
STICKS AND STONES MAY BREAK YOUR BONES, BUT WORDS
CAN ALSO KILL: LIMITING CRIMINAL LIABILITY FOR WORDS

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In June 2016, Michelle Carter was tried and convicted of involuntary manslaughter in a Massachusetts juvenile court for the death of her eighteen-year-old boyfriend, Conrad Roy III. Carter’s involvement in the suicidal death constituted discussions with Roy on how to carry out the act, contemporaneous text messages encouraging Roy to carry out the suicide attempt, and the failure to contact his family or authorities. This Note focuses on the legal effects of Carter’s involuntary manslaughter conviction. It highlights the First Amendment free speech implications that result from Carter’s words being construed as an “overt act” for the purpose of an involuntary manslaughter prosecution. Additionally, it examines and analyzes how the current state of Massachusetts’s criminal law allows for a conviction of a defendant such as Carter. Finally, it recommends that the Massachusetts legislature take steps in legislating “assisted suicide.”

TABLE OF CONTENTS

I.	INTRODUCTION.....	1742
II.	BACKGROUND	1744
	A. Prosecutorial Approach.....	1746
	B. Defense Approach.....	1747
	C. The Verdict.....	1747
	D. Sentencing.....	1748
	E. Appeal	1749
	1. First Amendment.....	1749
	B. Suicide Cases	1752
	1. Causation Issues in Suicide Cases.....	1752
	2. Suicide Cases in Massachusetts Courts.....	1753
	a. Commonwealth v. Atencio.....	1754
	b. Persampieri v. Commonwealth	1755

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III. ANALYSIS.....	1756
A. <i>Affirmative Act</i>	1758
B. <i>Failure to Act Under a Duty</i>	1759
C. <i>Break in the Causal Chain</i>	1761
IV. RECOMMENDATION.....	1763
A. <i>Legislating Assisted Suicide</i>	1763
B. <i>Common Law Considerations</i>	1763
1. <i>“Presence” Requirement</i>	1764
2. <i>Knowledge Requirement</i>	1765
3. <i>Intent Requirement</i>	1767
V. CONCLUSION	1768

I. INTRODUCTION

“He got out of the car because it was working and he got scared and I f—g told him to get back in.”¹ This was the incriminating text message sent by seventeen-year-old Michelle Carter that led to her conviction for involuntary manslaughter for her boyfriend’s suicide.² Conrad Roy III took his own life on July 12, 2014.³ Carter was later charged with and convicted of involuntary manslaughter for her role in Roy’s death.⁴ Carter was sentenced to two and a half years in prison as a result of her communications with Roy on the eve, and day, of his death.⁵ Carter’s conviction sparked a firestorm of criticism surrounding criminal culpability in cases where words are the supposed “weapon.”⁶

Massachusetts prosecutors pursued Carter’s case under a charge of involuntary manslaughter.⁷ Massachusetts, unlike many other states, does not have a

1. Ray Sanchez & Natisha Lance, *Girlfriend in Texting Suicide Trial Sent Me Chilling Message, Friend Says*, CNN (June 8, 2017, 11:20 AM), <http://www.cnn.com/2017/06/07/us/texting-suicide-massachusetts-trial/index.html>.

2. *Id.*

3. Erin Moriarty, *Death by Text: The Case Against Michelle Carter*, CBS NEWS (Feb. 11, 2019), <https://www.cbsnews.com/news/michelle-carter-conrad-roy-death-by-text-suicide-trial/>.

4. *Id.*

5. Jesse Barron, *The Girl from Plainville*, ESQUIRE (Aug. 23, 2017), <http://www.esquire.com/news-politics/a57125/michelle-carter-trial/>; Emily Shapiro & Doug Lantz, *Michelle Carter Sentenced to 2.5 Years for Texting Suicide Case*, ABC NEWS (Aug. 3, 2017, 3:20 PM), <http://abcnews.go.com/US/michelle-carter-set-sentenced-texting-suicide-case/story?id=48947807>.

6. See Danny Cevallos, *Texting Suicide Trial Reveals Legal Shades of Gray*, CNN (June 8, 2017, 8:02 PM), <http://www.cnn.com/2017/06/08/opinions/massachusetts-manslaughter-opinion-cevallos/index.html>; Elie Mystal, *Being a Bitch Is Now a Criminal Offense, Apparently; Teen Convicted of Texting Someone to Death*, ABOVE THE LAW (June 16, 2017, 4:14 PM), <http://abovethelaw.com/2017/06/being-a-bitch-is-now-a-criminal-offense-apparently/>; Robby Soave, *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>.

7. Jan Ransom, *New Texts Show Michelle Carter Was Aggressive in Pushing Suicide*, BOS. GLOBE, (June 8, 2017), <https://www.bostonglobe.com/metro/2017/06/08/trial-woman-accused-texting-friend-into-killing-himself-set-resume/sGNOjUNZAd8BzKhC7UTsGN/story.html>.

specific statute for assisted suicide as it pertains to manslaughter.⁸ While various other states have statutes that criminalize the act of convincing someone to commit suicide, Massachusetts does not.⁹ Therefore, prosecutors developed a controversial case in which they argued that mere words were enough to charge Carter for involuntary manslaughter.¹⁰ The Massachusetts prosecutors successfully convinced Judge Moniz, the presiding judge in the high-profile bench trial, that Michelle Carter's words were enough to constitute a "willful act" as required for an involuntary manslaughter conviction under Massachusetts common law.¹¹ Carter's verdict raised a number of concerns among the legal community.¹² In particular, the verdict raised concerns regarding the decision's implications on one's right to freedom of speech as guaranteed under the First Amendment of the United States Constitution.¹³

This Note addresses the relevant First Amendment concerns regarding free speech that arose out of the conviction of Michelle Carter. In Part II, the Note provides background on the relevant facts of Carter's case and evaluates the role Carter played in the suicide of Conrad Roy. Next, Part II addresses the prosecutorial decision to pursue Carter under Massachusetts's common law charge of involuntary manslaughter. Additionally, it overviews the First Amendment right to free speech, as well as the prior history of suicide cases in the state of Massachusetts.

Part III then examines the trial judge's guilty verdict and considers the possible effects of the decision on existing legal precedent. First, it examines Judge Moniz's classification of speech as an "over act" for the purpose of an involuntary manslaughter conviction. Additionally, Part III analyzes whether Carter created a duty to act and examines the causation concerns that suicide cases raise. This Note argues that Michelle Carter was properly convicted of involuntary manslaughter. This Note also asserts, however, that the pursuit of involuntary manslaughter convictions for suicide cases solely involving words as the "overt act" should be narrowly construed to facts that are similar to those in Michelle Carter's case in order to avoid implicating free speech violations.

Part IV recommends a path for Massachusetts to take moving forward in order to address many of the concerns raised by Carter's case. Overall, it recommends that Massachusetts take steps toward legislating the issue of assisted sui-

8. AJ Willingham, *The 5 Reasons for the Verdict in the Michelle Carter Trial*, CNN (June 16, 2017, 5:51 PM), <http://www.cnn.com/2017/06/16/us/michelle-carter-guilty-involuntary-manslaughter-texting-suicide-trnd/index.html>.

9. Soave, *supra* note 6.

10. Ransom, *supra* note 7.

11. *See, e.g., Commonwealth v. Life Care Ctrs. of Am., Inc.*, 926 N.E. 2d 206, 211 (Mass. 2010) ("Involuntary manslaughter is 'an unlawful homicide unintentionally caused by an act which constitutes such a disregard of probable harmful consequences to another s to amount to wanton or reckless conduct.' Wanton or reckless conduct generally involves a wilful act that is undertaken in disregard of the probably harm to others that may result." (citation omitted)).

12. *See* Dina Roth Port, *Where Do You Stand? Lawyers Weigh in on the Michelle Carter Suicide Case*, ROCKET MATTER (June 23, 2017), <https://www.rocketmatter.com/in-the-news/michelle-carter-suicide-case/>.

13. *See* Cevallos, *supra* note 6; Mystal, *supra* note 6.

cide. As Massachusetts continues in the realm of common law, this Note recommends an approach moving forward that would limit convictions in similar cases—in which speech is considered to be the “overt act”—to only the most extreme and egregious cases. It recommends that in order for words alone to constitute an “overt act” for the purpose of a common law charge of involuntary manslaughter, a purpose requirement, knowledge requirement, and intent requirement should have to be met in order to convict the individual. Part V then concludes this Note.

II. BACKGROUND

Though living just thirty-five miles apart from one another in Massachusetts, Michelle Carter and Conrad Roy III met in 2012 while visiting relatives in Florida.¹⁴ Despite having lived in such close proximity to one another, their relationship mostly existed virtually, consisting primarily of phone calls and text messages.¹⁵ Conversations among Roy and Carter took a turn in the summer of 2014 as Roy began sharing suicidal thoughts with Carter.¹⁶ At first, Carter listened to Roy express his desire to commit suicide and provided emotional support.¹⁷ In October 2012, Roy was hospitalized after he attempted to overdose on prescription drugs.¹⁸ Following Roy’s hospitalization, in a text exchange over Facebook on October 10, 2012, Carter wrote in one message, “you [have] so much to live for please [don’t].”¹⁹ In another, “[p]lease answer me Conrad [I] want to help you.”²⁰

Carter’s support shifted in 2014, however, from discouraging Roy’s suicide attempts to encouraging his suicide attempts.²¹ Carter’s involvement extended beyond just reinforcement of Roy’s suicidal thoughts but also turned into helping Roy carry out the act.²² This included advising Roy on potential locations, times, and manners of death for him to consider.²³

Carter: Yeah, it will work. If you emit 3200 ppm of it for five or ten minutes you will die within a half hour. You lose consciousness with no pain. You

14. Jason Le Miere, *Who Is Michelle Carter? Verdict Reached in Texting Suicide Trial Involving Death of Conrad Roy III*, NEWSWEEK (June 16, 2017, 11:19 AM), <http://www.newsweek.com/michelle-carter-verdict-conrad-roy-626649>.

15. *Id.*

16. Barron, *supra* note 5.

17. *Id.*

18. Nik DeCosta-Klipa, *Read the Facebook Messages Between Michelle Carter and Conrad Roy After His First Suicide Attempt*, BOSTON (June 12, 2017), <https://www.boston.com/news/local-news/2017/06/12/read-the-facebook-messages-between-michelle-carter-and-conrad-roy-after-his-first-suicide-attempt>.

19. *Id.*

20. *Id.*

21. See Nik DeCosta-Klipa, *Read the Text Messages at the Heart of the Michelle Carter Trial*, BOSTON (June 5, 2017), <https://www.boston.com/news/local-news/2017/06/05/read-the-messages-at-the-heart-of-the-michelle-carter-suicide-by-text-manslaughter-trial>, for exact text messages sent between Michelle Carter and Conrad Roy III. See also Paul LeBlanc, *The Text Messages that Led Up to Teen’s Suicide*, CNN (June 16, 2017, 1:29 PM), <http://www.cnn.com/2017/06/08/us/text-message-suicide-michelle-carter-conrad-roy/index.html>.

22. See DeCosta-Klipa, *supra* note 21.

23. *Id.*

just fall asleep and die. You can also just take a hose and run that from the exhaust pipe to the rear window in your car and seal it with duct tape and shirts, so it can't escape. You will die within, like, 20 or 30 minutes all pain free.²⁴

On July 12, 2014, Conrad Roy III, just eighteen-years-old, drove to the K-Mart parking lot in Fairhaven, Massachusetts.²⁵ Roy then used a water pump to emit carbon monoxide gas into the cab of his truck while he remained inside.²⁶ Roy's body was found the next day inside his truck.²⁷ After police concluded their investigation into Roy's death, Michelle Carter, then seventeen-years-old, was charged with involuntary manslaughter in March 2015.²⁸

News of the indictment of Michelle Carter lit a firestorm of criticism and debate among legal experts and analysts.²⁹ Most notably, critics took major issue with the fact that Michelle Carter was not physically present at the time that Roy took his life.³⁰ Regardless, prosecutors moved forward with pursuing the charges against Michelle Carter.³¹

In June 2016, Michelle Carter, then twenty-years-old, was tried for involuntary manslaughter in Bristol County, Massachusetts Juvenile Court.³² Although forty other states have "assisted suicide statutes," Massachusetts does not have a statute governing aiding or assisting suicide; rather, it is governed under Massachusetts common law.³³ Thus, prosecutors pursued a controversial case against Carter under the charge of involuntary manslaughter.³⁴ "[I]nvoluntary manslaughter includes an unlawful homicide unintentionally caused by wanton and reckless conduct."³⁵ According to Massachusetts law, proof of recklessness requires "more than a mistake of judgement or even gross negligence,"³⁶ and has

24. *Id.*

25. *Id.*

26. Veronika Bondarenko, *How Michelle Carter Urging Her Boyfriend to Kill Himself Over Hundreds of Texts Led to an Involuntary-Manslaughter Verdict*, BUS. INSIDER (June 16, 2017, 4:01 PM), <http://www.businessinsider.com/michelle-carter-conrad-roy-texts-suicide-involuntary-manslaughter-2017-6/#on-june-16-a-massachusetts-judge-found-that-carter-was-guilty-of-involuntary-manslaughter-for-sending-texts-that-encouraged-a-young-man-that-she-had-called-her-boyfriend-to-kill-himself-1>.

27. *Id.*

28. *Id.*

29. See Cevallos, *supra* note 6; Mystal, *supra* note 6; Port, *supra* note 12.

30. Joyce Chen, *Michelle Carter Will Appeal Suicide Texting Case Conviction*, ROLLING STONE (Sept. 1, 2017, 4:21 PM) <http://www.rollingstone.com/culture/news/michelle-carter-will-appeal-suicide-texting-case-conviction-w500764> ("This is a very unique and, despite the court's findings, novel issue involving speech alone, without presence – without physical presence[.]").

31. Moriarty, *supra* note 3.

32. Katharine Q. Seelye & Jess Bidgood, *Guilty Verdict for Young Woman Who Urged Friend to Kill Himself*, N.Y. TIMES (June 16, 2017), https://www.nytimes.com/2017/06/16/us/suicide-texting-trial-michelle-carter-conrad-roy.html?_r=0.

33. Stephanie Slifer, *Is It a Crime to "Encourage Suicide"?; Teens' Texts Under Scrutiny*, CBS NEWS (Mar. 3, 2015, 6:00 AM) <https://www.cbsnews.com/news/is-it-a-crime-to-encourage-suicide-unusual-massachusetts-case-of-conrad-roy-and-michelle-carter/>.

34. Ransom, *supra* note 7.

35. Commonwealth v. Catalina, 556 N.E.2d 973, 976, 979 (Mass. 1990).

36. Commonwealth v. Michaud, 451 N.E.2d 396, 400 (Mass. 1983).

been defined as “intentional conduct . . . involv[ing] a high degree of likelihood that substantial harm will result to another.”³⁷

Judge Lawrence Moniz presided over the near two-week bench trial.³⁸ The trial consisted of thousands of text messages sent between Carter to Roy as well as conversations between Carter and her close friends.³⁹ Though the case largely involved uncontested facts, the prosecution and defense presented incredibly different interpretations of these facts at trial.⁴⁰

A. *Prosecutorial Approach*

Prosecutors carried out the theme that Carter was insecure and desperate for attention.⁴¹ Prosecutor Katie Rayburn highlighted that Carter “wanted to bask in the pity and attention she would receive playing the part of the ‘grieving girlfriend.’”⁴² Rayburn’s closing arguments spent a considerable amount of time focusing on some of the final moments before Roy’s death.⁴³ She emphasized that the evidence, in the form of text messages that Conrad had sent to a friend, clearly demonstrated that Carter’s involvement went too far.⁴⁴ Rayburn continued to focus on the fact that Carter was on the phone with Roy while the act was underway.⁴⁵ Not only did Carter fail to notify any authorities of Roy’s suicide attempt at that time, but she guaranteed that Roy would go through with the act.⁴⁶ A text that Carter sent to a friend read:

His death is my fault. Like, honestly I could have stopped it. I was the one on the phone with him and he got out of the car because [it] was working and he got scared and I f[—]en told him to get back in . . . because I knew that he would do it all over again the next day and I couldn’t have him live the way he was living anymore.⁴⁷

Prosecutor Rayburn capitalized on this text message and largely made it a focus of the case.⁴⁸ She emphasized in her closing arguments that it was that very moment that “paint[s] a picture not only of Carter’s cruelty and disregard for Roy’s

37. *Commonwealth v. Welansky*, 55 N.E.2d 902, 910 (Mass. 1944).

38. Deborah Becker, *Mass. Justices Hear Appeal in Texting Suicide Conviction*, WBUR NEWS (Oct. 4, 2018), <https://www.wbur.org/news/2018/10/04/michelle-carter-suicide-text-case-sjc>.

39. Jaclyn Reiss & Jan Ransom, *How the Testimony Unfolded on the First Day of the Texting Suicide Case*, BOS. GLOBE (June 7, 2017), <https://www.bostonglobe.com/metro/2017/06/06/how-testimony-unfolded-first-day-texting-suicide-case/YeIFSnLft0BPhSgrKiYtDI/story.html>; Seelye & Bidgood, *supra* note 32.

40. Isaiah Thompson, *Same Facts, Different Stories in Carter Text-Suicide Closings*, WGBH NEWS (June 13, 2017), <http://news.wgbh.org/2017/06/13/local-news/same-facts-different-stories-carter-text-suicide-closings>.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. DeCosta-Klipa, *supra* note 21.

48. Thompson, *supra* note 40.

life, but as the intentional outcome of a plan of monstrous selfishness Carter had hatched.”⁴⁹

B. Defense Approach

Michelle Carter’s defense team, however, used many of the prosecutions own arguments to highlight the issues that existed within the prosecution’s case.⁵⁰ The defense stressed the importance of looking at the moments leading up to Roy’s death.⁵¹ Carter’s attorney, Joseph Cataldo, highlighted how the prosecution had characterized Carter as a liar throughout the trial.⁵² Because of this, defense called into question whether the events of that evening, which Carter described afterward in a text to a friend, really happened.⁵³ The defense attempted to cast doubt on whether Carter even spoke to Roy on the phone and encouraged him to get back in the truck.⁵⁴ In addition to playing off the notion that Carter’s tendency to lie calls into question the validity of her statements about her involvement in Roy’s death, defense counsel also emphasized Roy’s personal autonomy throughout the events of that night.⁵⁵ Cataldo argued that,

Conrad apparently knew [the hose] was working, and yet chose to get back in, but because he was ‘scared’ or ‘afraid,’ [prosecutors] want to basically replace that word that somehow therefore, after that, by going back in the car, that wasn’t his own decisions that he didn’t have the free, voluntary ability to stay.⁵⁶

Carter’s defense counsel argued prosecutors failed to prove beyond a reasonable doubt that Roy would still be alive but for Carter’s communications with Roy that night.⁵⁷ The defense emphasized this point throughout the trial by providing evidence that Roy had a history of suicide attempts and mental illness.⁵⁸

C. The Verdict

After nearly two weeks of hearing the cases presented by both parties, Judge Lawrence Moniz of Bristol County Juvenile Court rendered a decision on June 16, 2017.⁵⁹ In a dramatic delivery to a packed courtroom, in which he provided his rationale behind the verdict, Judge Moniz found Michelle Carter guilty of involuntary manslaughter for the death of Conrad Roy III.⁶⁰ Judge Moniz, like the attorneys trying the case, also focused on Carter’s instruction for Roy to get

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. Seelye & Bidgood, *supra* note 32.

59. *Id.*

60. *Id.*

back into his car.⁶¹ While Judge Moniz acknowledged that Roy had played an active role in carrying out his death, Carter was culpable for instructing him to get back in the vehicle.⁶² Judge Moniz found that “[Conrad Roy] breaks that chain of self-causation by exiting the vehicle. He takes himself out of that toxic environment that it has become.”⁶³ Judge Moniz believed that Roy exiting the vehicle was an indication that he had decided not to follow through with the act and, rather, to save himself.⁶⁴ Carter, with full knowledge of Roy’s “ambiguities, his fear, [and] his concerns” still instructed him to get back in the truck.⁶⁵ Additionally, Judge Moniz found that by ordering Roy back into the truck, Carter became responsible for placing Roy in a position of danger.⁶⁶ By placing Roy in a position of danger, Carter created for herself a duty to help.⁶⁷ The judge acknowledged that Carter took no steps to call the police, contact Roy’s family, or even simply instruct him to get out of the truck.⁶⁸ Ultimately, “[the] court [found] that instructing Mr. Roy to get back in the truck constituted wanton and reckless conduct.”⁶⁹

D. Sentencing

On August 3, 2017, Carter returned to the Bristol County Juvenile Court for sentencing, where she faced a maximum sentence of twenty years in prison.⁷⁰ In a sentence issued by the same judge that presided over Carter’s trial, she ultimately received two and a half years in Massachusetts jail.⁷¹ During Carter’s sentencing, however, her attorneys hinted at a possible appeal.⁷²

In late August 2017, Carter’s attorney Joseph Caltado filed a notice to appeal on the grounds that Massachusetts does not have an assisted suicide statute and the basis of the trial judge’s verdict violates Carter’s First Amendment right of freedom of speech.⁷³ The notice to appeal is a procedural move that officially signals to the court the defense intends to file an appeal.⁷⁴ Caltado stated that “[t]his is a very unique and, despite the court’s findings, novel issue involving speech alone, without presence—without physical presence. I suggest this is a

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. Barron, *supra* note 5; Shapiro & Lantz, *supra* note 5.

71. Shapiro & Lantz, *supra* note 5.

72. Chen, *supra* note 30.

73. Danny McDonald, *Michelle Carter’s Attorney Files Notice to Appeal Her Conviction*, BOS. GLOBE (Sept. 1, 2017), <https://www.bostonglobe.com/metro/2017/08/31/michelle-carter-attorney-files-notice-appeal-her-conviction/DdjdV4RZSHCWzhYIEB8fP/story.html>.

74. *Id.*

very important legal issue that needs to be pursued in the appellate court.”⁷⁵ Carter remained free pending her appeal.⁷⁶

E. Appeal

After filing the notice of appeal in late August 2017, Carter’s attorneys filed for direct appellate review by the Supreme Judicial Court of Massachusetts on February 5, 2018.⁷⁷ Direct appellate review by the Supreme Judicial Court of Massachusetts may be granted,

provided the questions presented by the appeal are: (1) questions of first impression or novel questions of law which should be submitted for final determination to the Supreme Judicial Court; (2) questions of law concerning the Constitution of the Commonwealth or questions concerning the Constitution of the United States which have been raised in a court of the Commonwealth; or (3) questions of such public interest that justice requires a final determination by the full Supreme Judicial Court.⁷⁸

Carter’s attorneys argued in their filing that being convicted on “words alone” violates Carter’s right to free speech.⁷⁹ Carter’s attorneys also made the argument that “[d]irect appellate review is appropriate in this matter because . . . this appeal presents novel questions of constitutional law and criminal law.”⁸⁰ The filing continues by arguing, “Carter is the first defendant to have been convicted of killing a person who took his own life, even though neither provided the fatal means nor was present when the suicide occurred.”⁸¹

On October 4, 2018, the case went before Massachusetts’s highest court for oral arguments.⁸² Carter’s attorneys argued that there is no precedent in Massachusetts that would allow for Carter to be convicted of involuntary manslaughter solely based on the use of words.⁸³ Prosecutors, however, argued that the case involved coercion and that Carter should be held criminally responsible.⁸⁴

1. First Amendment

Michelle Carter’s defense attorney’s argument on appeal was that the judge’s ruling violates Carter’s First Amendment rights because it infringes upon

75. Chen, *supra* note 30.

76. Shapiro & Lantz, *supra* note 5.

77. Joyce Chen, *After Convicted for Texts in Boyfriend’s Suicide Case, Michelle Carter Files Appeal*, ROLLING STONE (Mar. 5, 2018, 7:07 PM), <https://www.rollingstone.com/culture/news/michelle-carter-appeals-conviction-texts-boyfriend-suicide-w517483>.

78. MASS. R. APP. P. 11(a).

79. Chen, *supra* note 77.

80. *Id.*

81. *Id.*

82. Maria Cramer, *In Michelle Carter Appeal, High Court Considers Whether Encouraging Suicide Amounts to Manslaughter*, BOS. GLOBE (Oct. 4, 2018), <https://www.bostonglobe.com/metro/2018/10/04/state-highest-court-hear-appeal-michelle-carter-case-today/jkjaR4SzLuHMr86MvIR6ZJ/story.html>.

83. *Id.*

84. *Id.*

her right to freedom of speech.⁸⁵ The right to free speech is briefly explored below.

The right to free speech is a core American value that has found itself at the heart of litigation throughout the course of United States history.⁸⁶ Historically, the First Amendment has largely been understood to establish a broad understanding of protected speech.⁸⁷ As a result, speech that may be deemed morally reprehensible by some is nonetheless protected under the First Amendment of the United States Constitution.⁸⁸

For example, in August 2017, the American Civil Liberties Union (“ACLU”), which often considers itself a champion of free speech rights, successfully came to the defense of white supremacists in Charlottesville, Virginia.⁸⁹ When the city of Charlottesville attempted to revoke a permit granted to the group Unite the Right when they sought to protest the removal of a statue of Confederate General Robert E. Lee, the ACLU stepped in. The ACLU represented Jason Kessler, the organizer of the Unite the Right rally in Charlottesville, in order to retain their permit.⁹⁰ They did so successfully, and Unite the Right was ultimately able to carry out their controversial rally that gained national media attention.⁹¹

ACLU executive director, Anthony Romero, defended their representation of Kessler by stating, “Racism and bigotry will not be eradicated if we merely force them underground. Equality and justice will only be achieved if society looks such bigotry squarely in the eyes and renounces it.”⁹²

The criticism of the ACLU’s defense of the Unite the Right organization only intensified as it became clear Unite the Right provided a platform for groups such as the neo-Nazis and the Ku Klux Klan.⁹³ Even more so, the ACLU came under further fire when violence broke out between the protestors and counter-protesters present at the rally, which ultimately resulted in the death of counter-protester Heather Heyer.⁹⁴ Romero was then forced to speak out on the ACLU’s behalf, as people blamed the ACLU for defending the organization and allowing

85. Chen, *supra* note 30; *see also* 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.”).

86. *See generally* Brandenburg v. Ohio, 395 U.S. 444 (1969); Near v. Minnesota, 283 U.S. 697 (1931); Whitney v. California, 274 U. S. 357, 372–80 (1927) (Brandeis, J., concurring); Schenck v. United States, 249 U.S. 47 (1919).

87. *What Does Free Speech Mean?*, U.S. CTS., <http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does> (last visited Aug. 22, 2019).

88. *See* Joan Biskupic, *ACLU Takes Heat for its Free-Speech Defense of White Supremacist Group*, CNN (Aug. 17, 2017, 5:28 AM), <http://www.cnn.com/2017/08/16/politics/aclu-free-speech-white-supremacy/index.html> (highlighting the American Civil Liberties Union involvement in assuring first amendment rights protected speech of white supremacist protestors in Charlottesville, Virginia).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

the protests to occur.⁹⁵ He insisted that, “The violence of [the] weekend was not caused by our defense of the First Amendment.”⁹⁶

The ACLU’s role in protecting free speech of the Unite the Right organization is not a one-off occurrence.⁹⁷ Historically, the ACLU has represented groups such as the Nazis, Ku Klux Klan, and other notorious groups in order to ensure that their free speech rights are not infringed upon.⁹⁸ The type of bigoted speech permitted to be displayed in Charlottesville shocked many Americans.⁹⁹ But, the event demonstrates the true power of our First Amendment protection on free speech. The First Amendment casts broad protection over most types of speech. In only rare instances do we allow that right to be infringed upon by the government.

Though the type of communication that falls within protected speech has been understood by the courts to be highly expansive, courts have found instances to impose limitations on individuals’ right to free speech.¹⁰⁰ For example, “shouting fire in a crowded theater” has become a commonly used metaphor taken from an opinion drafted by Justice Holmes to represent the notion that reckless speech, especially that which would incite panic, is not protected by the First Amendment.¹⁰¹ In this famous case, Justice Holmes proposes that “[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”¹⁰² This notion is fascinating to grapple with when considered in the context of the violent protests sparked by the speech that occurred in Charlottesville, Virginia. Despite the protests resulting in the death of a peaceful protester, at the time the ACLU was advocating on behalf of Unite the Right it would likely be impossible to argue that there existed a clear and present danger. This further demonstrates the expansive range of speech protected by the First Amendment. Limitations, however, do still exist. Therefore, while freedom of speech under the First Amendment is generally interpreted as an extremely broad right, it is subject to limitations in circumstances of extreme speech that results in tremendously disturbing outcomes.¹⁰³

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. For example, students in school settings are often not afforded the same freedoms of speech. *See Morse v. Frederick*, 551 U.S. 393, 410 (2007) (holding that educators are permitted to suppress student speech involving the promotion of illicit drug use that is displayed on or across the street from a school); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 276 (1988) (holding that schools are permitted to practice prior restraint for articles published in a school newspaper); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986) (holding that a student’s suspension for giving a speech at an assembly that included sexual innuendos does not violate the First Amendment).

101. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

102. *Id.*

103. *See, e.g., id.*

B. *Suicide Cases*

In addition to arguing that Carter's conviction violated her constitutional right to free speech, her attorneys made the argument for direct appeal by emphasizing that her case is one of first impression.¹⁰⁴ Carter's attorneys argued that "Carter is the first defendant to have been convicted of killing a person who took his own life, even though she neither provided the fatal means nor was present when the suicide occurred."¹⁰⁵ He also argued that "[n]othing in the Massachusetts law made clear to 17-year-old Carter, or anyone else, that such circumstances could constitute involuntary manslaughter."¹⁰⁶ Criminal liability for suicide cases and its application in Massachusetts is discussed below.

1. *Causation Issues in Suicide Cases*

Much of the controversy surrounding Michelle Carter's conviction inherently came from the fact that Conrad Roy died via suicide.¹⁰⁷ For legal scholars, this raises concerns about the causal relationship between the words Carter exchanged with Roy through text messages and Roy's decision to carry out his suicide attempt.¹⁰⁸

Many states have statutes that subject their citizens to criminal liability if they are found to assist in another individual's suicide.¹⁰⁹ These statutes were largely enacted in a response to issues of physician assisted suicide.¹¹⁰ In Massachusetts, physician assisted suicide, like all cases of assisted suicide, is pursued under Massachusetts common law.¹¹¹ The application of the common law charge of manslaughter in Massachusetts to individuals who assist suicide through the use of technology is a rather recent phenomenon and has not been fully fleshed out by either the Massachusetts's courts or legislature.¹¹²

Suicide is often viewed by the law and commentators as "something that one person does to him or herself, independently choosing to carry out an act of self-destruction."¹¹³ A charge of involuntary manslaughter requires the element

104. Chen, *supra* note 77.

105. *Id.*

106. *Id.*

107. See generally Nicholas LaPalme, *Michelle Carter and the Curious Case of Causation: How to Respond to a Newly Emerging Class of Suicide-Related Proceedings*, 98 B. U. L. Rev. 1443 (2018).

108. *Id.*; Sherry F. Colb, *When Should Encouraging Suicide Be a Crime?*, JUSTIA (July 5, 2017), <https://verdict.justia.com/2017/07/05/encouraging-suicide-crime>.

109. Ashley B. Chin, *Suicide by Text: The Case of Michelle Carter*, 21 J. TECH. L. POL'Y 99, 102 (2017).

110. *Id.*

111. *States with Legal Physician-Assisted Suicide*, PROCON.ORG, <https://euthanasia.procon.org/view.resource.php?resourceID=000132> (last updated July 25, 2019).

112. Chin, *supra* note 109, at 102.

113. Colb, *supra* note 108.

of causation.¹¹⁴ A defendant must have caused the outcome in order to be convicted of involuntary manslaughter.¹¹⁵ Massachusetts common law requires two prongs of causation to be satisfied for conviction: actual cause and proximate cause.¹¹⁶

Actual cause in Massachusetts uses the “but-for” causation standard—but for the conduct of the defendant, the harm would not have occurred.¹¹⁷ But-for causation can become complicated in cases of suicide in which the deceased has a history of depression or other mental health issues.¹¹⁸ Determining that the death would not have occurred if it were not for the defendant’s conduct becomes more difficult.¹¹⁹ For example, in cases such as Roy’s where he had a history of mental health issues and previous suicide attempts, it is tough to definitively say that Roy would not have otherwise chosen to take his life at a later time without the involvement of Carter.

Proximate cause “is a cause, which, in the natural and continuous sequence, produces the death, and without which the death would not have occurred.”¹²⁰ Due to our general understanding that humans are autonomous beings, courts often conclude that third-party causation in circumstances of suicide are rare, due to the inability to establish proximate cause.¹²¹ An individual’s own decision to commit suicide often qualifies as an intervening act.¹²² An intervening act breaks the natural and continuous sequence necessary to establish proximate cause and therefore relieves any third-party individuals from criminal liability.¹²³ “If another person encourages the suicide or otherwise tries to persuade an individual that he should kill himself, those verbal acts are arguably superseded by the decision of the individual to carry out his own suicide.”¹²⁴

2. *Suicide Cases in Massachusetts Courts*

Carter’s case, “is not, however, the first time [Massachusetts has] contemplated the charge of involuntary manslaughter against a defendant where the death of the victim is self-inflicted.”¹²⁵ Massachusetts courts have grappled with

114. See generally *Commonwealth v. Life Care Ctrs. of America, Inc.*, 926 N.E.2d 206, 211 (Mass. 2010). “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.’” *Id.* at 211 (citing *Commonwealth v. Gonzalez*, 824 N.E.2d 843 (Mass. 2005) (emphasis added)).

115. *Id.*

116. *Commonwealth v. Rhoades*, 401 N.E.2d 342, 351 (Mass. 1980).

117. *Commonwealth v. Kerrigan*, No. 10-339, 2011 WL 311012, at *4 (Mass. Super. 2011).

118. LaPalme, *supra* note 107, at 1450–54.

119. *Id.*

120. *Rhoades*, 401 N.E.2d at 351.

121. See, e.g., *Johnstone v. City of Albuquerque*, 145 P.3d 76, 83 (N.M. Ct. App. 2006) (“Suicide is generally regarded as an intervening cause.”); *White v. Lawrence*, 975 S.W.2d 525, 530 (Tenn. 1998).

122. *Johnstone*, 145 P.3d at 84.

123. *Id.*

124. Colb, *supra* note 108.

125. See *Commonwealth v. Carter*, 52 N.E.3d 1054, 1062 (Mass. 2016).

criminal liability in cases of suicide in two notable cases, *Commonwealth v. Atencio*¹²⁶ and *Persampieri v. Commonwealth*.¹²⁷

a. *Commonwealth v. Atencio*

In 1963, in *Commonwealth v. Atencio*, the court was faced with the issue of a young boy who unintentionally took his life in the presence of two of his friends.¹²⁸ In the case, three young men, Atencio, Marshall, and the deceased, made the decision to play a game of “Russian roulette.”¹²⁹ The game involves placing one cartridge in a revolver and spinning the cylinder so that the participants are unaware of when the cartridge will fire.¹³⁰ Marshall, the individual who retrieved the gun, took the gun first, pointed it to his own head, pulled the trigger, and nothing happened.¹³¹ The gun was then passed to Atencio, who followed suit—pointing the gun at his own head, pulling the trigger, and nothing happening.¹³² The gun was then passed to the deceased, who followed suit, pulling the trigger, but this time the cartridge exploded, resulting in his death.¹³³

The court held that the defendants’ participation in a game of “Russian roulette” validated the charge of involuntary manslaughter, even though the defendants were not responsible for pulling the trigger of the gun.¹³⁴ The court found that the defendants’ participation in the game constituted a “mutual encouragement in a joint enterprise.”¹³⁵ According to the court, although the defendants attempted to argue that the game consisted of a series of autonomous choices made by each of its players, “[t]he defendants were much more than merely present at a crime. It would not be necessary that the defendants force the deceased to play or suggest that he play.”¹³⁶ The Massachusetts court held that third parties may be held criminally liable for a crime involving self-inflicted wounds.¹³⁷ According to the court, “[T]he Commonwealth had an interest that the deceased should not be killed by the wanton or reckless conduct of himself and others.”¹³⁸

126. *Commonwealth v. Atencio*, 189 N.E.2d 223 (Mass. 1963).

127. *Persampieri v. Commonwealth*, 175 N.E.2d 387 (Mass. 1961). Massachusetts also found itself in the news headlines following the suicide of fifteen-year-old Phoebe Prince. See Kayla Webley, *Teens Who Admitted to Bullying Phoebe Prince Sentenced*, TIME (May 5, 2011), <http://newsfeed.time.com/2011/05/05/teens-who-admitted-to-bullying-phoebe-prince-sentenced/>. Five teenagers were sentenced to probation and community service following a “three month campaign” of bullying that ended in Prince committing suicide. *Id.* The five teens struck a plea deal with the prosecution, ultimately reducing their numerous felony charges—not including manslaughter—down to a misdemeanor charge of criminal harassment. *Id.*

128. *Atencio*, 189 N.E.2d at 224.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 225.

136. *Id.*

137. *Id.*

138. *Id.* at 224.

This case, however, differs in significant ways from Michelle Carter's. In *Atencio*, both defendants were physically present with the victim when he died.¹³⁹ Carter, however, was miles away from Roy as he carried out his suicide attempt. Additionally, though it is not indicated in the record who in fact contrived the idea to play the game, it is established that Marshall, one of the defendants, went to retrieve the gun in order to play the game.¹⁴⁰ Therefore, unlike Carter, it can be argued that physical assistance was also provided to the victim which helped to facilitate his death. These distinctions contribute to the argument that Carter's case is one of first impression. The differences in the facts of both cases leave room for intense debate over whether criminal liability in Carter's case should be attached based on Massachusetts's case law.

b. *Persampieri v. Commonwealth*

Commonwealth v. Atencio was not the first time that Massachusetts courts were forced to grapple with instances in which defendants were being charged for injuries that were self-inflicted by the victim. Massachusetts considered criminal liability in a more traditional suicide case just two years before *Commonwealth v. Atencio* in *Persampieri v. Commonwealth*.¹⁴¹ The court held that the husband of a woman who committed suicide was properly charged with manslaughter after his wife threatened to commit suicide and then successfully carried it out.¹⁴² The deceased's husband challenged her that she would not go through with the suicide, encouraged her to get a gun, and then loaded that gun for her.¹⁴³ The court found that the husband's actions were "conduct [that] could be found to be wanton or reckless."¹⁴⁴ According to the facts the court found that,

[t]he petitioner's wife was emotionally disturbed, she had been drinking, and she had threatened to kill herself. The petitioner, instead of trying to bring her 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.¹⁴⁵

Just as in *Atencio*, *Persampieri* differs significantly from the facts set forth in Michelle Carter's case. Although the defendant in *Persampieri* did not pull the trigger of the gun, criminal liability still attached under the theory of wanton and reckless conduct.¹⁴⁶ This is the same theory that the prosecution pursued against

139. *Id.* at 225.

140. *Id.* at 225.

141. *Persampieri v. Commonwealth*, 175 N.E.2d 387, 388 (Mass. 1961).

142. *Id.* at 390.

143. *Id.* at 389.

144. *Id.* at 390.

145. *Id.*

146. *Id.*

Michelle Carter fifty-six years later.¹⁴⁷ Persampieri, unlike Carter, was physically present when his wife took her life.¹⁴⁸ Additionally, much like *Atencio*, the defendant also retrieved the weapon that was used to ultimately inflict the harm on the deceased.¹⁴⁹ This differs from Carter, in that she did not physically supply Roy with the tools used to carry out his suicide—he obtained those items on his own.¹⁵⁰

Because Carter's case is factually different from the previous cases of involuntary manslaughter convictions in suicide cases, it is essential to understand how the Judge Moniz in Carter's case rationalized a guilty verdict on the theory of involuntary manslaughter developed under Massachusetts common law.

III. ANALYSIS

Attaching criminal liability to cases in which a victim takes his or her own life and where the sole "overt act" of the defendant is the use of words creates cause for concern, particularly among the legal community.¹⁵¹ Such cases pose serious concerns regarding an individual's right to freedom of speech under the First Amendment of the United States Constitution.¹⁵²

Classifying words as a weapon in such a way that exposes individuals to criminal liability, when that is the only action the defendant took against the victim, could open the door to potentially dangerous legal precedent.¹⁵³ This concern is legitimate. There is a fear that without a clear line that indicates when words can be deemed an "overt act," individuals could be exposed to criminal liability, in violation of the First Amendment, for a death carried out by the victim himself with very little involvement from the defendant.

Freedom of speech is a deeply rooted value held within the United States.¹⁵⁴ The implications on free speech must be seriously considered when drawing the line for when words can cross over into an "overt act." Legal analysts, for example, fear that cases such as Carter's will encourage prosecutors to continue to move the line so that more and more types of speech may be subject to criminal liability.¹⁵⁵

While it is important to note that Carter's case only establishes legal precedent in Massachusetts, it is still possible that the case could inspire creative prosecutions across the United States. Prosecutors have an incredible amount of

147. *Id.*; see Shapiro & Lantz, *supra* note 5.

148. *Persampieri*, 175 N.E.2d at 389; Shapiro & Lantz, *supra* note 5.

149. *Commonwealth v. Atencio*, 189 N.E.2d 223, 224 (Mass. 1963); *Persampieri*, 175 N.E.2d at 389.

150. Shapiro & Lantz, *supra* note 5.

151. See, e.g., Kevin Daley, *First Amendment Experts Dubious of Carter Conviction*, THE DAILY CALLER (June 18, 2017, 2:03 PM), <http://dailycaller.com/2017/06/18/first-amendment-experts-dubious-of-carter-conviction/>.

152. See U.S. CONST. amend. I.

153. Chen, *supra* note 77.

154. Melanie Eversley, *Girlfriend Suicide Texting Case Sets Wrong Precedent Legal Experts Say*, USA Today (Aug. 3, 2017, 9:09 PM), <https://www.usatoday.com/story/news/2017/08/03/michelle-carter-texting-suicide-case-sets-bad-precedent-experts-say/538794001/>.

155. *Id.*

discretion when it comes to how they prosecute a case.¹⁵⁶ This includes how to interpret certain actions in light of various criminal charges.¹⁵⁷ Cases like Carter's could potentially encourage prosecutors to look creatively at the law within their states and find ways to reach cases that exclusively involve speech.¹⁵⁸ Due to the wide reaching possibility of a groundbreaking case like Michelle Carter's, it is important to address the concerns that a decision like this creates—particularly in regard to issues of free speech.

The Commonwealth of Massachusetts, unlike nearly forty other states in the United States, does not have a statute making it a crime to engage in “coercing or encouraging suicide.”¹⁵⁹ Because Massachusetts does not have a formal statute criminalizing the assisting or aiding suicide, prosecutors in this case proceeded under Massachusetts's common law standards governing involuntary manslaughter.¹⁶⁰

The crime of involuntary manslaughter cannot be found in Massachusetts's criminal statutes. Rather, the elements of involuntary manslaughter have been derived from the common law of the state and developed through case law.¹⁶¹ Massachusetts common law defines involuntary manslaughter as

an unlawful homicide, unintentionally caused (1) in the commission of an unlawful act, *malum in se*, not amounting to a felony nor likely to endanger life . . . or (2) by an act which constitutes such a disregard of probable harmful consequences to another as to constitute wanton or reckless conduct.¹⁶²

At trial, Michelle Carter was found guilty of involuntary manslaughter in Massachusetts on the basis that her conduct satisfied the second element of involuntary manslaughter—“wanton and reckless conduct.”¹⁶³ Massachusetts courts have interpreted “wanton or reckless conduct” to mean “intentional conduct, by way either of commission or of omission where there is a duty to act, which conduct involves a high degree of likelihood that substantial harm will result to another.”¹⁶⁴ Typically, for the purpose of an involuntary manslaughter conviction, wanton or reckless conduct requires an affirmative act.¹⁶⁵

156. Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 369, 369 (2010) (“In a world of scarcity, prosecutors are the key gatekeepers who ration criminal justice.”).

157. *Id.* at 370.

158. *Id.* at 374.

159. Ray Sanchez et al., *Woman Sentenced to 15 Months in Texting Suicide Case*, CNN (Aug. 3, 2017, 5:38 PM), <http://www.cnn.com/2017/08/03/us/michelle-carter-texting-suicide-sentencing/index.html>.

160. *Id.*

161. *See, e.g.*, *Commonwealth v. Levesque*, 766 N.E.2d 50, 53 (Mass. 2002); *Commonwealth v. Campbell*, 226 N.E.2d 211, 219 (Mass. 1967); *Commonwealth v. Pease*, 731 N.E.2d 92, 94–95 (Mass. App. Ct. 2000).

162. *Pease*, 731 N.E.2d at 94 (emphasis added).

163. Seelye & Bidgood, *supra* note 32.

164. *Commonwealth v. Welansky*, 55 N.E.2d 902, 910 (Mass. 1944).

165. *Involuntary Manslaughter—Wanton and Reckless Conduct*, MASS. PRAC. SERIES §7:157 (2018).

It is possible under the common law that an omission, in which a defendant had a duty to act but failed to do so, may form the basis for an involuntary manslaughter conviction.¹⁶⁶ Therefore, for Michelle Carter to have been properly convicted of involuntary manslaughter, she must have either (1) committed intentional conduct in the form of an affirmative act, or (2) be found to have failed to act when under the duty to do so, which ultimately resulted in a high degree of harm to another individual.¹⁶⁷

A. *Affirmative Act*

Prior to trial, Carter's attorneys challenged the indictment on two grounds: (1) Carter should not have been charged as a "youthful offender," and (2) evidence provided at the indictment did not point to any criminal act as to warrant probable cause for arrest.¹⁶⁸ In arguments regarding these matters before the Massachusetts Supreme Judicial Court, Carter's defense counsel argued that Carter's speech cannot fall under the first type of wanton or reckless conduct requiring an affirmative act because her speech never "crossed the line from protected speech into an affirmative criminal act."¹⁶⁹

Massachusetts has no clear standard for what elements must be satisfied in order for speech to cross the line to become an affirmative act.¹⁷⁰ Strong proponents of the First Amendment's free speech protections would argue that speech alone should never be sufficient to constitute an affirmative act in order to establish criminal liability.¹⁷¹ Cases such as Carter's, in which the speech carried out by the defendant seems universally reprehensible, challenge the notion that speech should *never* be criminalized.

The Massachusetts Supreme Judicial Court held that the grand jurors could reasonably find that Michelle Carter engaged in an affirmative act that resulted in the death of her boyfriend Conrad Roy.¹⁷² According to the Massachusetts Supreme Judicial Court, "physical acts are certainly one means by which the Commonwealth can show the commission prong of involuntary manslaughter. However, the defendant does not point to—and our research has not uncovered—any case in which physical acts have been made a prerequisite of involuntary manslaughter."¹⁷³ The idea that a physical act is not required for an involuntary

166. *See* Levesque, 766 N.E.2d at 58 (holding that two homeless people, occupying space in a deserted warehouse, had a duty to act when they tipped over a candle and started a fire that resulted in the deaths of six firefighters, and defendants failure to attempt to extinguish or report the fire was deemed intentional and reckless to satisfy an involuntary manslaughter conviction).

167. *See generally* Levesque, 766 N.E.2d at 58; Welansky, 55 N.E.2d at 910.

168. Daniel S. Medwed, *Murder, She Texted? Michelle Carter, Manslaughter, and Assisted Suicide*, WGBH NEWS (Apr. 26, 2016), <http://news.wgbh.org/2016/04/26/local-news/murder-she-texted-michelle-carter-manslaughter-and-assisted-suicide>.

169. *Id.*

170. *Id.*

171. *See id.*

172. Commonwealth v. Carter, 52 N.E.3d 1054, 1064–65 (Mass. 2016).

173. *Id.* at 1061 n.14.

manslaughter conviction challenges the traditional notions of what “acts” could qualify as causing an individual’s death.

According to the ruling handed down by the Massachusetts Supreme Judicial Court, it could be possible to find that words alone can be deemed the affirmative act or the “weapon” that caused a person’s death, even though the harm was self-inflicted.¹⁷⁴ Thus, the Massachusetts Supreme Judicial Court, before the case went to trial, indicated that Carter’s words, though she was not physically present at the time of Roy’s death, could conceivably constitute an affirmative act for the purpose of an involuntary manslaughter conviction, thus eliminating this potential theory for the defense.¹⁷⁵

The Massachusetts Supreme Judicial Court did acknowledge, however, that while it is not their first time reviewing an involuntary manslaughter charge where the defendant is charged for the self-inflicted death of the victim, this is a case of first impression for the Court where a defendant is charged for involuntary manslaughter on the basis of words alone.¹⁷⁶ It is this fact that has caused great concern for defenders of the First Amendment’s free speech clause.¹⁷⁷

In previous Massachusetts cases, in which defendants provided the actual weapon and were physically present as the events transpired, the role the words played in bringing about the death appear to carry less weight.¹⁷⁸ In a case such as Carter’s, where only words are at play, it becomes a significant concern for those who are greatly concerned with the impact on free speech. If words alone can be “weaponized” under the law, free speech is seen to be under attack.

B. *Failure to Act Under a Duty*

In addition to arguing Michelle Carter engaged in wanton and reckless conduct that caused the death of Conrad Roy, the prosecution pursued an involuntary manslaughter conviction under the theory of failure to act.¹⁷⁹ The elements of involuntary manslaughter based on a failure to act include:

1. It was a special relationship between the defendant and the victim that gave rise to a duty of care, or the defendant created a situation that posed a grave risk of death or serious injury to another;
2. [t]he defendant’s failure to act caused the victim’s death;
3. [t]he defendant intentionally failed to act;
4. [t]he defendant’s failure to act was wanton and reckless.¹⁸⁰

174. *Michelle Carter: What the Texting Suicide Case Tells Us*, BBC (June 17, 2017), <http://www.bbc.com/news/world-us-canada-40307210>.

175. *Carter*, 52 N.E.3d at 1061–62.

176. *Id.*

177. *See Michelle Carter: What the Texting Suicide Case Tells Us*, *supra* note 174.

178. *See generally* Commonwealth v. Atencio, 189 N.E.2d 223 (Mass. 1963); *Persampieri v Commonwealth*, 175 N.E.2d 387 (Mass. 1961).

179. Commonwealth’s Response to Defendant’s Motion to Dismiss at 24, *Commonwealth v. Carter* (New Bedford Juv. Ct. Aug. 21, 2015) (No. 15YO0001NE) [<https://perma.cc/P6F3-U64D>]. Because Carter’s case is in juvenile court, many of the documents in *Commonwealth v. Carter* are not available online.

180. Memorandum of Decision and Order on Defendant’s Motion to Dismiss Indictment at 3, *Commonwealth v. Carter* (New Bedford Juv. Ct. Sept. 22, 2015) (No. 15YO0001NE).

Judge Moniz found Carter's case satisfied all of the necessary elements for an involuntary manslaughter conviction based upon a failure to act, thus holding her liable for involuntary manslaughter under this theory.¹⁸¹

When Judge Moniz announced his verdict and provided an explanation to the court, he cited a state case from 2001, *Commonwealth v. Levesque*.¹⁸² He quoted from *Levesque* stating that "[i]t is indicated that where one's actions create a life-threatening risk to another, there is a duty to take reasonable steps to alleviate the risk. The reckless failure to fulfill this duty can result in a charge of manslaughter."¹⁸³ Judge Moniz related this directly to Carter's case, expressing "[s]he [admitted] in a subsequent text that she did nothing" while she was aware that Roy was dying.¹⁸⁴ Additionally, Judge Moniz focused on the fact that Carter ordered Roy back into the truck after removing himself from the toxic environment.¹⁸⁵ At that moment, Judge Moniz argues, Carter becomes the definitive cause of Roy's danger, and thus has a self-imposed duty to act.¹⁸⁶

Judge Moniz suggests it may not even have been required that Carter contact the authorities, or a member of Carter's family, to report that Roy was in the process of committing suicide. Judge Moniz stated, "[s]he did not issue a simple additional instruction: Get out of the truck."¹⁸⁷ The court found Carter easily could have alerted authorities or Roy's family in these circumstances.¹⁸⁸ Text messages between Carter and Roy indicate she knew exactly where Roy was physically located throughout the suicide process, therefore making it possible for her to direct either authorities or his family to that location for help.¹⁸⁹ Additionally, just days prior to the suicide, Carter asked Roy for the phone numbers of Roy's mother and sister.¹⁹⁰ This indicated to Judge Moniz that Carter not only had knowledge Roy was in peril, but also had easily accessible means to obtain help for him.¹⁹¹ Carter had an "open line of communication" with Roy's family that would have permitted her to easily get him help.¹⁹² Instead, according to Judge Moniz, "she called no one."¹⁹³ Ultimately, the presiding judge found Carter had an established duty to act and breached that duty by failing to contact any authorities or even merely instruct Roy to exit the vehicle.¹⁹⁴

According to the court, prosecutors proved their case on both theories—that Carter's actions had caused Roy's death and that her failure to act caused

181. *Id.*

182. *Id.* (citing *Commonwealth v. Levesque*, 766 N.E.2d 50 (Mass. 2002)).

183. Willingham, *supra* note 8.

184. *Id.*

185. Seelye & Bidgood, *supra* note 32.

186. *Id.*

187. Willingham, *supra* note 8.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

Roy's death.¹⁹⁵ According to Judge Moniz, "her failure to act where she had a self-created duty to Mr. Roy, since she had put him into that toxic environment . . . [t]hat said conduct caused the death of Mr. Roy."¹⁹⁶

The fact that the self-created duty is established by the prosecutor, solely through the use of words, creates the same concerns that arise when the court ruled words alone can constitute an "overt act."¹⁹⁷ Ruling words alone can establish a legal duty to help someone who is engaged in a suicide attempt legitimately raises the free speech concerns addressed above. It cannot be said that every time someone expresses hateful words toward another, they have created a duty to act. This interpretation would impose a duty to act in far too many cases, thus further jeopardizing free speech.

This does not assert, however, the court was wrong when they found Carter had a duty to act. Like the court points out, Carter had significant knowledge of the circumstances to understand the full impact her words were having at the time.¹⁹⁸ By Roy removing himself from the vehicle and only returning to the vehicle after being instructed to do so by Carter, it is easier to establish Carter's actions actually "*created* a situation that posed a grave rise of death or serious injury of another."¹⁹⁹

C. *Break in the Causal Chain*

An important component to consider when looking at criminal liability in suicide cases in which the harm caused to the victim was self-inflicted is the chain of causation. In order to be convicted of involuntary manslaughter, it must be proven the defendant in fact *caused* the death of the individual.²⁰⁰ Oftentimes, causation is understood in a "but-for" context—but for the conduct carried out by the defendant, the ultimate harm would not have resulted.²⁰¹ Proximate cause must also be demonstrated for the purpose of an involuntary manslaughter conviction.²⁰² That is, proximate cause is established if the defendant's conduct "is a cause, which, in the natural and continuous sequence, produces the death, and without which the death would not have occurred."²⁰³

The element of causation becomes muddled in a case regarding liability for suicide due to notions of autonomy.²⁰⁴ In suicide cases, in which an individual is making an active choice to take their own life, it becomes difficult to say that,

195. *See id.*

196. *Id.*

197. *See Eversley, supra* note 154.

198. Willingham, *supra* note 8.

199. Memorandum of Decision and Order on Defendant's Motion to Dismiss Indictment at 3, Commonwealth v. Carter (New Bedford Juv. Ct. Sept. 22, 2015) (No. 15YO0001NE) (emphasis added).

200. *See generally* Commonwealth v. Pease, 731 N.E.2d 92 (Mass. App. Ct. 2000).

201. *See, e.g.,* Commonwealth v. Kerrigan, No. 10-339, 2011 WL 311012, at *4 (Mass. Super. Ct. Jan. 20, 2011).

202. *See id.*

203. Commonwealth v. Rhoades, 401 N.E.2d 342, 351 (Mass. 1980).

204. *See supra* notes 122–23 and accompanying text.

had the words not been exchanged, the harmful outcome would not have occurred. For example, in instances where the suicide victim has a history of severe depression, or perhaps previous suicide attempts, it becomes more difficult to determine the defendant's words in fact caused the deceased to take his or her life. Perhaps the deceased would have taken their life on another occasion in which the defendant would not be involved.

Additionally, many believe people are always empowered with freedom of choice. This presents an inquiry: can it be said there is a causal link between the words and the suicide when the individual, at any moment, could have made the decision to not go through with the decision to commit suicide? Many typically understand people to be responsible for their own actions and choices. Historically, in cases of suicide, it is understood an individual's choice to take their own life breaks any causal chain that may link another individual to the death of that person for the purpose of establishing criminal liability.²⁰⁵ Thus, Michelle Carter's case largely challenges traditional notions of causation.

Judge Moniz found that prosecutors successfully demonstrated the causation elements were met in Carter's case.²⁰⁶ Judge Moniz, in his address to the court, focused intently on the moment in which Roy removed himself from his truck.²⁰⁷ Judge Moniz implies that, up until the moment Roy removed himself from the vehicle, he was responsible—or the cause—for the harm he was experiencing.²⁰⁸ Once he removed himself from the vehicle, he is no longer the cause.²⁰⁹ Judge Moniz expresses that, “[Roy] breaks that chain of self-causation by exiting the vehicle. He takes himself out of that toxic environment that it has become.”²¹⁰ In this moment, Roy acts as his own intervening act by removing himself from the vehicle.

While Judge Moniz found the causation element of involuntary manslaughter was satisfied, many legal analysts are puzzled by the decision, arguing that it ultimately establishes words themselves can kill—a concept that threatens the notion of free speech.²¹¹ Matthew Segal, legal director at the ACLU of Massachusetts, argues, “[t]o take the view that the murder weapon here . . . was Michelle Carter's words—that is quite an aggressive view of causation,” and “[i]t's problematic to see prosecutors stretch the criminal law that much.”²¹²

One could argue Judge Moniz's explanation of his causation ruling in this case is actually very narrow in scope. For example, it is not known if Judge Moniz would have ruled similarly had Roy never exited the vehicle. According

205. See, e.g., *Stephenson v. State*, 179 N.E.2d 633, 639 (Ind. 1932) (“So if it be true . . . that the indictment alleges that [the deceased] voluntarily committed suicide, that is, that she took her own life while in sound mind, such an act on her part would constitute an intervening responsible agent such as would break the causal connection between the acts of appellant and the death of [the deceased].”).

206. Chen, *supra* note 30.

207. Seelye & Bidgood, *supra* note 32.

208. *Id.*

209. *Id.*

210. *Id.*

211. See Eversley, *supra* note 154.

212. Michelle Carter: *What the Texting Suicide Case Tells Us*, *supra* note 174.

to the explanation Judge Moniz provided to the court, it appears as though the causal chain would not have been broken had Roy never left his car. Therefore, if this case is acting as precedent, the facts could potentially serve as a limitation on its applicability. Cases that could be successfully prosecuted to a guilty verdict would have to include facts that mirror the unique events found in Carter's case. If there are special circumstances in a case, such as exiting a vehicle, that indicate the causal chain was in fact broken, then there is room to argue that the defendant's words cannot reasonably be seen as the cause of the self-inflicted harm by the victim and therefore limiting the amount of cases in which this precedent may be applied.

IV. RECOMMENDATION

Moving forward, Massachusetts must take concrete steps to address the concerns raised by Michelle Carter's case. This Part analyzes how Massachusetts courts should incorporate some of the unique aspects of Michelle Carter's case into its common-law doctrine of involuntary manslaughter charges in suicide cases.

A. Legislating Assisted Suicide

One solution, and arguably the most effective solution, that should strongly be considered is to clarify the law surrounding criminal liability in suicide cases by calling upon the Massachusetts State Legislature to act. Massachusetts's lack of assisted suicide statute creates the type of legal environment that allows a prosecutor to pursue a case like Carter's. It is possible Carter's case could spur the Massachusetts legislature to enact a statute that makes it a crime to coerce and encourage suicide, as already done in nearly forty other states. While this solution could seemingly raise some of the very same concerns that resulted in Carter's case, such as causation and free speech issues, it would allow the legislature to clearly define the law for these specific types of instances when a victim has engaged in self-harm. The legislature itself, if it so desired, could clearly define whether words alone could ever be considered the "overt act" necessary to convict someone of involuntary manslaughter.

Additionally, should Massachusetts legislate that words could be enough to be an "overt act," it could also more clearly establish what type of speech crosses the threshold into an "overt act." Furthermore, citizens of Massachusetts would be put on notice that prosecutors have the statutory grounds to pursue these types of cases, as opposed to relying on the common law and prosecutorial discretion.

B. Common Law Considerations

In the interim period in which the Massachusetts legislature has not addressed the issue, or should the Massachusetts legislature choose to forgo creating such a statute, it is necessary to clearly define the boundaries of these types

of cases in the realm of Massachusetts common law. Cases of involuntary manslaughter where words alone are considered the “act” causing the death of another individual, or the act establishing a duty to act, should be narrowly construed so that only the most reprehensible “acts” would result in a guilty verdict. This can be done by requiring a prosecutor to prove certain elements be met in order for a defendant’s actions to qualify as an “overt act” for the purposes of involuntary manslaughter. Such elements should include, a (1) presence requirement, (2) knowledge requirement, *and* an (3) intent requirement.

By requiring a prosecutor to establish such elements, and therefore narrowly defining what communication constitutes an “overt act” for the purpose of an involuntary manslaughter conviction, it assures only extreme behavior is deemed to be unprotected by the First Amendment’s free speech clause. Limiting the numbers of cases in which a defendant’s actions would qualify as an “overt act” to only the most egregious cases thus would remain consistent with the notion set forth by Justice Holmes in *Schebeck v. U.S.*²¹³ It would assure that speech deemed unprotected by the First Amendment would be “of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”²¹⁴

1. “Presence” Requirement

Developments in technology over recent decades have permitted people to be in constant communication with one another. Because of this, presence with another person is no longer only physical, but can be virtual as well. By requiring communication that qualifies as an “overt act” for the purpose of a manslaughter conviction to satisfy a “presence” requirement, it reduces some of the concerns that arise over causation. The closer in time the communication occurred to the self-inflicted injury, the less likely an intervening act took place to break the causal chain between the communication and the ultimate harm. The amount of time between communication and the harm should be so small the defendant was virtually present while the actual harm was being carried out. Essentially, the communication should have occurred throughout the process of the victim taking his own life.

It is reasonable one could find Michelle Carter’s case satisfies this presence requirement. Carter was not physically present with Roy, but she was virtually “present” through the use of text messages and phone conversations.²¹⁵ Carter was interacting with Roy in real-time as the entire situation unfolded.²¹⁶

Heightening the communication standard to entail a “presence” requirement reduces the possibility that certain types of common communication will be prosecuted. For example, many individuals may be concerned about the application of the Carter precedent to cases of adolescent bullying.

213. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

214. *Id.*

215. *See e.g.*, DeCosta-Klipa, *supra* note 21.

216. *See id.*

Cases of adolescent bullying is an area of great concern for individuals who believe the Carter precedent could open the door to unlimited prosecution.²¹⁷ Under present circumstances, children appear to communicate with one another constantly, and do so on a variety of platforms.

The advent of social media, instant messaging, and text communication has created a realm in which young adults feel empowered in ways that encourage bullying. Communication can occur behind the veil of a screen. Unfortunately, stories emerge in which young adults choose to take their lives due to the bullying they face online.²¹⁸ While there is incentive to monitor this type of behavior, only in extreme and rare cases should this be done criminally. While this behavior is generally considered reprehensible, it must be balanced with freedom of speech concerns.

A dangerous precedent may be set if children become criminally liable for any mean thing they say to a peer. Because of this, requiring a “presence” element be shown in order to establish an “overt act” has taken place, drastically reduces the number of cases that would satisfy this test. It also assures that only in the most reprehensible situations are words deemed to have actually caused the victim to carry out the self-inflicted harm. For example, if a defendant tells a classmate to “go kill yourself” and as a result, the next day the classmate takes her life, the “presence” requirement would not be satisfied in order for the prosecutor to establish an “overt act” took place. Though the scenario is extremely disturbing, it should not be enough to prosecute the individually criminally. In turn, even speech that would be considered reprehensible by many would not meet the requirement necessary to successfully prosecute for involuntary manslaughter. Thus, freedom of speech is still protected.

2. *Knowledge Requirement*

It should not be enough that an individual is recklessly communicating with someone in real-time as they engage in self-harm. Communicating with someone, while being unaware of the complete context of the situation can result in unintended consequences. Thus, requiring that the defendant have knowledge of the victim’s circumstances reduces the range of cases that could be successfully prosecuted under this theory.

217. Marco della Cavo, *Texting Suicide Case Could Set Bad Precedent, Legal Experts Say*, USA TODAY (June 17, 2017, 7:29 PM), <https://www.usatoday.com/story/news/nation/2017/06/17/texting-suicide-verdict-could-set-bad-precedent-legal-experts-say/102956784/>.

218. See, e.g., Elizabeth Chuck, *Bullying Drove 13-Year-Old Rosalie Avila to Kill Herself, Parents Say*, NBC NEWS (Dec. 4, 2017, 3:38 PM), <https://www.nbcnews.com/news/us-news/bullying-drove-13-year-old-rosalie-avila-kill-herself-parents-n826281>; Jamiel Lynch, *Police Accuse Two Students, Age 12, of Cyberbullying in Suicide*, CNN, <https://www.cnn.com/2018/01/23/us/florida-cyberstalking-charges-girl-suicide/index.html> (last updated Jan. 24, 2018, 3:36 PM); Natalie Musumeci, *Couple Arrested for Bullying Teen Who Killed Herself in Front of Family*, N.Y. POST (Mar. 16, 2017, 3:36 PM), <https://nypost.com/2017/03/16/couple-arrested-for-cyberbullying-teen-who-killed-herself-in-front-of-family/>. For information regarding increased rates of suicide among cyberbullying victims, see Swansea University, *Young Victims of Cyberbullying Twice as Likely to Attempt Suicide and Self-harm, Study Finds*, SCI. DAILY (Apr. 19, 2018), <https://www.sciencedaily.com/releases/2018/04/180419130923.htm>.

Not only was Michelle Carter discussing and urging Conrad Roy to commit suicide throughout his suicide attempt, but evidence suggests she knew of his specific circumstances as well.²¹⁹ Carter was fully aware and had the knowledge that Roy was in the midst of killing himself while she was in communication with him on the evening of July 12, 2014.²²⁰ She knew he was in the K-Mart parking lot, he was presently carrying out his death by asphyxiation, and he had a history of suicide attempts.²²¹ By requiring “knowledge” to be a component of the communication being classified as an “overt act” in an involuntary manslaughter charge, one continues to limit the number of individuals that would be convicted. Therefore, the number of cases that raise serious concerns of free speech, causation, and duty to act will be limited.

It is conceivable that facts could arise in which an individual is “virtually present” while a victim is engaging in self-harm. They may lack the knowledge the victim is engaging in harm in that very moment. These types of scenarios make a knowledge requirement essential, in addition to a “presence” requirement. Many would feel uncomfortable attaching criminal liability in a case in which the person is engaging in detestable speech but is unaware of the actual implications their words are having in that moment. Many feel this way because we hope if the individual engaged in the speech knew their words were the motivating factor in a suicide attempt that is contemporaneously being carried out, they may choose to stop. Therefore, by requiring a prosecutor to prove the defendant had full knowledge of the circumstances surrounding their communication, we avoid prosecuting individuals that may otherwise be overcome by their moral conscious and refrain from such speech if only they had known.

Virtual communication inherently means an individual may not be fully aware of the circumstances of the person whom they are communicating with due to the fact that communication can exist without being physically present with one another. For example, adolescents engaging in online bullying of a classmate through instant messenger may not be aware that, while they communicate with their victim via online chat, that person is engaged in self-harm that could be fatal. While there is an incentive to teach children about the consequences of online bullying, it should not be done by subjecting them to criminal liability. Unfortunately, this reprehensible behavior occurs far too often and attaching criminal liability in these circumstances opens the door to convicting individuals who aren’t fully aware of the gravity of their actions in that moment.

While we often understand these scenarios to be most common among adolescents, the same standards should be applied to adults as well. A knowledge requirement should be universal in establishing an “overt act” took place in order to assure that in only rare instances, where an individual is acting so recklessly, do we infringe upon an individual’s right to free speech.

Additionally, by establishing a knowledge requirement exists, we begin to address the “duty to act” method of proving involuntary manslaughter. Where an

219. DeCosta-Klipa, *supra* note 21.

220. *Id.*

221. Willingham, *supra* note 8.

individual is aware they are simultaneously communicating with someone who is attempting suicide, we become inclined to define them as acting with extreme recklessness by not notifying anyone of the situation. Thus, by requiring knowledge to be proven in order to establish an “overt act” took place, it inadvertently makes it easier for a prosecutor to establish the defendant is also guilty on the theory that they created a duty to act and failed to do so.

Requiring an individual to have knowledge of the context of their communication would aid in limiting free speech concerns, address causation concerns, and clarify when a duty to act is established.

3. *Intent Requirement*

In the case of Michelle Carter, she was not only “present” and fully aware of all the circumstances surrounding Roy’s situations as she communicated with him, but evidence indicated Carter intended for Roy to take his life as well.²²² Carter assisted Roy in planning the suicide attempt and even coaxed him to get back in the truck after he had removed himself from the vehicle.²²³ She was wanton and reckless both in her words and in her failure to even attempt to stop him. These actions, and Carter’s failure to act, help us to justify infringing upon Carter’s First Amendment right to free speech and push us toward the standard of extreme recklessness Justice Holmes articulates in *Schenck*.²²⁴

Creating an intent requirement, like the “presence” and knowledge requirements, would further reduce the number of prosecutions and convictions that would arise out of charges of involuntary manslaughter based solely on the use of words. It should not be enough for a person to be communicating negatively with someone at the same time that individual is engaging in self-harm. It should also not be enough the individual knows, at the time they are communicating with the victim, the victim is engaging in acts of self-harm. It is conceivable an individual may be simultaneously communicating with an individual engaging in self-harm, be aware of this fact, yet still should not be culpable for the harms are carried out by that person.

It is necessary to require that the individual also intends for harm to be inflicted on that person. This assures we are criminalizing speech in only the most extreme cases. For example, there could be a case of online bullying in which an individual is communicating with a victim while the victim is carrying out a suicide attempt. The victim may even inform the individual that he or she is currently carrying out their suicide attempt as the two communicate with each other. Therefore, the prosecutor would likely be able to establish that the “presence” and knowledge requirements have been met. We would, however, find ourselves less comfortable convicting the individual in this situation if we knew they did not intend for the victim to actually commit suicide. Perhaps they interpreted their words as “kidding around” or “joking.” This dynamic, one could

222. See DeCosta-Klipa, *supra* note 21; LeBlanc, *supra* note 21.

223. DeCosta-Klipa, *supra* note 21.

224. See *generally* Schenck v. United States, 249 U.S. 47 (1919).

imagine, occurs quite frequently among adolescents whom we would be hesitant to convict despite their despicable conduct. Thus, we would want a prosecutor to provide evidence to establish the individual actually intended for the victim to carry out his or her suicide.

This is where Michelle Carter's case sets itself apart from other cases in which a person's speech can be considered a reasonable factor leading to an individual's suicide. Not only was Carter "present" throughout Roy's suicide attempt, not only was she informed and knowledgeable of the fact that Roy was in the midst of carrying out his suicide attempt, but she wished for him to carry out the harm as well.²²⁵ Carter was not merely criticizing Roy in a way that could possibly exacerbate his depression and ultimately lead to him engaging in self-harm. Instead, Carter was directly encouraging Roy to carry out his suicide attempt. By demonstrating that Carter told Roy to "get back in the car"—a taunt that he would not actually follow through with his suicide attempt—the prosecutor provided evidence Carter intended and wanted Roy to carry out his self-harm.²²⁶ This, too, leads one to feel more comfortable sacrificing Carter's right to free speech by criminalizing her behavior. It is this most extreme behavior that society has a significant interest in deterring.

By requiring a prosecutor to establish that all three of these requirements are met in order to determine that speech constitutes an "overt act" in the case of an involuntary manslaughter conviction, we attempt to limit the number of cases in which freedom of speech is constitutionally infringed upon. Additionally, these requirements inadvertently address other concerns such as causation and duty to act. Instinctively, situations like Carter's invoke a desire to punish her behavior. We strongly wish to discourage any person from intentionally and knowingly encouraging an individual, whom they know is in a state of extreme vulnerability, to carry out a suicide. This feeling must be balanced with our desire to maintain a fundamental right and value we recognize in this country—free speech. Therefore, imposing criminal liability to speech alone must be done delicately and with great care.

Overall, these requirements attempt to limit involuntary manslaughter charges based off of speech to only the most egregious cases. Words should only arise to the status of a "weapon" when they are used in real-time, with full knowledge of the circumstances, and with the intent for the ultimate harm to result. When all of these are satisfied, speech results in wanton and reckless disregard for human life that is no longer protected by the First Amendment.

V. CONCLUSION

The guilty verdict set forth in *Commonwealth v. Michelle Carter* rightfully raised serious concerns among legal analysts about the fate of the First Amendment's guarantee of freedom of speech.²²⁷ Carter's case was the first of its kind

225. See DeCosta-Klipa, *supra* note 21; LeBlanc, *supra* note 21.

226. Sanchez & Lance, *supra* note 1.

227. Soave, *supra* note 6.

in Massachusetts to rule that *words alone* could constitute an “overt act” for the purpose of an involuntary manslaughter conviction.²²⁸ It also uniquely ruled that words alone could also establish a duty to act in cases that may traditionally be understood as suicide cases.²²⁹ In order to assure free speech rights are being preserved, it is imperative that the facts of this case be understood in a narrow context. This does not assert, however, that words should be criminalized only in cases demonstrating the exact same facts. Rather, the principles applied by Judge Moniz in Carter’s case should be used to draft a framework for evaluating words that prosecutors are alleging rise to the level of an “overt act” in an involuntary manslaughter conviction.

Moving forward, courts should require that in order to establish that words have crossed the line into an “overt act,” they must satisfy a (1) presence requirement, (2) knowledge requirement, *and* (3) intent requirement. By limiting prosecution to cases in which a defendant communicates simultaneously with an individual whom he or she knows is engaging in self-harm and the defendant does so with the intent for that person to carry out the harm, only the most egregious cases would withstand prosecution. Thus, only the most egregious defendants will have their right to free speech obstructed. This aligns with the Supreme Court’s history of allowing free speech to be hindered only in extreme circumstances.

228. *Id.*

229. Seelye & Bidgood, *supra* note 32.

