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Words as Weapons: Electronic Communications that Result in Suicide and the Uncomfortable Truth with Criminal Culpability Based on Words Alone

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**WORDS AS WEAPONS: ELECTRONIC COMMUNICATIONS THAT
RESULT IN SUICIDE AND THE UNCOMFORTABLE TRUTH WITH
CRIMINAL CULPABILITY BASED ON WORDS ALONE**

INTRODUCTION

In 2012, teenagers Michelle Carter and Conrad Roy III formed a romantic relationship, which primarily consisted of online and cell phone communication.¹ The relationship was discrete, for even Conrad's best friend was unaware of its existence.² In July of 2014, Conrad's body was found by police inside the cabin of his pickup truck.³ Conrad had parked at a K-Mart in Fairhaven, Massachusetts and used a combustion engine to poison himself with carbon monoxide.⁴ Conrad and Carter lived approximately fifty miles apart and had not seen each other for approximately a year prior to Conrad's death.⁵ Even so, on August 21, 2015, a grand jury issued an indictment charging Carter with involuntary manslaughter for assisting in Conrad's suicide.⁶ Carter is being tried in juvenile court since she was seventeen at the time of Conrad's death, but could still serve up to twenty years in state prison.⁷ The

1. Commonwealth's Resp. to Def.'s Mot. to Dismiss at 1, *Commonwealth v. Carter*, No. 15YO0001NE (Mass. Dist. Ct. Aug. 21, 2015) [hereinafter "Resp. to Def.'s Mot."].

2. *Id.*

3. *Id.* at 17.

4. *Id.*

5. Denise Lavoie, *Texts Led to Suicide, Prosecutor Says*, U.S. NEWS & WORLD REP. (Sept. 9, 2015, 1:43 AM), <http://www.usnews.com/news/us/articles/2015/09/09/teen-charged-with-en-couraging-her-boyfriend-to-kill-himself>.

6. Resp. to Def.'s Mot., *supra* note 1, at 1.

7. Michael E. Miller, *'Manslaughter by text': teen faces charges after boyfriend kills himself*, THE SYDNEY MORNING HERALD (Sept. 26, 2015), <http://www.smh.com.au/world/manslaughter-by-text-teen-faces-charges-after-boyfriend-suicides-20150925-gjv9xk.html>. The Commonwealth of Massachusetts is permitted to seek an indictment against a juvenile who committed a specific type of violent crime if they were seventeen at the time of the offense. *Commonwealth v. Mogelinski*, 1 N.E.3d 237, 242 (Mass. 2013). Once an indictment is successfully obtained, the juvenile is classified as a youthful offender who is proceeded against in juvenile court even though they may be treated as an adult in other respects. *Id.* For example, their court proceedings are not shielded from the public, they may receive an adult sentence, and they may serve their prison sentence in an adult correctional facility or state prison. *Id.* The juvenile court also retains jurisdiction over children who turn eighteen while their cases are pending. *Id.* at 241. The manslaughter penalty under MASS. ANN. LAWS ch. 265, § 13 (LexisNexis 2016) states that a defendant convicted of manslaughter may not be sentenced to

prosecution's argument that Carter assisted in the suicide of Conrad and that her actions constituted involuntary manslaughter rests on three theories: Carter counseled him to overcome his doubts⁸ for more than a week prior to his suicide via hundreds of text messages,⁹ Carter researched and devised the plan to run the combustion engine within his truck, and Carter directed him to go back into his truck after he exited because he was frightened that the plan was working.¹⁰ Furthermore, Carter lied to the police and Conrad's family regarding his whereabouts, both while he was committing the act itself and afterwards, implying that she had no knowledge of the incident.¹¹

Carter had asked Conrad to delete their exchange of text messages before he followed through with the suicide, however, authorities still recovered them.¹² The morning Conrad killed himself, Carter had texted him, "You can't think about it. You just have to do it. You said you were gonna do it. Like I don't get why you aren't."¹³ "You can't keep living this way. You just need to do it like you did the last time and not think about it."¹⁴ Carter was aware that Conrad attempted suicide two years earlier, received counseling, and had a history of anxiety and depression.¹⁵ After the incident, Carter felt guilt and remorse and wrote to one of her friends, "[If] they read my messages with him I'm done. His family will hate me and I can go to jail."¹⁶ "[H]is 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 told him to get back in."¹⁷ "I'm the reason everyone was in that church yesterday."¹⁸ "I helped ease him into it and told him I was okay . . . I could have easily stopped him or called the police but I didn't."¹⁹ In total, Carter and

more than twenty years in prison. *Commonwealth v. Brown*, 1 N.E.3d 259, 266 (Mass. 2013). Judges thereby have discretion in deciding defendants' terms. *Id.*

8. Resp. to Def.'s Mot., *supra* note 1, at 1.

9. Abby Phillip, 'It's now or never': Texts reveal teen's efforts to pressure her boyfriend into suicide, WASH. POST (Aug. 31, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/08/31/its-now-or-never-texts-reveal-teens-efforts-to-pressure-boyfriend-into-suicide/>.

10. Resp. to Def.'s Mot., *supra* note 1, at 6–7.

11. Phillip, *supra* note 9.

12. Resp. to Def.'s Mot., *supra* note 1, at 40.

13. Resp. to Def.'s Mot., *supra* note 1, at 1.

14. Resp. to Def.'s Mot., *supra* note 1, at 1.

15. Resp. to Def.'s Mot., *supra* note 1, at 6; *see also* Lavoie, *supra* note 5. After his prior suicide attempt, Conrad spent time in a psychiatric hospital according to his Aunt. *Id.* However, she stated that Conrad "did not have the signs." *Id.* Conrad's grandfather further explained that Conrad seemed happy in the days before his suicide. *Id.* He blamed Carter: "We saw the light at the end of the tunnel, and [Carter] just blew that tunnel up. She shut the light off." *Id.*

16. Resp. to Def.'s Mot., *supra* note 1, at 20.

17. Resp. to Def.'s Mot., *supra* note 1, at 21.

18. Resp. to Def.'s Mot., *supra* note 1, at 20.

19. Resp. to Def.'s Mot., *supra* note 1, at 21–22.

Conrad shared over one-thousand text messages in the weeks leading up to his suicide.²⁰ On the evening that Conrad took his life, Carter's final text message to Conrad read, "You can do this."²¹ Three minutes later Conrad called Carter, and they spoke on the phone for ninety minutes until Conrad successfully poisoned himself.²² Prosecutors allege that Carter's motive was to receive as much attention and sympathy as possible from her family and friends after Conrad's death.²³

According to Carter's defense attorney, Joseph Cataldo, this case is unprecedented in the state of Massachusetts, and he is unaware of any cases in the state "where a person who is thirty miles away is charged with committing manslaughter by text."²⁴ Former Massachusetts prosecutor, Rikki Klieman, acknowledges that while the accusations facing Carter are "horrendous," the facts do not fit neatly into any existing statute in Massachusetts.²⁵ "It's not cyberbullying, it's not harassment, it's not stalking. So the prosecutor says, 'This is reprehensible conduct, disgusting conduct, must-be punished conduct,' so he goes forward and says, 'Let's call this involuntary manslaughter.' Does it neatly fit in that definition? Not so much."²⁶

When severe incidents like Conrad's result in suicide and receive national attention, prosecutors are forced to "shoe-horn" these incidents into ill-fitting statutes in an aggressive attempt to criminally punish the perpetrators.²⁷ This comment will address three different charges that prosecutors may utilize in these types of scenarios: cyberbullying, assisted suicide, and involuntary manslaughter. This is an analysis of each charge through the lens of Conrad's case and will address the hurdles the prosecution must overcome in order to convict Carter under each offense. Part I of this comment will compare current state cyberbullying laws and critique the major gaps and First Amendment breaches in the promulgation of these statutes. This part will focus on severe cyberbullying incidents that result in suicide and will propose an effective criminal procedure to combat cyberbullying that does not over-criminalize cyberbullies. This part will then assess the likely effect of these proposed amendments as applied to Conrad's case. Part II will compare how the states

20. Miller, *supra* note 7.

21. Resp. to Def.'s Mot., *supra* note 1, at 16.

22. Resp. to Def.'s Mot., *supra* note 1, at 17.

23. Resp. to Def.'s Mot., *supra* note 1, at 22.

24. Stephanie Slifer, *Is it a crime to "encourage suicide"? Teens' texts under scrutiny*, CBS NEWS (Mar. 3, 2015, 6:00 AM), <http://www.cbsnews.com/news/is-it-a-crime-to-encourage-suicide-unusual-massachusetts-case-of-conrad-roy-and-michelle-carter/>.

25. *Id.*

26. *Id.*

27. Justin W. Patchin, *Most Cyberbullying Cases Aren't Criminal*, CYBERBULLYING RESEARCH CTR. (Oct. 12, 2010), <http://cyberbullying.org/most-cyberbullying-cases-arent-criminal/>.

address assisted suicide and focus on the recent statutory modifications that further require some physical act beyond pure speech in order to reach a conviction. This part will then propose that each state adopt more stringent statutes, as some states have already begun to, and further analyze Carter's actions in the context of different states' assisted suicide laws. Part III will lay out the prosecution's prima facie claim under involuntary manslaughter and assess how difficult it will be to prove beyond a reasonable doubt that Carter's words alone caused Conrad to take his own life. Finally, Part V will propose that while Carter's text messages are reprehensible, this does not mean they are criminal.

I. CYBERBULLYING

A. *The Growing Technological Era and the Confusion Surrounding Cyberbullying*

At first glance, Carter's text messages appear to be a disturbing case of cyberbullying as Carter consistently urged Conrad to kill himself.²⁸ Youth suicide continues to be a significant public-health concern in the United States, and one major factor that has been linked to suicide is cyberbullying.²⁹ Bullies have always existed, but cyberbullying is a unique offense growing more and more prevalent as technology advances.³⁰ Due to the convenience and constant access provided by cell phones, the average teen spends nine hours a day using media, including computers and cell phones.³¹ Geographical limitations no longer restrain a bully's reach, and victims can now be bullied at any time of the day or even in their own homes.³² Electronic communications further provide anonymity to the perpetrator and allow for widespread public distribution, making them severely dangerous and cruel for adolescents.³³ It is

28. Lavoie, *supra* note 5.

29. Sameer Hinduja & Justin W. Patchin, *Cyberbullying Research Summary*, CYBERBULLYING RESEARCH CTR. (2010), http://cyberbullying.org/cyberbullying_and_suicide_research_fact_sheet.pdf.

30. Haley E. Phillips, *Online Bullying and the First Amendment: State Cyberbullying Statutes After People v. Marquan M.*, 93 N.C.L. REV. 179, 183 (2015).

31. *Landmark Report: U.S. Teens Use an Average of Nine Hours of Media Per Day, Tweens Use Six Hours*, COMMON SENSE MEDIA (Nov. 3, 2015), <https://www.commonsensemedia.org/about-us/news/press-releases/landmark-report-us-teens-use-an-average-of-nine-hours-of-media-per-day> (not including the time spent using media for school or homework).

32. Lyrisa Lidsky & Andrea Pinzon Garcia, *How Not to Criminalize Cyberbullying*, 77 MO. L. REV. 693 (2012).

33. Megan Meier Cyberbullying Prevention Act of 2008, 110 H.R. 6123, 106th Cong. § 2(3) (2008) [hereinafter "Cyberbullying Prevention Act of 2008"]. Online victimizations are associated with emotional distress and other psychological problems, including depression. Cyberbullying can negatively impact academic performance, safety, the well-being of children in

no surprise public officials have called for the “elimination” of cyberbullying,³⁴ however, the vast majority of cyberbullying cases are not categorized as criminal nor should they be.³⁵ Tragic incidents such as suicides often transform these into high-profile cases that receive national attention and unsurmountable public scrutiny.³⁶

It is important to acknowledge that many teenagers who commit suicide subsequent to being cyberbullied have other emotional and social issues impacting their lives.³⁷ In fact, studies have shown that approximately ninety-percent of suicide victims were mentally ill.³⁸ It is unlikely that being a victim of cyberbullying *by itself* will lead to suicide; rather, “it tends to exacerbate instability and hopelessness in the minds of adolescents already struggling with stressful life circumstances.”³⁹ Carter’s defense attorney contends that Conrad’s history of depression and prior suicide attempt where he overdosed on acetaminophen⁴⁰ were the ultimate cause of Conrad’s suicide and that he likely had a predisposition to take his own life.⁴¹ The defense also asserts that Carter repeatedly tried to talk Conrad out of killing himself and only decided to support his plan when it became evident she was incapable of changing his mind.⁴² Approximately one month before his suicide, Carter suggested that Conrad seek treatment at a psychiatric hospital where she was already receiving treatment for her own condition.⁴³ Conrad refused and suggested they both kill themselves together “like Romeo and Juliet.”⁴⁴ Carter’s attorney goes so far as to accuse Conrad of “brainwash[ing]” Carter into supporting his plan to take his life by “ultimately persuad[ing] a young, impressionable

school, force children to change schools, and in some cases lead to extreme violent behavior, such as murder and suicide.

34. Lidsky & Garcia, *supra* note 32, at 695. The United Nations, for example, has called for concerted efforts to eliminate bullying in all regions, which includes cyberbullying. Special Representative of Secretary-General on Violence Against Children reasons that “[b]ullying is a very serious problem and still a taboo in modern societies.” *UN Envoy Calls for Concerted Efforts to Eliminate Bullying in All Regions*, UN NEWS CENTRE (Oct. 16, 2015), http://www.un.org/apps/news/story.asp?NewsID=52292#.VsY_hJMrI9c.

35. Patchin, *supra* note 27.

36. Patchin, *supra* note 27.

37. Hinduja & Patchin, *supra* note 29, at 2.

38. *Risk of Suicide*, NAT’L ALLIANCE ON MENTAL ILLNESS, <https://www.nami.org/Learn-More/Mental-Health-Conditions/Related-Conditions/Suicide>.

39. Hinduja & Patchin, *supra* note 29, at 2.

40. Lavoie, *supra* note 5.

41. Resp. to Def.’s Mot., *supra* note 1, at 36.

42. Lavoie, *supra* note 5.

43. Lavoie, *supra* note 5.

44. Lavoie, *supra* note 5. *See also infra* notes 184–186 (for a more in depth analysis on suicide pacts).

girl.”⁴⁵ Conrad and Carter’s dialogue of text messages was not the typical exchange of words between a cyberbully and a victim. Among the many texts, Carter wrote to Conrad, “You’re finally going to be happy in heaven. No more pain. No more bad thoughts and worries. You’ll be free.”⁴⁶ Carter appeared to be in love with Conrad: “I love you to the moon and back . . . You are my beautiful guardian angel forever and ever.”⁴⁷

While cyberbullying incidents resulting in suicide are isolated and do not represent the norm,⁴⁸ society agrees that cyberbullying is troublesome.⁴⁹ Nonetheless, not everyone agrees on exactly which types of conduct cyberbullying should encompass, how far these statutes should reach, or the appropriate punishment for violators.⁵⁰ A universal definition of cyberbullying has not yet been defined; however, researchers acknowledge that one is overdue.⁵¹ The National Conference of State Legislatures has defined cyberbullying as the “willful and repeated use of cell phones, computers, and other electronic communication devices to harass and threaten others.”⁵² This definition includes four main components: (1) deliberate behavior, not merely accidental; (2) repeated behavior, more than a one-time incident; (3) harm occurred from the victim’s perspective; and (4) is executed through a technological medium.⁵³ Contrarily, the federal government’s interagency working group has adopted the broad definition of “any type of harassment or bullying (teasing, telling lies, making fun of someone, making rude or mean comments, spreading rumors, or making threatening or aggressive comments) that occurs through email, a chat room, instant messaging, a website (including blogs), or text messaging.”⁵⁴ Both of these definitions are in stark contrast to

45. Phillip, *supra* note 10.

46. Resp. to Def.’s Mot., *supra* note 1, at 3.

47. Resp. to Def.’s Mot., *supra* note 1, at 2. See generally Resp. to Def.’s Mot., *supra* note 1 (detailing all of the text messages that the district attorney released in their full context).

48. Hinduja & Patchin, *supra* note 29, at 1.

49. Symposium, *Cyberbullying: Emerging Realities and Legal Challenges: Foreword*, 77 MO. L. REV. 613, 614 (2012) [hereinafter “*Emerging Realities*”].

50. *Id.*

51. Charles E. Notar, *Cyberbullying: A Review of the Literature*, 1 UNIVERSAL J. OF EDUC. RES. 1, 2 (2013), <http://files.eric.ed.gov/fulltext/EJ1053975.pdf>.

52. *Cyberbullying*, NAT’L CONF. OF ST. LEGIS. (Dec. 14, 2010), <http://www.ncsl.org/research/education/cyberbullying.aspx>. This definition was created by the NCSL. For more information on the NCSL, visit <http://www.ncsl.org/aboutus.aspx>.

53. Kelly A. Albin, *Bullies in a Wired World: The Impact of Cyberspace Victimization on Adolescent Mental Health and the Need for Cyberbullying Legislation in Ohio*, 25 J.L. & HEALTH 155, 157 (2012).

54. Lidsky & Garcia, *supra* note 32, at 698–99. This definition was issued by a government “working group” comprised of representatives from seventeen federal agencies that support programs and services focusing on youth. *Electronic Aggression*, YOUTH.GOV, <http://youth.gov/youth-topics/teen-dating-violence/electronic>.

one another and fall on opposite ends of the spectrum. One encompasses seemingly malicious and repeated acts, while the latter could include typical juvenile behavior. It is challenging enough to resolve an issue when society *agrees* on its exact definition. Consequently, one of the major challenges in prosecuting cyberbullies is the unclear scope of behaviors the laws are trying to deter.⁵⁵ This further leads to the major constitutional flaws with existing cyberbullying laws: the legislatures' overly ambitious attempt to "eliminate" cyberbullying and thereby integrating its definition as a social problem with the legal definition of cyberbullying as a crime.⁵⁶ While broad social models of the definition of cyberbullying may be useful in devising policy responses to the issue, lawmakers need to create more narrow, "perhaps less politically satisfying" definitions of cyberbullying.⁵⁷

B. Lack of a Federal Cyberbullying Law: United States v. Drew

Presently, there are no federal laws that directly address cyberbullying.⁵⁸ However, in 2009, the Megan Meier Cyberbullying Prevention Act was introduced to the House of Representatives although it was never enacted.⁵⁹ Thirteen-year-old Megan Meier's story was a prominent one, for it was the signal event that revolutionized cyberbullying into a national issue ultimately resulting in legal reform.⁶⁰ Beginning in 2006, defendant Lori Drew and her co-conspirators created a fake social media account on MySpace as a sixteen-year-old boy under the alias of "Josh Evans."⁶¹ The defendant led Megan to believe that Josh had a romantic interest in her and won Megan's trust up until he cruelly notified her he no longer wanted to be friends.⁶² He concluded by telling her, "The world would be a better place without [you] in it."⁶³ Megan responded, "You're the kind of boy a girl would kill herself over."⁶⁴ It was

55. *Emerging Realities*, *supra* note 49, at 614.

56. Lidsky & Garcia, *supra* note 32, at 698.

57. Lidsky & Garcia, *supra* note 32, at 699.

58. *Federal Laws*, STOPBULLYING.GOV, <http://www.stopbullying.gov/laws/federal/index.html> (last visited Feb. 26, 2016). Federal case law does allow schools to discipline students for off-campus behavior that results in a substantial disruption of the learning environment at school. The states have codified that standard in state statutes. *See infra* note 74, at 1; *see also infra* notes 76–78 (discussing the states' statutes).

59. *See, e.g.*, Cyberbullying Prevention Act of 2008, *supra* note 33; *see also infra*, notes 103, 105–109 (discussing why the Megan Meier Cyberbullying Prevention Act of 2008 was not enacted).

60. Lidsky & Garcia, *supra* note 32, at 700.

61. *United States v. Drew*, 259 F.R.D. 449, 452 (C.D. Cal. 2009).

62. *Id.*

63. *Id.*

64. Rebecca Cathcart, *Judge Throws Out Conviction in Cyberbullying Case*, N.Y. TIMES (July 2, 2009), http://www.nytimes.com/2009/07/03/us/03bully.html?_r=0.

approximately twenty minutes after Megan left the computer screen that she hung herself in her bedroom.⁶⁵

The county prosecutor declined to file any criminal charges, while the federal prosecutor creatively interpreted law and charged the defendant with one count of conspiracy⁶⁶ and three violations of the Computer Fraud and Abuse Act (the “Act”) for “intentionally access[ing] a computer used in interstate commerce without (and/or in excess of) authorization in order to obtain information for the purpose of committing the tortious acts of intentional infliction of emotional distress on [Megan].”⁶⁷ Essentially, the defendant was being charged with violating MySpace’s terms of service by “defrauding” MySpace and misrepresenting her identity and motive.⁶⁸ Megan’s case exemplifies what happens when there is no explicit cyberbullying law in place, and highly aggressive prosecutors innovatively attempt to stuff these incidents into existing statutes that do not fit the circumstances.⁶⁹ In many cases this misdirection of prosecutorial resources is not done consistently or appropriately.⁷⁰ Nonetheless, a federal district judge overturned the jury verdict finding the defendant guilty of this misdemeanor violation of the Act.⁷¹ The judge reasoned that to uphold this conviction would “transform the [Act] into an overwhelmingly overbroad enactment that would convert a multitude of otherwise innocent Internet users into misdemeanant criminals.”⁷² While the defendant in this case escaped criminal liability, she still suffered severe social condemnation for her despicable conduct.⁷³

C. *States’ Legislative Response Through School Based Remedies and the Drawbacks*

While no federal cyberbullying law has successfully been enacted, in recent years every state has passed some type of legislation to address the issue of *bullying* in general.⁷⁴ Among these statutes, the ones that directly address *cyberbullying* can be divided into two main categories: states that advise public schools to implement anti-bullying policies and procedures and those that

65. *The Top Six Unforgettable Cyberbullying Cases Ever*, NOBULLYING.COM, (Dec. 22, 2015), <http://nobullying.com/six-unforgettable-cyber-bullying-cases/>.

66. *Id.*

67. *Drew*, 259 F.R.D. at 452–453.

68. *See id.*

69. Patchin, *supra* note 27.

70. Patchin, *supra* note 27.

71. *Drew*, 259 F.R.D. at 452.

72. *Id.* at 466.

73. Lidsky & Garcia, *supra* note 32, at 702.

74. *See* Sameer Hinduja & Justin W. Patchin, *State Cyberbullying Laws*, CYBERBULLYING RESEARCH CENTER, <http://cyberbullying.org/Bullying-and-Cyberbullying-Laws.pdf>.

criminalize cyberbullying specifically both on and off campus.⁷⁵ In total, there are twenty-three states that have adopted statutes that include cyberbullying and eighteen of which impose criminal sanctions.⁷⁶ However, these approaches fail to effectively address severe cases of cyberbullying, including instances where suicide results.⁷⁷ The most common types of statutes are those that merely regulate school policies and fail to directly address cyberbullying by perpetrators outside of the school system, private school cyberbullies, or incidents that occur off of school campuses⁷⁸ where a majority of online communication between teens occurs.⁷⁹ With so many students carrying cell phones, schools have begun to enact rules banning cell phone use at school.⁸⁰ This suggests that the majority of the cyberbullying taking place among teens is not confined to school premises.

Maine's statute resembles most states when it comes to regulating school board policies.⁸¹ It prohibits both bullying and cyberbullying on campus and further requires school boards to create policies with specific procedures in place for anonymously reporting bullies, referring identified bullies to counseling, and carving out disciplinary action for violators.⁸² In 2010, Massachusetts, where Carter and Conrad resided, was one of the states that passed an anti-bullying law that included the prohibition of cyberbullying.⁸³ It addresses those behaviors that "materially and substantially disrupt the education process or the orderly operation of a school."⁸⁴ Ultimately, these school-based policy statutes fail to reach perpetrators like Carter, who did not go to the same school as Conrad, and they do not encompass adults or parents of students like the defendant that targeted Megan Meier. Additionally, while some states' school policy statutes apply to private schools, other states do not extend these protections to private school students.⁸⁵ States that fail to

75. *See id.*

76. *See id.* Hawaii, Michigan, and New York all currently *propose* criminal sanctions.

77. Phillips, *supra* note 30, at 191.

78. Phillips, *supra* note 30, at 184. *See also, e.g.*, N.H. REV. STAT. ANN. § 193-F:4 (2011); OHIO REV. CODE ANN. § 3313.666 (2010); N.J. ADMIN. CODE § 6A:16-7.7 (2015) (requiring only public school districts and chartered public schools to implement anti-cyberbullying policies).

79. *Infra* notes 82-83.

80. Catherine Donaldson-Evans, *Schools Make Rules For Cell Phone No-Nos*, FOX NEWS (Sept. 23, 2004), <http://www.foxnews.com/story/2004/09/23/schools-make-rules-for-cell-phone-no-nos.html>.

81. Phillips, *supra* note 30, at 185.

82. *See, e.g.*, ME. REV. STAT. ANN. tit. 20-A, § 6554 (2015).

83. *See, e.g.*, Anti-Bullying and Harassment Act of 2011, H.R. 975, 112th Cong. (1st Sess. 2011).

84. *Id.*

85. Phillips, *supra* note 30, at 185; *see also* Donaldson-Evans, *supra* note 80, and accompanying text.

recognize cyberbullying in their anti-bullying statutes and states that merely regulate at the school level are failing to account for the outlying cases such as Conrad and Megan Meier's.

D. Additional Criminal Cyberbullying Statutes

As a companion, some states have recently begun to enact their own aggressive cyberbullying statutes that impose criminal sanctions on violators in response to some of these high-publicity cases resulting in suicides.⁸⁶ These statutes are broad and generally apply to anyone who harasses a minor online as opposed to only applying to public school students.⁸⁷ North Carolina is a prime example of what these statutes entail.⁸⁸ North Carolina makes it a misdemeanor for anyone to engage in a number of online harassment activities, that includes but is not limited to, creating a fake online profile, pretending to be a minor online, or "us[ing] a computer system for repeated, continuing, or sustained electronic communications" with the intent to "intimidate" or "torment" a person.⁸⁹ Other popular attributes in state laws include a broad definition of "electronic communications" and require "malicious" intent.⁹⁰

While these state laws attempt to address the major gaps in school-based policy statutes and at first glance seem favorable, they also create their own hazards and are difficult to enforce.⁹¹ Above all, cyberbullying statutes are

86. Phillips, *supra* note 30, at 186. Other states have utilized tort remedies, while several cities and counties also have ordinances against cyberbullying. *Id.* at 184, 187. However, not all states draft entirely new legislation. Some follow Missouri's legislative path: in response to Megan Meier's case in 2008, Missouri modernized its existing criminal harassment statute (codified at MO. REV. STAT. § 565.090 (2016)), *invalidated in part* by *State v. Vaughn*, 366 S.W.3d 513 (Mo. 2012) (severing subsection (5) from the act as unconstitutionally overbroad). Many states amend their harassment or stalking laws to further encompass cyber versions of these offenses. Although amendments of this type only seem like minor adjustments to cover new, electronic means of committing acts that are already criminal, these amendments inevitably target "non-physical" harassment and stalking, which only consists of expressive conduct. Without arduous drafting in the expansion of these laws, cyber stalking and cyber harassment would be unlikely to withstand constitutional challenges. Seemingly, legislatures would be better off creating entirely new laws as opposed to amending old ones. Lidsky & Garcia, *supra* note 32, at 700.

87. Phillips, *supra* note 30, at 186.

88. Phillips, *supra* note 30, at 186.

89. *See, e.g.*, N.C. GEN. STAT. § 14-458.1 (2016).

90. Phillips, *supra* note 30, at 186; *see, e.g.*, MD. CODE ANN., CRIM. LAW § 3-805(a)(2) (2016)(broadly defining electronic communications as the transmission of information, data, or communication by the use of a computer or any other electronic means that is sent to a person and that is received by the person); LA. REV. STAT. ANN. § 14:40.7(A) (with the malicious and willful intent to coerce, abuse, torment, or intimidate a person under the age of eighteen).

91. Phillips, *supra* note 30, at 186-88. Many adolescents do not feel comfortable reporting these incidents, and they often go undetected until it is too late. There are also issues such as law enforcement's lack of expertise in the realm of cyberspace and relatively limited resources and

difficult to draft without running afoul of the First Amendment.⁹² Many cyberbullying laws criminalize broad sweeps of online communication, and as a result, the statutory language would unlikely withstand constitutional vagueness and overbreadth challenges.⁹³ By failing to define terms such as “intimidate” or “harass,” statutes would likely be rendered impermissibly vague and infringe on our constitutional right to freedom of speech.⁹⁴ For example, if a victim is extremely reserved or has been isolated from society, merely using swear words in an online forum could rise to the level of intimidation or harassment.⁹⁵ Moreover, by criminalizing these laundry lists of online behaviors, the laws encompass an extremely wide range of online activities, some of which fall outside of an appropriately tailored definition of cyberbullying.⁹⁶ For example, there is the possibility that the statute would criminalize adding a juvenile’s name to a spam list.⁹⁷ In *People v. Marquan M.*, New York’s Court of Appeals was the first court to strike down a county’s cyberbullying statute on constitutional grounds because the statutory language as written was not “fairly susceptible to an interpretation that satisfies applicable First Amendment requirements.”⁹⁸ If the reasoning of the Court in *Marquan M.* was applied to various other criminal cyberbullying statutes, several would likely be held unconstitutional because they criminalize online speech too generally.⁹⁹

Had the Megan Meier Cyberbullying Prevention Act passed into federal law, it would have “amend[ed] the federal criminal code to impose criminal penalties on anyone who transmits in interstate or foreign commerce a communication intended to coerce, intimidate, harass, or cause substantial emotional distress to another person, using electronic means to support severe, repeated, and hostile behavior.”¹⁰⁰ As drafted, Megan’s Act received little enthusiasm from the House subcommittee who thought the measure was an unconstitutional breach of free speech.¹⁰¹ The committee’s chairman warned

knowledge of cybercrimes. Further, by prohibiting online activities based on the author’s intent and adding this *mens rea* requirement, i.e. that the perpetrator acted intentionally, purposefully, or willfully, it is challenging to reach convictions because mental states are often difficult to prove in all areas of criminal law. *Id.*

92. Phillips, *supra* note 30, at 188.

93. Phillips, *supra* note 30, at 180.

94. Phillips, *supra* note 30, at 201.

95. Phillips, *supra* note 30, at 201.

96. Phillips, *supra* note 30, at 186.

97. Phillips, *supra* note 30, at 202.

98. Phillips, *supra* note 30, at 181 (citing *People v. Marquan M.*, 19 N.E.3d 480 (N.Y. 2014)).

99. Phillips, *supra* note 30, at 181; *see generally Marquan M.*, 19 N.E.3d at 480.

100. *See, e.g.*, Cyberbullying Prevention Act of 2008, *supra* note 33.

101. David Kravets, *Cyberbullying Bill Gets Chilly Reception*, WIRED (Sept. 30, 2009, 6:37 PM), <http://www.wired.com/2009/09/cyberbullyingbill/>.

that “[w]e need to be extremely careful before heading down this path.”¹⁰² The law could unintentionally punish political or other forms of speech; for example, a blogger coercing a politician into voting a particular way.¹⁰³ By repeatedly using a hostile tone, the author could be using electronic means to transmit a communication into interstate commerce with the intent to coerce, therefore violating the law.¹⁰⁴ Megan’s Act further proposed up to two years of imprisonment for violators.¹⁰⁵ The committee therefore was concerned that the legislation was “over-criminaliz[ing].”¹⁰⁶ Promulgating new and zealous cyberbullying laws can also be considered over-criminalizing because the legislature is essentially creating new crimes that overlap with existing ones.¹⁰⁷ These statutes often coincide with assault, battery, eavesdropping, wiretapping, and threat-making, among other crimes.¹⁰⁸ As a result, cyberbullies, most of which are juveniles, run the risk of being disproportionately punished for their wrongdoing when prosecutors charge them with multiple offenses or unwarranted charges with severe sentences.¹⁰⁹ Ultimately, the states’ haphazard cyberbullying laws fail to account for perpetrators like Carter and offer no assistance in the prosecution of Conrad’s case.

E. *How to Effectively Combat Severe Incidents of Cyberbullying*

Legislators are struggling to find a comprehensive and effective solution to protect cyberbullying victims without drafting statutes that would likely be subject to significant vagueness and overbreadth challenges under the First

102. *Id.*

103. Larry Magid, *Stop Cyberbullying with Education, Not New Law*, CNET (July 19, 2009, 12:20 PM), <https://www.cnet.com/news/stop-cyberbullying-with-education-not-new-law/>.

104. *Id.*

105. *See, e.g.*, Cyberbullying Prevention Act of 2008, *supra* note 33 at § 3(a)(a).

106. Kravets, *supra* note 101.

107. Lidsky & Garcia, *supra* note 32, at 697–698. Douglas Husak, a professor of philosophy, has studied the principle of over-criminalization in depth. He has attempted to formulate a theory for identifying “criminal laws that are justified” and “those that are not.” He identified the creation of “overlapping crimes” as one example of over-criminalization. He further explains that overlapping crimes often come about when tragedies, such as youth suicides, attract national media attention, and, as a result, officials publicly pledge to take action to prevent similar cases in the future. Oftentimes, this consists of the enactment of a seemingly new offense. Husak explains that new statutes are necessary if they truly prohibit harmful and culpable conduct that was not already criminalized. Such cases, however, are rare. Far more typically, the original conduct was already prohibited by law, and the new offense actually describes that criminal behavior in greater specificity, while imposing a more severe sentence. As is the issue in this case, the new law frequently involves the use of a technological innovation such as a cell phone or computer. *Id.* (citing generally DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008)).

108. Lidsky & Garcia, *supra* note 32, at 698.

109. Lidsky & Garcia, *supra* note 32, at 698.

Amendment or over-criminalizing cyberbullies.¹¹⁰ As a result of the major gaps in current laws, the atypical cases that result in suicide have no effective criminal procedure in place. The inconsistencies among the states leave many unanswered questions.¹¹¹ The behaviors that constitute cyberbullying evolve drastically from state to state and from school campuses to students' homes.¹¹² The penalties for cyberbullying outside of school intervention range from civil penalties to misdemeanors and felonies with prison sentences.¹¹³ It is also unclear if cyberbullying should be criminal in the first place, and if so, should warrant a manslaughter charge with a long prison sentence like Carter, a misdemeanor as in Megan Meier's case, or some lesser offense. After all, most cyberbullying violators are juveniles. To punish juveniles so harshly in an area of the law that is so arbitrary and underdeveloped seems unjust.

Lawmakers' reflexive criminalization of cyberbullying due to political and emotional pressure is understandable; however, simultaneously criminalizing common childhood wrongdoing, especially when committed through speech, can lead to unfavorable consequences.¹¹⁴ Legislatures have been too ambitious in their attempt to "eliminate" cyberbullying and have tried to encompass far too much conduct in one statute, thereby potentially violating the First Amendment.¹¹⁵ As of now, statutes are drafted to deter incidents ranging from adults in an online forum telling children to go kill themselves to name-calling among teenagers through text messages. I suggest that lawmakers clearly define four different categories of cyberbullying, including: (1) minor conduct that schools are better equipped to tackle through administrative responses; (2) severe conduct that rises to the level of criminal such as threats and stalking; (3) tortious conduct such as invasion of privacy, intentional infliction of emotional distress, libel, and defamation; and¹¹⁶ (4) merely ill-mannered conduct that is better left stigmatized by public shaming and shunning.¹¹⁷ Not

110. *Emerging Realities*, *supra* note 49, at 617.

111. *See* Hinduja & Patchin, *supra* note 74.

112. *See* Hinduja & Patchin, *supra* note 74.

113. *See* Hinduja & Patchin, *supra* note 74.

114. Lidsky & Garcia, *supra* note 32, at 697.

115. Lidsky & Garcia, *supra* note 32, at 712.

116. Lidsky & Garcia, *supra* note 32, at 718.

117. *See, e.g.,* Daniel Solove, *More facts about the Megan Meier Case*, CONCURRING OPINIONS (Dec. 7, 2007), http://concurringopinions.com/archives/2007/12/more_facts_about.html. After Megan Meier's trial, Drew (the defendant) received death threats and repulsive insults. On the Internet, she was portrayed as a monster who should go to prison, lose custody of her children, or worse. Her name and address were posted online, and an Internet site with satellite images of her home said she should "rot in hell." Her home-based business was run into the ground because she lost all of her clients. Someone obtained Drew's cell phone password to replace her voicemail recording with a disturbing message. Her neighbors had reported that she had not been seen outside for a lengthy amount of time, and the sheriff in her town reported that patrols had drastically increased around the Drew residence for fear of her safety.

all of these issues can be resolved through statutory law nor should they be.¹¹⁸ Criminal statutes should focus on only criminalizing particularly troublesome forms of narrowly defined online activities, such as threats, stalking, fighting words, repetitive speech, and adult-to-student speech since children are more emotionally vulnerable and have a higher necessity for these types of protections.¹¹⁹ While narrow legislation of this type of specificity is not as politically popular, it is far more likely to uphold to First Amendment scrutiny.¹²⁰ By distinguishing between different degrees of cyberbullying and creating separate solutions for what only *seems* like one major social issue, prosecutors are capable of a more tightly drawn and effective response to these severe incidents without over-criminalizing any of these types of behaviors.

Most significantly, states are failing to account for the mental illnesses that the overwhelming majority of suicidal cyberbullying victims suffer from.¹²¹ Since it is unlikely that being a victim of cyberbullying *by itself* will lead to suicide, laws should address that at some point the cyberbully is no longer the cause of the victim's decision to end their own life. Ideally, the states need to find common ground between psychological research and legal research in order to better grasp the role that mental illness plays in suicides before concluding that cyberbullies' words were the sole cause of the suicides. Navigating these subtle and often wavering lines of criminal culpability lends itself to strong evidence that the appropriate remedy for these types of cases may be found in the civil courts.

Even if the Massachusetts legislature was to amend their current cyberbullying statutes as proposed, Carter's words would still unlikely rise to the level of criminal. On its face, Carter pressuring Conrad to commit suicide through text messages is atrocious; however, Carter and Conrad's relationship did not resemble that of a typical cyberbully and their victim.¹²² When viewed alone Carter's text messages are troublesome, but there are also excerpts where they displayed their love to one another and where Carter urged Conrad to go to the psychiatric hospital where she was already receiving treatment for her own condition.¹²³ According to Carter's defense attorney, "It should be further noted the district attorney did not release all of the various text messages which showed for months prior to Conrad Roy's suicide Miss Carter continuously requested he seek help."¹²⁴ Carter was his confidant and romantic interest.¹²⁵

118. Lidsky & Garcia, *supra* note 32, at 725.

119. Lidsky & Garcia, *supra* note 32, at 725.

120. Lidsky & Garcia, *supra* note 32, at 725.

121. *Risk of Suicide*, *supra* note 38.

122. *See generally* Resp. to Def.'s Mot., *supra* note 1.

123. *See generally* Resp. to Def.'s Mot., *supra* note 1.

124. Lindsay McCane, *Michelle Carter: Conrad Roy III's Girlfriend Charged with Involuntary Manslaughter for his Suicide*, Inquisitr (Sept. 9, 2015), <http://www.inquisitr.com/240>

Conrad had told her that she was one of the reasons he had not yet committed suicide: “Without you and my family I’d be long gone.”¹²⁶ Moreover, Conrad’s history of depression and prior suicide attempt raise the inference that Conrad would have taken his life without the assistance of Carter’s text messages. As the legislatures struggle to draft cyberbullying laws that can withstand constitutional scrutiny, it becomes more clear that the First Amendment does not allow criminal law to be used to punish every social contravention when committed through speech alone.

II. ASSISTED SUICIDE

A. *Defining Assisted Suicide and the Recent Statutory Modifications*

Carter’s conduct more closely resembles what some states’ assisted suicide laws ban. Allegedly, the lack of a criminal prohibition against assisted suicide in Massachusetts makes the case against Carter “an uphill battle for the prosecution.”¹²⁷ However, even if Massachusetts did outlaw assisted suicide, in many states her conduct would still remain outside the scope of the statute.¹²⁸ Assisted suicide is defined as “[the] intentional act of providing a person with the medical means or the medical knowledge to commit suicide,” which is not to be confused with physician-assisted suicide which occurs “when a *doctor* provides the means.”¹²⁹ Carter was the one who devised the plan to poison Conrad through the use of a combustion engine that would generate carbon monoxide.¹³⁰ Her efforts included advice on the plan’s technical aspects: “If you emit 3200 ppm of [carbon monoxide] for five or ten minutes you will die within a half hour 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.”¹³¹ “[T]ake some Benadryls before just in case and then you’ll breath it in and pass out and die very quickly and peacefully with no pain at all. There is no way you can fail.”¹³² Based off of

6015/michelle-carter-conrad-roy-iiiis-girlfriend-charged-with-involuntary-manslaughter-for-his-suicide/.

125. Resp. to Def.’s Mot., *supra* note 1, at 26.

126. Resp. to Def.’s Mot., *supra* note 1, at 26.

127. Slifer, *supra* note 24.

128. See *State-by-State Guide to Physician-Assisted Suicide*, PROCON.ORG (Oct. 5, 2015), <http://euthanasia.procon.org/view.resource.php?resourceID=000132> (last visited Feb. 13, 2016) [hereinafter “*State-by-State Guide*”].

129. Katie Franklin, Comment, *Physician-Assisted Death, Dementia, and Euthanasia: Using an Advances Directive to Facilitate the Desires of Those with Impending Memory Loss*, 51 IDAHO L. REV. 547, 552 (2015).

130. Resp. to Def.’s Mot., *supra* note 1, at 6.

131. Resp. to Def.’s Mot., *supra* note 1, at 6.

132. Resp. to Def.’s Mot., *supra* note 1, at 8.

her research, Carter further proposed the idea of purchasing a carbon monoxide tank, a regulator, and a feeding tube to go directly into Conrad's lungs.¹³³ It was her idea for Conrad to drive his truck to a parking lot in the daytime, an area where no one would interfere with the plan or report him, and where his suicide would be "less suspicious."¹³⁴ "Just park your car and sit there and it will take, like, 20 minutes. It's not a big deal."¹³⁵ Carter suggested specific alternative suicide methods as well, such as a suffocating himself with a bag or by hanging himself.¹³⁶ She then advised Conrad on how to conceal the preparation and execution of the plan from his parents.¹³⁷

There is currently a great deal of debate surrounding the morality of assisting someone to commit suicide, although most of it centers around *physician-assisted* suicide.¹³⁸ In 1997, the United States Supreme Court unanimously held that there is no Constitutional right to assisted suicide, which left the states free to pass their own laws prohibiting it.¹³⁹ As a result, there are forty states to date that have passed assisted suicide laws¹⁴⁰ although the degree of punishment varies drastically for perpetrators,¹⁴¹ similar to cyberbullying laws. Many states define assisted suicide as a form of homicide, most commonly manslaughter, but some consider it murder.¹⁴² Contrarily, other states punish perpetrators with professional discipline, a fine, or damages.¹⁴³

133. Resp. to Def.'s Mot., *supra* note 1, at 6.

134. Resp. to Def.'s Mot., *supra* note 1, at 33.

135. Resp. to Def.'s Mot., *supra* note 1, at 10.

136. Resp. to Def.'s Mot., *supra* note 1, at 11.

137. Resp. to Def.'s Mot., *supra* note 1, at 10.

138. See Franklin, *supra* note 129, at 563. See, e.g., Massachusetts "Death with Dignity" Initiative, Question 2 (2012), [https://ballotpedia.org/Massachusetts_%22Death_with_Dignity%22_Initiative,_Question_2_\(2012\)](https://ballotpedia.org/Massachusetts_%22Death_with_Dignity%22_Initiative,_Question_2_(2012)). In 2012, Massachusetts' "Death with Dignity" initiative was on the November general election ballot as an indirect initiated state statute. *Id.* The proposed measure would have allowed for terminally ill patients to be given lethal drugs, but it was defeated. The petition number for the initiative was 11-12. *Id.* See also 42 U.S.C. § 14401 (1997). In 1997, President Clinton signed the Federal Assisted Suicide Funding Restriction Act of 1997, which prohibits the use of federal funds in support of physician-assisted suicide (codified at 42 U.S.C. § 14401). *Id.*

139. Wash. v. Glucksberg, 521 U.S. 702, 705, 727 (1997) (holding Washington's ban on assisted suicide rationally related to a legitimate governmental interest).

140. Susan Zalkind, *Is Telling Someone to Commit Suicide a Crime?* VICE (Sept. 2, 2015), <http://www.vice.com/read/is-telling-someone-to-commit-suicide-a-crime-902>.

141. See generally Zalkind, *supra* note 140.

142. See *State-by-State Guide*, *supra* note 128.

143. See *State-by-State Guide*, *supra* note 128. In some states, if a suicide or an attempted suicide results, then the degree of punishment is worse.; see, e.g., MINN. STAT. § 609.215 (2016); N.H. REV. STAT. ANN. § 630:4 (2016); N.J. STAT. ANN. § 2C:11-6 (2016); TEX. PENAL CODE ANN. § 22.08 (2015); PA. CONS. STAT. § 2505 (2016).

A study found that only one-sixth of all reported assisted suicide cases are prosecuted.¹⁴⁴ Since law enforcement and prosecutors appear reluctant to bring forth charges in these cases, it seems fair to conclude that, as drafted, assisted suicide laws may be unworkable.¹⁴⁵ This also lends itself to evidence that this unwillingness to seek criminal sanctions is proof of law enforcement's sympathetic attitude towards violators and failure to see culpability.¹⁴⁶ If the vast majority of assisted suicide cases are not investigated or prosecuted, then statutory enforcement is not uniform which can result in serious injustice when these laws *are* enforced.¹⁴⁷

Public policy surrounding assisted suicide also seems to be changing in recent years.¹⁴⁸ While for a long time these laws have been long-standing expressions of the states' commitment to the preservation of human life, the majority of Americans now believe that a person has a moral right to end their own life if they are suffering.¹⁴⁹ Accordingly, there are five states that explicitly allow for physicians to prescribe life-ending medication to patients in this instance.¹⁵⁰

Of the states that make assisting suicide criminal, some prohibit the broadly defined acts of "aiding" or "assisting" another person to commit

144. Catherine D. Shaffer, Note, *Criminal Liability for Assisting Suicide*, 86 COLUM. L. REV. 348, 370-71 (1986).

145. Shaffer, *supra* note 144, at 371.

146. Shaffer, *supra* note 144, at 371.

147. Shaffer, *supra* note 144, at 371.

148. Shaffer, *supra* note 144, at 367.

149. See, e.g., *Should assisted suicide be legalized?*, DEBATE.ORG, <http://www.debate.org/opinions/should-assisted-suicide-be-legalized> (last visited Feb. 17, 2016). A recent poll shows seventy-four percent of Americans believe assisted suicide should be legalized. *Id.* See generally Justine R. Young, Article, *Dead Wrong: The Problems with Assisted Suicide Statutes and Prosecutions*, 6 STAN. L. & POL'Y REV 123 (1994) (identifying the problems with assisted suicide statutes and prosecutions even though suicide is not a crime in any state).

150. See, e.g., *Gonzales v. Oregon*, 546 U.S. 243, 249, 275 (2006) (upholding Oregon's Death With Dignity Act (ODWDA) exempting civil or criminal liability to state-licensed physicians who in compliance with ODWDA dispense or prescribe a lethal dose of drugs upon the request of a terminally ill patient, codified at OR. REV. STAT. § 127.800 (2006)); Patient Choice at End of Life Act, 2013 Bill Text VT S.B. 77 (2013) (allowing Vermont residents with terminal diseases the option to be described a lethal dose of drugs); Medicare End-of-Life Care Planning Act of 2007, 110 S. 466 (2007); *Baxter v. State*, No. ADV-2007-787, 2008 Mont. Dist. LEXIS 482, at *36 (Mont. Dist. Ct. Dec. 5, 2008) (holding that a competent, terminally ill patient has a right to die with dignity without violating Montana's Constitution); Washington Death with Dignity Act, REV. CODE WASH. (ARCW) § 70.245.901. All of these states require specific qualifications such as the patient must be at least eighteen years of age, reside within the state, death must be expected within six months, and the patient must orally request to the physician that they wish to die on two separate occasions or at least fifteen days apart, in addition to one written request. See *Id.* Montana is the only of the five states that has no legal protocol in place when it comes to the age requirement, number of months until death is expected, or the number of requests to the physician. *Baxter*, 2008 Mont. Dist. LEXIS 482, at *36.

suicide.¹⁵¹ However, several states have amended their statutes to further require intent and causation.¹⁵² Most importantly, many states have moved away from broad prohibitions on “encouraging” or “advising” someone to commit suicide and now explicitly require some physical act beyond pure speech.¹⁵³ For example, Georgia defines assist as “the act of physically helping or physically providing the means” to commit suicide.¹⁵⁴ In Arizona, it is manslaughter to “intentionally provide the physical means that another person uses to commit suicide, with the knowledge that the person intends to commit suicide.”¹⁵⁵ Evidence of the states’ evolving definitions of what constitutes assistance in carrying out assisted suicide and the further requirements of intent, causation, and some physical act beyond pure speech, implies that these broad assisted suicide laws that were encompassing words alone were criminalizing acts not intended to be criminalized. Carving out the stringent requirement of a physical act in order to convict someone further implies the discomfort of prosecuting defendants based entirely on what they said. This once again leads to the constitutional issues of criminalizing words alone.

151. Katherine Ann Wingfield & Carl S. Hacker, *Physician-Assisted Suicide: An Assessment and Comparison of Statutory Approaches Among the States*, 32 SETON HALL LEGIS. J. 13, 51 (2007). *See, e.g.*, ALASKA STAT. § 11.41.120(a)(2) (2015) (aiding another person to commit suicide); Ark. Code Ann. § 5-10-104 (2016) (causing or aiding another person to commit suicide); Colo. Rev. Stat. § 18-3-104(1)(b) (2016) (causing or aiding another person to commit suicide); Fla. Stat. § 782.08 (2016) (deliberately assisting in the commission of self-murder).

152. James Schoeberl, *Constitutional Law: How Minnesota Unconstitutionally Broadened Its Assisted-Suicide Statute – State v. Melchert-Dinkel*, 41 WM. MITCHELL L. REV. 398, 413 n.126 (2015). *See, e.g.*, ALASKA STAT. § 11.41.120(a)(2) (2015); ARK. CODE ANN. § 5-10-104(a)(2) (2016); CONN. GEN. STAT. § 53a-54a(a) (2016); IND. CODE ANN. § 35-42-1-2 (LexisNexis 2016); WASH. REV. CODE ANN. § 9A.36.060(1) (LexisNexis 2016). Louisiana, for example, is specific in that assisted suicide is “the intentional advising, encouraging, or assisting, of another person to commit suicide, or the participation in any physical act which causes, aids, abets, or assists another person in committing or attempting to commit suicide.” LA. STAT. ANN. § 14:32.12(A)(2) (2016). Some states take this a step further and distinguish “aiding” and “causing.” For example, in Delaware, a defendant is guilty if he or she “intentionally aids another person to commit suicide,” but is charged with manslaughter if he or she “intentionally causes another person to commit suicide” or murder if he or she “intentionally causes another person to commit suicide by force or duress.” DEL. CODE ANN. tit. 11, § 645 (2016).

153. Schoeberl, *supra* note 152, at 413, 428. *See, e.g.*, IDAHO CODE § 18-4017(1) (2016); 720 ILL. COMP. STAT. 5/12-34.5(a)(2) (2016); KAN. STAT. ANN. § 21-5407(a)(2) (2016); KY. REV. STAT. ANN. § 216.302(2) (LexisNexis 2015); MD. CODE ANN., CRIM. LAW § 3-102 (LexisNexis 2016); VA. CODE ANN. § 8.01-622.1(A) (2016); IND. CODE ANN. § 35-42-1-2.5(b) (LexisNexis 2016); OKLA. STAT. tit. 63, § 3141.3 (2016); 11 R.I. GEN. LAWS §11-60-3 (2016); S.C. CODE § 16-3-1090(B)(2) (2016); IOWA CODE § 707A.2 (2016); TENN. CODE ANN. § 39-13-216(a) (2016).

154. GA. CODE ANN. § 16-5-5(a)(1) (2016).

155. ARIZ. REV. STAT. ANN. § 16-5-5(A)(3) (2015).

B. *Constitutional Freedom of Speech Protections Revisited: State v. Melchert-Dinkel*

One of Carter's affirmative defenses is that her words are protected by the First Amendment and Article XVI's free speech safeguards.¹⁵⁶ Even though Massachusetts, Carter and Conrad's home state, lacks an assisted suicide law all together, the convicted defendant's conduct in *State v. Melchert-Dinkel* closely resembles Carter's actions. This case is also a prime example of states' assisted suicide statutes evolving in recent years due to the protections of the First Amendment.¹⁵⁷ In 2012, Melchert-Dinkel was convicted under Minnesota's assisted suicide statute.¹⁵⁸ There, the defendant posed online as a depressed and suicidal female nurse under various aliases.¹⁵⁹ He responded to posts on suicide websites presenting himself as a caring and compassionate friend who understood his victims' plight and wanted to help.¹⁶⁰ Melchert-Dinkel described step-by-step how to commit suicide by tying a rope to a doorknob and slinging the rope over the top of the door, similar to how Carter provided step-by-step instructions to Conrad on how to poison himself in his truck.¹⁶¹ One of Melchert-Dinkel's victims suffered from mental health issues and was debating on whether or not to commit suicide.¹⁶² After four days of ongoing electronic communications with Melchert-Dinkel who persistently pressured the victim to take his own life, the victim hanged himself utilizing Melchert-Dinkel's proposed suicide method.¹⁶³ Like Melchert-Dinkel, Carter also knew Conrad suffered from depression, yet encouraged Conrad to commit suicide through text messages and promoted her well-researched suicide method.¹⁶⁴

Minnesota's assisted suicide statute under which Melchert-Dinkel was prosecuted made it illegal to "intentionally advise, encourage, or assist in taking the other's own life."¹⁶⁵ Later in 2014, Melchert-Dinkel was tried again in the Minnesota Supreme Court which reversed the decision and convicted him only of "assisting" a suicide, thereby striking the words "encouraging" and "advising" from the statute.¹⁶⁶ The court found that the part of the law that banned someone from "encouraging" or "advising" suicide was unconstitutional, but upheld the part of the law that makes it a crime to "assist"

156. Resp. to Def.'s Mot., *supra* note 1, at 37.

157. See *State v. Melchert-Dinkel*, 844 N.W.2d 13 (Minn. 2014).

158. *Id.* at 16.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 17.

163. *Melchert-Dinkel*, 844 N.W.2d at 17.

164. Resp. to Def.'s Mot., *supra* note 1, at 26.

165. *Melchert-Dinkel*, 844 N.W.2d at 17. See also MINN. STAT. § 609.215(1).

166. *Id.* at 18.

in someone's suicide despite the fact these words appear interchangeable.¹⁶⁷ On remand, the court held that to "assist" someone requires "a level of involvement in the suicide beyond merely expressing a moral viewpoint or providing general comfort and support."¹⁶⁸ In applying the majority's reasoning to Conrad's case, Carter would be convicted under the Minnesota statute if the prosecution could prove that her text messages rose to "a level of involvement in the suicide beyond merely expressing a moral viewpoint or providing general comfort and support" and that there was a "direct, causal connection" between Carter's words and Conrad's actions to commit suicide. Given Conrad's state of mental health, the prosecution would have a difficult task proving that Conrad would not have committed suicide without Carter's text messages.

In Justice Page's dissent he agreed with the majority that barring speech that "advises" or "encourages" suicide is unconstitutional; however, he disagreed with the court's remand to determine whether Melchert-Dinkel's speech "assisted" the victims in taking their own lives.¹⁶⁹ He contended that according to the definition of "assist" in the dictionary there was insufficient evidence to prove that Melchert-Dinkel assisted in the suicides due to lack of a physical act.¹⁷⁰ Justice Page pointed out that the majority's decision to avoid this dictionary definition of assist was "telling" since it seemed to require a physical act.¹⁷¹ Additionally, Minnesota's assisted suicide statute is analogous to its aiding and abetting statute which requires a physical act beyond mere words.¹⁷² Justice Page reasoned that without some action "more concrete than speech," the publication of a book outlining suicide methods could be a violation of the First Amendment.¹⁷³ Even by further requiring a direct, causal link between the speech and suicide, Justice Page's book example also suggests a direct, causal link because it targets an entire population of mentally unstable and potentially suicidal people.¹⁷⁴ The assessment of whether a direct, causal link exists between the victim and the person assisting suicide is arguably arbitrary. Even more so, Conrad's suicidal predisposition would likely sever the causal chain.

167. *Id.*

168. *Id.* The court defined "assist" to be consistent with the plain meaning of the word; *speech* or conduct that provides another person with what is needed for the person to commit suicide. *Id.* (emphasis added).

169. *Id.* at 25.

170. *Id.* Using the same dictionary that the majority relied on, "assist" can be defined as "[a]n act of helping" and to help "a person in necessity; an action, process, or result."

171. *Melchert-Dinkel*, 844 N.W.2d at 25. The majority's analysis instead relies on the definition of the word "help," a word not used in the language of the statute.

172. Schoeberl, *supra* note 152, at 422. *see, e.g.*, MINN. STAT. § 609.05, 609.215.

173. Schoeberl, *supra* note 152, at 422.

174. Schoeberl, *supra* note 152, at 422.

It is important to note that suicide itself is not considered a crime in the United States, nor is attempted suicide or the discussion of suicide; rather, it is “considered an expression of mental illness.”¹⁷⁵ Since one of the categories of speech that is not afforded First Amendment protections is speech generated in connection with illegal activities, in the event that suicide was an illegal act, Carter could be found guilty of “inciting or producing imminent lawless action.”¹⁷⁶ However, since suicide is not unlawful conduct, this First Amendment exception does not apply to Conrad’s case. Counterintuitively, assisted suicide laws are examples of legislatures criminalizing people for assisting others to carry out legal acts.¹⁷⁷ Even a surviving member of a suicide pact may be charged as an aider or abetter of suicide.¹⁷⁸ Despite the relatively low number of cases in the United States where a party to a suicide pact has been charged with assisted suicide, it is poor public policy to criminalize those contemplating suicide that instead choose to live.¹⁷⁹ Overall, there is a certain perverseness about legislatures punishing one who aids an act that is not itself a crime.¹⁸⁰

C. *The Necessity for More Stringent Assisted Suicide Statutes*

The Minnesota Supreme Court striking the verbs “encourage” and “advise” from their assisted suicide statute, in addition to the many states that recently added a requirement of some physical act beyond pure speech, intent, and causation in their assisted suicide laws, all lend themselves to the conclusion that convicting someone based purely on their words is problematic. Whether Carter was being tried in a state with a stringent assisted suicide law or in a state where speech alone constitutes assistance, all of these statutes come with serious public policy concerns. Further magnifying the major inconsistencies among the states, there are five states that explicitly legalize assisted suicide and five others that are silent on the issue. If states are insistent upon keeping their laws that ban assisted suicide, I suggest that they strike behaviors such as “encourage” or “advise” from their laws just as Minnesota did subsequent to *Melchert-Dinkel*. By criminalizing words of encouragement and advice, legislatures are prohibiting broad sweeps of communication and

175. *In re Joseph G.*, 667 P.2d 1176, 1178 (Cal. 1983) (discussing the American legal view of suicide). One commentator reasoned, “punishing suicide is contrary to modern penal and psychological theory.” Derrick Augustus Carter, *Knight in the Duel With Death: Physician Assisted Suicide and the Medical Necessity Defense*, 41 VILL L. REV. 663 (1996).

176. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). *See also* *United States v. Williams* 553 U.S. 285, 303 (2008).

177. Schoeberl, *supra* note 152, at 420.

178. Shaffer, *supra* note 144, at 366.

179. Shaffer, *supra* note 144, at 366 (psychiatric treatment would be more appropriate than criminal sanctions).

180. Shaffer, *supra* note 144, at 366.

simultaneously breaching the First Amendment. These states should further strike broad acts such as “aid” and “assist” from their statutes because these laws would likely be deemed constitutionally vague.

I next suggest the states adopt more stringent assisted suicide laws that further require proof of intent, causation, and a physical act. Evidence of some states already adding these elements and moving away from prohibitions on “encouraging” or “advising” someone to commit suicide, suggests that laws where speech alone constitutes assistance are criminalizing words not intended to be criminalized. With such a small percentage of reported assisted suicide cases being prosecuted, by adopting these proposed amendments, the statutes would be more specific and would offer law enforcement and prosecutors clear guidance in order to successfully bring forth these charges. These proposed statutes are superior to current state statutes because a streamlined definition of assistance will remove the obscure assessment of what constitutes assistance in order to reach a conviction. By no means should cyber-based encouragement alone fall within the scope of any states’ assisted suicide laws because anything broader would likely not withstand First Amendment challenges. Conrad’s case once again brings attention to the disharmony of the states’ promulgation of statutes surrounding convictions based on pure speech. Nevertheless, if Massachusetts were to make these proposed amendments, Carter’s text messages would be an insufficient act to constitute assistance. The First Amendment once again suggests that just because conduct is reprehensible, does not mean it is criminal.

III. INVOLUNTARY MANSLAUGHTER

A. *The Seeming Need for a Physical Act in Massachusetts: Persampieri v. Commonwealth*

The majority of states issue statutes solely addressing assisted suicide and recognize it as a unique offense; however, there are eight states that include assisted suicide in their manslaughter or homicide statutes.¹⁸¹ While Carter and Conrad’s home state of Massachusetts is one of the states with no explicit statute that prohibits assisted suicide, Massachusetts’ manslaughter statute has a case in the notes following the statute from the Supreme Judicial Court of Massachusetts that is related to assisted suicide.¹⁸² The note is about a case, *Persampieri v. Commonwealth*, that reads “husband aiding wife to commit suicide could be found guilty of involuntary manslaughter.”¹⁸³ Although the

181. Wingfield & Hacker, *supra* note 151, at 53. *See, e.g.*, MO. REV. STAT. § 565.023 (a person commits the crime of voluntary manslaughter if he knowingly assists another in the commission of self-murder).

182. *See* MASS. GEN. LAWS ANN. ch. 265 § 13(2) (LexisNexis 2016).

183. *Id.*

facts in *Persampieri* are comparable to Conrad's case, Carter's actions can be distinguished due to her lack of physical assistance in the suicide.

In *Persampieri*, the defendant informed his wife that he was going to file for divorce after they returned home from a social gathering.¹⁸⁴ The wife had been drinking and was in a fragile emotional state when she threatened to commit suicide.¹⁸⁵ The defendant reminded her that she had attempted suicide on two prior occasions and said she was "chicken . . . and wouldn't do it."¹⁸⁶ He then told her to go and get the .22 caliber rifle in the kitchen.¹⁸⁷ When the wife unsuccessfully tried to load the gun, the defendant loaded it for her and handed the gun back to his wife.¹⁸⁸ "She put . . . [it] between her legs with the butt . . . on the floor and the muzzle barrel against her forehead."¹⁸⁹ His wife tried to reach the trigger, but was unable to.¹⁹⁰ At the advice of her husband, she removed her shoe so she could reach the trigger, and the gun discharged.¹⁹¹ The wife died the following day, and the defendant was convicted of involuntary manslaughter for the reckless disregard of his wife's safety and the possible consequences of his conduct.¹⁹² Similar to the victim in *Persampieri*, Conrad had mental health issues and previously attempted to take his own life; still Carter continued to goad him with his suicidal thoughts. Arguably, *Persampieri* is precedent that assisted suicide is prohibited in Massachusetts, at least under common law.¹⁹³ Nonetheless, Carter's case can be distinguished from *Persampieri* who handed his wife a loaded gun because there was no physical exchange between Carter and Conrad. Likewise, Carter was not in the same proximity as Conrad, but was in a location far away on a cell phone when he committed suicide.¹⁹⁴

B. The Prosecution's Prima Facie Claim: Commonwealth of Massachusetts v. Michelle Carter

Carter was indicted on involuntary manslaughter charges, "an unlawful homicide unintentionally caused by an act which constitutes such disregard of probable harmful consequences to another as to amount to wanton or reckless conduct."¹⁹⁵ In Massachusetts, there is no statutory definition of manslaughter;

184. *Persampieri v. Commonwealth*, 343 N.E.2d Mass. 19, 22 (1961).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 22–23.

190. *Persampieri*, 343 N.E.2d at 19, 23.

191. *Id.*

192. *Id.*

193. Wingfield & Hacker, *supra* note 151, at 58.

194. Zalkind, *supra* note 140.

195. *Commonwealth v. Life Care Ctrs. Of Am., Inc.*, 456 N.E.2d 826, 836 (Mass. 2010).

its elements are derived from common law.¹⁹⁶ In order to prove involuntary manslaughter: (1) the defendant's conduct must have been intentional; (2) the conduct must have been wanton and reckless; and (3) the conduct must have been the cause of the victim's death.¹⁹⁷

In order to prove that Carter acted with the requisite intent, the first element of the crime, the prosecution heavily relies on Carter telling Conrad to get back in the truck when he feared that the plan was working.¹⁹⁸ On the day of the suicide, Carter's final text message to Conrad read, "You can do this."¹⁹⁹ Three minutes later Conrad called Carter, and they talked on the phone for ninety minutes.²⁰⁰ At some point during that call, Conrad got out of the car "because [the carbon monoxide poisoning] was working and he got scared."²⁰¹ Carter "told him to get back in."²⁰² Second, Carter's forceful assistance and counsel over the course of the week prior to Conrad's suicide, and not just during the incident, is further evidence she intended for Conrad to take his own life.²⁰³ Finally, the prosecution looks to Carter's ploys to get attention after Conrad's death to prove her intent.²⁰⁴ After the suicide, Carter published Facebook and Twitter posts about Conrad: "Even though I could not save my boyfriend's life, I want to put myself out here to try to save as many other lives as possible."²⁰⁵ Carter created a Facebook event for a fundraiser that she organized in Conrad's memory.²⁰⁶ She held the fundraiser in her hometown, a considerable distance from Conrad's hometown.²⁰⁷ When Conrad's friend, Tom, proposed holding the tournament closer to Conrad's friends and family, Carter became upset.²⁰⁸ Carter told Tom, "[T]his was my idea. I created it to be here."²⁰⁹ When Tom shared the Facebook event through his Facebook account, Carter asked him, "You're not taking credit for my idea though; right? LOL."²¹⁰ At the tournament, Tom noticed that Carter was acting strange and seeking attention.²¹¹ Conrad's sisters said they felt uncomfortable because they

196. *Commonwealth v. Catalina*, 556 N.E.2d 973, 976 (Mass. 2011).

197. *See Life Care Ctrs. Of Am., Inc.*, 926 N.E.2d at 211-12.

198. Resp. to Def.'s Mot., *supra* note 1, at 25.

199. Resp. to Def.'s Mot., *supra* note 1, at 16-17.

200. Resp. to Def.'s Mot., *supra* note 1, at 17.

201. Resp. to Def.'s Mot., *supra* note 1, at 17.

202. Resp. to Def.'s Mot., *supra* note 1, at 17.

203. Resp. to Def.'s Mot., *supra* note 1, at 17.

204. Resp. to Def.'s Mot., *supra* note 1, at 25.

205. Resp. to Def.'s Mot., *supra* note 1, at 22.

206. Resp. to Def.'s Mot., *supra* note 1, at 22.

207. Resp. to Def.'s Mot., *supra* note 1, at 22.

208. Resp. to Def.'s Mot., *supra* note 1, at 22.

209. Resp. to Def.'s Mot., *supra* note 1, at 22.

210. Resp. to Def.'s Mot., *supra* note 1, at 22.

211. Resp. to Def.'s Mot., *supra* note 1, at 22.

did not know anyone there.²¹² While Carter's conduct subsequent to the suicide does not portray her in a positive light, she arguably resembles a typical teenage girl. By alleging that these actions constitute intent is a difficult argument for the prosecution to make in proving their heavy burden.

To prove the second element, the prosecutors rely on the facts of *Persampieri* as support that her conduct was "wanton or reckless," i.e. "intentional conduct . . . involving a high degree of likelihood that substantial harm will result to another."²¹³ Recall that the defendant in *Persampieri* handed his emotionally unstable wife a loaded gun that discharged when she removed her shoe at the advice of her husband, and therefore the defendant was convicted of involuntary manslaughter.²¹⁴ The prosecution reasons that, like the defendant in *Persampieri*, Carter knew Conrad had previously attempted to commit suicide and that he was planning to do it again, yet continued to provoke Conrad with texts like "[y]ou always say you're gonna do it, but never do."²¹⁵ Carter was in a position of trust as Conrad's confidant and had specific knowledge that her relationship with him was one of the reasons he had not already committed suicide, further demonstrating her reckless behavior.²¹⁶ Carter offered Conrad comfort by convincing him that his family and friends would understand and that his parents would not be afflicted with emotional distress, but would "get over it and move on."²¹⁷ The prosecution also points to Carter's failure to alleviate the risk created by her actions as wanton or reckless behavior.²¹⁸ They contend that if an individual's actions create a life-threatening condition, there is a duty to take reasonable steps to alleviate the risk created.²¹⁹ Carter allegedly had days to report Conrad's purchase of a combustion engine and hours to warn authorities the day of the incident.²²⁰ Nevertheless, not only can Carter's actions be distinguished from *Persampieri* because she did not affirmatively assist in the suicide by handing Conrad a loaded gun, but under *Commonwealth v. Pugh*, the Supreme Judicial Court of Massachusetts held that "proof of recklessness

212. Resp. to Def.'s Mot., *supra* note 1, at 22.

213. Resp. to Def.'s Mot., *supra* note 1, at 24-25 (quoting *Commonwealth v. Pugh*, 462 Mass. 482, 496 (2012)).

214. See *Persampieri v. Commonwealth*, 343 N.E.2d 19, 19 (1961).

215. Resp. to Def.'s Mot., *supra* note 1, at 25. See, e.g. Carter's text messages: "I just want to make sure tonight is the real thing." "You can't keep pushing it off, though. That's all you keep doing." "When are you gonna do it? Stop ignoring the question???" "There isn't anything anyone can do to save you, not even yourself." "WELL WHEN ARE YOU GETTING [THE GENERATOR]?" "The time is right."

216. Resp. to Def.'s Mot., *supra* note 1, at 26.

217. Resp. to Def.'s Mot., *supra* note 1, at 2.

218. Resp. to Def.'s Mot., *supra* note 1, at 29.

219. Resp. to Def.'s Mot., *supra* note 1, at 29.

220. Resp. to Def.'s Mot., *supra* note 1, at 30.

requires more than a mistake of judgment or even gross negligence.”²²¹ In that case, the Court held that there was insufficient evidence to convict the defendant on a theory of wanton or reckless behavior when the defendant’s failure to call for assistance, i.e. omission to act, was the proximate cause of the death that resulted.²²² While Carter may have been grossly negligent, her failure to alleviate the risk likely does not constitute wanton or reckless behavior.

In support of the third element of causation, the prosecution again relies on the reasoning in *Persampieri*: “[A] defendant can cause a victim’s death by influencing and enabling him to take his own life.”²²³ The prosecution focuses on Carter telling Conrad “to get back in” when he exited the truck while in a suicidal state and suffering from the effects of carbon monoxide poisoning.²²⁴ As in many cases of assisted suicide, causation proves to be a significant hurdle for the prosecution.²²⁵ For involuntary manslaughter, as with all homicides, the defendant’s acts must be the proximate cause of the victim’s death, i.e. but for the defendant’s actions, the death would not have ensued. In 1816, *Commonwealth v. Bowen* was the first assisted suicide case that took place in the United States and coincidentally it was in Massachusetts.²²⁶ Other courts have presented similar doctrines of causation as laid out in *Bowen*.²²⁷ There, the defendant was indicted in a lower court feloniously for counseling, persuading, and procuring a fellow prisoner, Jewett, to hang himself the day before Jewett was scheduled to be executed.²²⁸ The Commonwealth appealed, maintaining that advising someone to murder themselves was in itself murder.²²⁹ The relevant inquiry was whether the prisoner was instrumental in the suicide of Jewett, by advice or otherwise.²³⁰ The jury instructions concentrated on the question of causation – whether or not the defendant’s advice actually had any influence on Jewett and thereby brought about the effect intended.²³¹ The jury found the prisoner not guilty; probably from a doubt whether the advice given by him was, in any measure, the procuring

221. 969 N.E.2d 672, 685 (Mass. 2012).

222. *Id.* at 676.

223. Resp. to Def.’s Mot., *supra* note 1, at 31 (quoting *Persampieri v. Commonwealth*, 343 N.E.2d 19, 22–23 (1961)).

224. Resp. to Def.’s Mot., *supra* note 1, at 32.

225. John A. Alesandro, *Physician-Assisted Suicide And New York Law*, 57 ALB. L. REV. 820, 829 (1994).

226. *Id.* at 829.

227. *Id.* at 830.

228. *Commonwealth v. Bowen*, 13 Mass. 356, 356 (1816).

229. *Id.* at 359.

230. *Id.*

231. Alesandro, *supra* note 225, at 829.

cause of Jewett's death.²³² Under *Bowen*, Carter's advice likely was not the "procuring cause" of Conrad's suicide.

An act is a cause of a victim's death if the act, in a natural and continuous sequence, results in death, and without the act, death would not have occurred.²³³ Carter's defense attorney argues that there is no evidence that Carter caused Conrad's death because he obtained and ran the combustion engine himself, while she was in a distant location on a cell phone.²³⁴ On the same basis, Conrad's decision to commit suicide constituted an intervening event which would insulate Carter from criminal liability.²³⁵ The defense contends that there is no evidence that Carter "provided the means" or "set into action" the events which led to the suicide.²³⁶ Once again Conrad's mental health issues and previous attempt at suicide imply that he likely had a predisposition to take his own life despite Carter's supportive words.²³⁷ Conrad also left a suicide note, lending itself to the conclusion that Conrad thought his plan out and left his house that morning with the intent to take his own life.²³⁸ While a grand jury decided there was sufficient evidence to indict Carter with *probable cause* of each element of involuntary manslaughter, the prosecution has major hurdles to overcome in order to prove *beyond a reasonable doubt* that Carter committed manslaughter.

IV. THE PROPOSAL: TEXT MESSAGES ARE AN INSUFFICIENT *ACTUS REUS*

After analyzing Carter's actions under various cyberbullying, assisted suicide, and involuntary manslaughter laws, it would be difficult to convict her of any crime in many states. While few would argue that Carter's actions were reprehensible, this does not mean they are criminal. Coincidentally, each analysis suffered from the same issues: the seeming need for a physical act beyond pure speech, the causal chain between Carter's text messages and Conrad's death being severed by his suicidal predisposition, and the protections afforded from freedom of speech under the First Amendment. Carter's case will likely center around whether words in and of themselves can lead to criminal culpability and whether certain electronic communications, such as text messages, are protected under the First Amendment.²³⁹ Unfortunately for our litigious society, just because something is repugnant does not automatically transform it into a criminal act. Our First Amendment

232. *Bowen*, 13 Mass. at 360–61.

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

234. Resp. to Def.'s Mot., *supra* note 1, at 35.

235. Resp. to Def.'s Mot., *supra* note 1, at 35.

236. Resp. to Def.'s Mot., *supra* note 1, at 35.

237. Resp. to Def.'s Mot., *supra* note 1, at 35.

238. Resp. to Def.'s Mot., *supra* note 1, at 36.

239. Slifer, *supra* note 24.

jurisprudence recognizes that all members of society will in many instances be exposed to unpleasant and even repugnant speech, ranging from rude comments to racial slurs.²⁴⁰ The only proper recourse is to develop emotional resiliency for the law cannot intervene in every case where someone's emotions have been affected, nor would most citizens want laws to.²⁴¹ Implicit in the right to engage in protected activities is "a corresponding right to associate with others in pursuit of a wide variety of social, political, economic, educational, religious, and cultural ends."²⁴²

It is no coincidence that the same issues surfaced in the analysis of each crime. By allowing a seventeen-year-old girl's text messages alone to suffice as a weapon in the manslaughter of her mentally ill teenage boyfriend, society would undoubtedly be lead down a slippery slope. The State would do well to leave punishment to tort law rather than attempt the arduous task of drafting cyberbullying, assisted suicide, and involuntary manslaughter statutes with enough precision and specificity to withstand First Amendment challenges and still simultaneously punish Carter's words.²⁴³ Legislatures need to admit to their constituents that some social behaviors must be curtailed through educating, socializing, and stigmatizing perpetrators as opposed to criminalizing their speech.²⁴⁴

CONCLUSION

While Carter's conduct contains components of cyberbullying, assisted suicide, and involuntary manslaughter, there is no statute that perfectly fits the circumstances. Even if the legislatures create a more tightly drawn response to severe cases like Conrad's by amending existing statutes, her text messages are still not enough to constitute an *actus reus* in a criminal conviction. Society has a long history of being uncomfortable with convictions based on words alone, and the only evidence the prosecution has in Conrad's case are Carter's text messages. The combination of First Amendment protections, Conrad's history of depression, and his previous suicide attempt, raise reasonable doubt that Conrad committed suicide solely because of Carter's text messages. Furthermore, the state of Carter's own mental health creates an impression that the prosecution may be attempting to criminalize mental illness. While a quick glimpse of Carter's text messages leaves most people troubled, her words likely are not and should not be illegal, as potentially unsatisfying as that may be. Criminal law cannot be used to punish every social transgression, especially when many of those transgressions are committed through

240. Lidksy & Garcia, *supra* note 32, at 724.

241. Lidksy & Garcia, *supra* note 32, at 724.

242. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).

243. Lidksy & Garcia, *supra* note 32, at 724.

244. Lidksy & Garcia, *supra* note 32, at 725.

speech.²⁴⁵ The uncomfortable truth is that Michelle Carter did something disgraceful, but she should not be found a criminal.

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245. Lidksy & Garcia, *supra* note 32, at 725.

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