked to the online challenge.[150] The death challenge has occurred across the globe, from parts of central Asia, Europe, South America, and the United States.[151] With its arrival in the United States, a new question arises: "if there is a curator in the United States linked to another's suicide, can he be prosecuted without running afoul of the First

[142] *Id.* ("Some tasks reportedly include waking up at a certain hour to watch a scary movie or listen to music provided by the curator. Others include self-cutting. The final day's task is suicide.").
[143] *Id.*
[144] Timm-Garcia & Hartung, *supra* note 136.
[145] *Id.* ("While authorities investigate whether there are curators who directly communicate with teens or whether the game is simply internet folklore."); *see also* Kirill Chulkov, *Budeikin Pleaded Guilty to Creating "Death Groups" in the VKontakte Network*, RIA NOVISTI (May 11, 2017, 4:14 PM), https://ria.ru/incidents/20170511/1494079056.html [https://perma.cc/64XA-27P3].
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] Timm-Garcia & Hartung, *supra* note 136.
[151] *Id.*

Amendment, as all of his communication occurred over the internet?" The outcome in the Michelle Carter case seems to indicate that prosecution would be possible; however, the internet seems to be entitled to stronger First Amendment Protection than the speech at issue in the Michell Carter case.[152]

More recently, another "challenge" surfaced that, while not as malicious in nature, could pose just as great a risk to the health and safety of teenagers. The "Tide Pod Challenge" is a viral internet challenge that encourages teens to attempt eating Tide detergent "pods."[153] Pictures and videos of teens participating in the challenge surfed on almost all major social media platforms.[154] While this challenge has not led to any deaths, several cases of children being hospitalized due to portions of the detergent pods being ingested during the challenge have been reported.[155]

Conceivable prosecution arising from the Tide Pod Challenge raises fundamental First Amendment questions as well. If someone dies while participating, is there anyone who can be held criminally responsible? While the issue here is not speech *per se*, the images certainly convey a meaning and could be described as expressive conduct, and as such might be entitled to First Amendment protections.[156] In other words, if a person was induced or led to participate in the challenge after watching someone else participate in

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[152] *See* Reno v. ACLU, 521 U.S. 844, 874 (1997) ("We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.").

[153] Alex Abad-Santos, *Why People are (Mostly) Joking About Eating Tide Pods,* VOX (Jan. 19, 2018, 12:15 PM), https://www.vox.com/2018/1/4/16841674/tide-pods-eating-meme-tide-pod-challenge [https://perma.cc/3MAT-KXEU].

[154] *Id.*

[155] Rebekah L. Sanders, *2 Phoenix-Area Teens Poisoned by Laundry-Detergent Pods,* AZCENTRAL (Jan. 18, 2018) https://www.azcentral.com/story/news/local/arizona/2018/01/18/two-phoenix-area-teens-poisoned-after-eating-tide-pods-laundry-detergent-challenge-youtube/1045446001/ [https://perma.cc/TVA4-CEDW] ("Two Phoenix-area teenagers were sickened by eating laundry-detergent pods last week as part of a social-media craze that has caused a spike in poisonings across the nation. . .").

[156] R.A.V. v. City of St. Paul, 505 U.S. 377, 413 (1992) (White, J., concurring); Mendoza v. Licensing Bd. of Fall River, 827 N.E.2d 180, 188 n. 12 (2005).

a video online, could the original person who posted that video be criminally liable if the second person died during the challenge? Again, the Carter decision seems to suggest an avenue of prosecution might be available, but substantial constitutional considerations would make proving criminal liability considerably difficult.

V. CONCLUSION

Massachusetts prosecuted Michelle Carter for the text messages that she sent her mentally ill and unstable boyfriend. It is clear why society would want to deter behavior that pushes vulnerable persons who are considering suicide into the realm of concrete irreversible actions. The Massachusetts supreme court erred on the side of caution when it declared that the government interest in preserving human life was all that was needed to silence a First Amendment Challenge to Carter's indictment.

This article argued that the court improperly failed to justify the Carter conviction through the lens of strict scrutiny. A robust First Amendment demands that content-specific regulations of otherwise protected speech be narrowly tailored to fit a compelling state interest. The standard is not simply that such a compelling interest exist. The precedent that this case creates is dangerous and detrimental to the advancement of a free and focused First Amendment.

Further, Carter's behavior, while morally suspect, fell within none of the traditionally unprotected categories of speech. Her messages neither rose to the level of incitement; fighting words; or true threats, nor were they speech integral to the commission of a crime. Moreover, the Massachusetts common law statute for involuntary manslaughter is open to constitutional attack on vagueness and overbreadth grounds. By any calculus, the Massachusetts supreme court arrived at the wrong decision in the Carter case.

The Massachusetts opinion leaves open the possibility of further prosecutions for the content of text messages. This is a frightening proposition in the tech-heavy world of the twenty-first century. Despite an understandable, societal desire for accountability for speech via texts that contribute to physical or emotional harm to others, the proper government response cannot be to elide the First Amendment.