
CRIMINAL LAW — LIABILITY FOR PHYSICAL HARM — TRIAL COURT CONVICTS DEFENDANT OF INVOLUNTARY MANSLAUGHTER BASED ON ENCOURAGEMENT OF SUICIDE. — *Commonwealth v. Carter*, No. 15YO0001NE (Mass. Juv. Ct. June 16, 2017).

Can words kill? Recently, faced with high-profile deaths related to bullying or the affirmative encouragement of suicide, prosecutors increasingly seem to answer “yes.”¹ But while most people acknowledge words can “kill” in some sense, many are unwilling to accept that this conclusion is likewise true in a legal sense.² The implication that words can sustain a criminal conviction pits society’s instinct to preserve life (and avenge death) against the robust American tradition of protecting free speech, regardless of how repugnant that speech may be.³ Recently, in *Commonwealth v. Carter*,⁴ a Massachusetts Juvenile Court trial judge found Michelle Carter guilty of involuntary manslaughter for encouraging her long-distance boyfriend, Conrad Roy, to commit suicide.⁵ By incorporating a theory of omission liability into his analysis, the trial judge unduly complicated the issue. Instead, a guilty verdict would have been entirely defensible on the well-accepted, simpler theory that a defendant is responsible for the acts of another when his conduct completely overwhelms the victim’s free will — a high bar minimizing free speech concerns.

On July 12, 2014, Roy drove his truck to a secluded parking lot where he was found dead the next day, killed by carbon monoxide poisoning.⁶ During the ensuing investigation, text message records showed Roy and Carter, who met in 2012 and formed a romantic relationship, had frequently discussed Roy’s suicidal thoughts, history of mental health difficulties, and previous suicide attempts.⁷ While Carter initially

¹ See, e.g., Travis M. Andrews, *A Horribly Bullied Teen Committed Suicide. Now His Former Dairy Queen Boss Has Been Charged with Involuntary Manslaughter*, WASH. POST (Feb. 2, 2017), <http://wapo.st/2jGwY6g> [<https://perma.cc/PCP7-BYSQ>]; Chris Williams, *Nurse Charged with Aiding Suicides over Web*, NBC NEWS (Apr. 23, 2010, 2:06 PM), http://www.nbcnews.com/id/36739748/ns/us_news-crime_and_courts/t/nurse-charged-aiding-suicides-over-web [<https://perma.cc/YS4K-CWDC>].

² See, e.g., Robby Soave, Opinion, *Michelle Carter Didn’t Kill with a Text*, N.Y. TIMES (June 16, 2017), <https://nyti.ms/2sz3rUq> [<https://perma.cc/CVL9-H93G>].

³ Cf. *State v. Melchert-Dinkel*, 844 N.W.2d 13 (Minn. 2014) (reversing a conviction for intentionally advising or assisting in suicide on First Amendment grounds).

⁴ Verdict, *Commonwealth v. Carter*, No. 15YO0001NE (Mass. Juv. Ct. June 16, 2017) [hereinafter Verdict].

⁵ *Id.*

⁶ Commonwealth’s Response to Defendant’s Motion to Dismiss at 17, *Carter*, No. 15YO0001NE [hereinafter Commonwealth’s Response].

⁷ *Id.* at 1–18; see also Brief for the Defendant/Appellant add. at 36–51, *Commonwealth v. Carter*, 52 N.E.3d 1054 (Mass. 2016) (No. 12043), 2016 WL 963901 (detailing some of the text messages exchanged between Carter and Roy from June 1, 2014, onward); *Read Text Messages, Other Evidence From the Trial of Michelle Carter*, WCVB (June 13, 2017, 1:20 PM) [hereinafter

dissuaded Roy from acting on those thoughts, she eventually changed course, regularly encouraging him to commit suicide and helping him devise the method he would use.⁸ A grand jury indicted Carter for involuntary manslaughter in February 2015.⁹

Carter moved to dismiss the indictment, arguing that, as a matter of law, words alone — without a “physical act” — could not sustain a manslaughter charge.¹⁰ The Juvenile Court denied the motion; on appeal, the Massachusetts Supreme Judicial Court (SJC) affirmed.¹¹ Justice Cordy, writing for a unanimous court, rejected the argument that verbally encouraging someone to commit suicide cannot constitute the wanton or reckless conduct required for a manslaughter conviction.¹² He highlighted the “coercive quality” of Carter’s encouragement given the circumstances, namely the intimate relationship between the two, “the defendant’s virtual presence at the time of the suicide, the previous constant pressure the defendant had put on the victim, and his already delicate mental state.”¹³ Since the evidence suggested Carter “overbore the victim’s willpower,”¹⁴ Justice Cordy concluded that there was probable cause to sustain a manslaughter indictment.¹⁵

The case thus proceeded to trial, where Carter waived her right to a jury.¹⁶ According to the prosecution, Carter had preyed on Roy’s vulnerable mental state through callous text messages and phone calls in pursuit of attention.¹⁷ The prosecution presented a detailed recounting

Text Message File], <http://www.wcvb.com/article/evidence-from-the-trial-of-michelle-carter/10011731> [https://perma.cc/V62U-BURX] (linking to the full file of all text messages).

⁸ Katharine Q. Seelye & Jess Bidgood, *Guilty Verdict for Young Woman Who Urged Friend to Kill Himself*, N.Y. TIMES (June 16, 2017), <https://nyti.ms/2tv3vSb> [https://perma.cc/TDV7-LE5K]. Carter advised Roy on using a carbon monoxide-producing generator and concealing his use of the generator. Commonwealth’s Response, *supra* note 6, at 6–11.

⁹ Michael E. Miller, *Michelle Carter Can Face Manslaughter Charge for Allegedly Encouraging Boyfriend’s Suicide, Judge Rules*, WASH. POST (Sept. 24, 2015), <http://wapo.st/1WkpVyK> [https://perma.cc/VWQ4-RHMU].

¹⁰ Reply Brief for the Defendant/Appellant at 4–5, *Carter*, 52 N.E.3d 1054, 2016 WL 1317502. Involuntary manslaughter consists of conduct that: (1) is intentional, (2) is wanton or reckless, and (3) causes the victim’s death. *Carter*, 52 N.E.3d at 1061 (citing *Commonwealth v. Life Care Ctrs. of Am., Inc.*, 926 N.E.2d 206, 211 (Mass. 2010)).

¹¹ *Carter*, 52 N.E.3d at 1059, 1065.

¹² *Id.* at 1061. Justice Cordy pointed out that the court had never required a physical act to sustain such an indictment and that the SJC had allowed convictions of involuntary manslaughter to stand where the death of the victim was self-inflicted. *Id.* at 1061–62.

¹³ *Id.* at 1063.

¹⁴ *Id.* (citing *Commonwealth v. Atencio*, 189 N.E.2d 223, 225 (Mass. 1963)).

¹⁵ *Id.* at 1064.

¹⁶ *Plainville Teen Waives Right to Jury Trial in Texting Suicide Case*, CBS BOS. (June 5, 2017, 9:39 AM), <http://boston.cbslocal.com/2017/06/05/michelle-carter-conrad-roy-teen-texting-suicide-case> [https://perma.cc/X3NU-NJ8A].

¹⁷ 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/>

of Carter and Roy's text messages, which constituted a significant proportion of their contact, since they did not live in the same town.¹⁸ Carter assuaged Roy's doubts, the prosecution explained.¹⁹ She encouraged him to commit suicide as soon as possible and scolded him when he delayed plans to do so.²⁰ The prosecution further demonstrated that, around the time Roy was committing suicide, he and Carter shared two lengthy phone conversations.²¹ Carter later texted her friend to explain Roy called her after exiting the truck because he was "scared."²² In response, Carter told him to "get back in," which he did.²³ An expert testified that it took approximately twenty minutes of exposure for Roy to die from carbon monoxide poisoning, and Carter told friends that she had listened over the phone as he died.²⁴ Afterward, Carter's text messages revealed she claimed to be unaware of Roy's plans to commit suicide,²⁵ but later she told a friend she "helped ease him into it" and "his death is my fault."²⁶

Following the prosecution's case, Judge Moniz denied the defense's motion for a directed verdict, rejecting the argument there was no law prohibiting the encouragement of suicide.²⁷ The defense then argued a change in Carter's antidepressant prescription led her to adopt her aggressive tone with Roy.²⁸ A psychiatrist testified the drug rendered Carter "involuntarily intoxicated" such that she was "unable to form intent."²⁹ The defense avowed it was "Roy's idea to take his own life"

how-testimony-unfolded-first-day-texting-suicide-case/YeIFSnLftoBPhSgrKiYtDI/story.html [https://perma.cc/3HGE-AV25].

¹⁸ See Text Message File, *supra* note 7; Commonwealth's Response, *supra* note 6, at 1.

¹⁹ Commonwealth's Response, *supra* note 6, at 1-4.

²⁰ *Id.* at 4-6. Examples of Carter's texts include: "you always seem to have an excuse" (July 6); "You can't keep pushing it off tho [sic], that's all you keep doing" (July 8); and "WELL WHEN ARE YOU GETTING [THE GENERATOR]" (July 9). *Id.* at 5; Text Message File, *supra* note 7.

²¹ Commonwealth's Response, *supra* note 6, at 17.

²² *Id.* at 21.

²³ *Id.*

²⁴ 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> [https://perma.cc/E9H6-M8DD].

²⁵ Commonwealth's Response, *supra* note 6, at 17.

²⁶ *Id.* at 21.

²⁷ *Michelle Carter's Defense Denied Motion to Dismiss Case*, CBS BOS. (June 9, 2017, 8:39 AM), <http://boston.cbslocal.com/2017/06/09/michelle-carter-defense-dismiss-case-attempt> [https://perma.cc/A6ML-FAH3].

²⁸ Ray Sanchez, Natisha Lance & Jay Croft, *Texting Suicide Trial: Michelle Carter's Fate in Judge's Hands*, CNN (June 13, 2017, 6:59 PM), <http://www.cnn.com/2017/06/13/health/text-message-suicide-trial/index.html> [https://perma.cc/8MFH-LDYW]. Carter switched from Prozac to Celexa, a change that a psychiatrist explained may affect one's empathy, decisionmaking, ability to feel love, and wisdom. *Id.*

²⁹ *Id.*

and consequently his death was “a suicide . . . not a homicide.”³⁰ After presenting evidence showing Roy had searched online for ways to commit suicide and may have been physically abused by his father,³¹ the defense reiterated Roy was a distressed young man, long intent on suicide before he “dragged” Carter into his depression.³²

Judge Moniz found Carter guilty.³³ Although he did not issue a written opinion supporting his decision, he did summarize his rationale in a verbal statement given at the time of the verdict.³⁴ Judge Moniz explained that prosecutors proved beyond a reasonable doubt Carter’s words of encouragement in the weeks leading up to the suicide were wanton or reckless but failed to prove that this conduct caused Roy’s death.³⁵ In his view, Roy’s research, preparation, and expressed desire to commit suicide made it clear that Carter’s support at that time did not cause his death.³⁶ However, Judge Moniz observed, when Roy exited the truck and abandoned his suicide attempt, he “br[oke] that chain of self-causation.”³⁷ Given Carter’s knowledge of Roy’s fears and the danger posed by the toxic environment within the truck, Judge Moniz found Carter’s instruction to get back into the truck at Roy’s crucial moment of equivocation to be wanton and reckless conduct.³⁸ Carter’s instruction created “a life-threatening risk”³⁹ to Roy by “put[ting] him into that toxic environment”⁴⁰ and thus imposed on Carter “a duty to take reasonable steps to alleviate [that] risk.”⁴¹ Ultimately, Carter’s “actions and *also her failure to act*, where she had a self-created duty,” constituted wanton and reckless conduct that “caused the death of Mr. Roy.”⁴²

³⁰ Reiss & Ransom, *supra* note 17.

³¹ David Linton, *Judge Hears Two Different Portraits of Plainville Woman During Texting-Suicide Trial*, SUN CHRON. (Attleboro, Mass.) (June 6, 2017), http://www.thesunchronicle.com/news/local_news/judge-hears-two-different-portraits-of-plainville-woman-during-texting/article_24d9bf3d-1693-5870-ae5e-2f9dboda459a.html [<https://perma.cc/HR67-GML6>].

³² Sanchez, Lance & Croft, *supra* note 28.

³³ Verdict, *supra* note 4.

³⁴ ABC News, *Judge Announces Verdict in Texting Suicide Trial*, FACEBOOK (June 16, 2017), <https://www.facebook.com/ABCNews/videos/10155909880378812> [<https://perma.cc/NK7N-8ARM>]. Notably, Judge Moniz stated his comments “should not be construed as a complete explanation of [his] findings as to the facts, [his] deliberative process, or all of the law that has been analyzed and applied.” *Id.* at 00:22.

³⁵ *Id.* at 02:09.

³⁶ *Id.* at 02:37.

³⁷ *Id.* at 03:37.

³⁸ *Id.* at 06:25. Arguing criminal liability for verbally supporting suicide is not without precedent, Judge Moniz cited an 1816 case that affirmed the murder conviction of a prisoner who encouraged a fellow prisoner to hang himself hours before he was to be publicly hanged. *Id.* at 05:19 (citing *Commonwealth v. Bowen*, 13 Mass. (13 Tyng) 356 (1816)).

³⁹ *Id.* at 09:32 (quoting *Commonwealth v. Levesque*, 766 N.E.2d 50, 57 (Mass. 2002)).

⁴⁰ *Id.* at 12:05.

⁴¹ *Id.* at 09:32 (quoting *Levesque*, 766 N.E.2d at 57).

⁴² *Id.* at 11:57. Judge Moniz noted briefly this finding was not offset by Carter’s involuntary

Judge Moniz's omission-based theory unnecessarily complicated the decision. The guilty verdict could have been better justified by a simpler, conduct-based theory: Carter's constant pressuring and final command to "get back in" overwhelmed Roy's free will such that she was responsible for his getting back into the truck. Grounding the decision in this reasoning would have made it clear that there is a high threshold for imposing criminal liability on the encouragement of suicide, curtailing free speech fears.

The attachment of criminal liability to Carter for her *failure* to act is a surprising departure from the SJC's guidance. In response to Carter's pretrial appeal, the SJC had already stated that a finder of fact could legally find Carter's *affirmative* conduct to be wanton or reckless such that she could be liable for involuntary manslaughter.⁴³ Indeed, the court specifically mentioned in its opinion that "[t]he indictment was returned on the basis of the defendant's wanton or reckless conduct" rather than a "failure to act."⁴⁴ Nevertheless, Judge Moniz's statements indicate his finding of guilt rested instead on Carter's failure to act to fulfill a duty to alleviate the "life-threatening risk"⁴⁵ that arose when she "put him into" the truck.⁴⁶ It is possible the use of omission liability was an attempt to narrow the applicability of the decision.⁴⁷ But the imposition of such a "duty to rescue" presupposes that Carter's instruction *caused* Roy to get into the truck to create that risk in the first place. Put differently, if Carter purposely "put [Roy] into" the truck and he was then killed by the toxic fumes inside, then there would seem to be no need to resort to omission liability.⁴⁸ Judge Moniz's theory thus implausibly rests Carter's culpability on her failure to act, whereas common

intoxication argument, since he "did not find that analysis credible." *Id.* at 12:31.

⁴³ Commonwealth v. Carter, 52 N.E.3d 1054, 1063–64 (Mass. 2016).

⁴⁴ *Id.* at 1060.

⁴⁵ ABC News, *supra* note 34, at 09:32.

⁴⁶ *Id.* at 11:52; *see also* United States v. Hatatley, 130 F.3d 1399, 1406 (10th Cir. 1997) ("When a person *puts another in a position of danger*, he creates for himself a duty to safeguard or rescue the person from that danger." (emphasis added)).

⁴⁷ Judge Moniz gave no indication of why he used a more complicated theory of liability than that posited by the SJC. It may be, however, that his articulation of omission liability was intended to introduce additional hurdles for a manslaughter conviction in suicide encouragement cases. Namely, Judge Moniz's standard may be read to require (1) an act creating a life-threatening risk, (2) knowledge that, as a result of that risk, the victim is attempting suicide, (3) use by the victim of a method that gives the encourager an opportunity to prevent the suicide, and (4) a failure to prevent it. *See* 1 WAYNE R. LAFAYE, SUBSTANTIVE CRIMINAL LAW § 6.2 (2d ed. 2003).

⁴⁸ Judge Moniz also said Carter created the duty "by instructing Mr. Roy to get back into the truck." ABC News, *supra* note 34, at 10:19. Even if the duty arose from the instruction itself, rather than her "put[ting]" Roy in the truck, omission liability would still be unnecessary. As Justice Cordy explained, wanton or reckless conduct "involv[es] a high degree of likelihood that substantial harm will result." *Carter*, 52 N.E.3d at 1060 (quoting Commonwealth v. Pugh, 969 N.E.2d 672, 685 (Mass. 2012)). If Carter's instruction created a "life-threatening risk" to Roy, the instruction itself could constitute the wanton or reckless conduct necessary to sustain a manslaughter conviction.

sense and the premise of an omission-based theory suggest that Carter's guilt actually stems from her "put[ting] him into" a toxic environment.⁴⁹ The unsuitability of omission liability here is reinforced by a key difference between this case and the traditional case of omission liability: whereas the typical victim in an omission case is helpless as a result of the defendant's actions,⁵⁰ the victim here ostensibly could have saved himself from the risk created by the defendant, but did not. An omission-based theory does nothing to explain why Carter's failure to seek help was an intervening cause warranting criminal liability, despite Roy's final decision to get in the truck and stay there. It also seems to suggest, oddly, that Carter would not be liable if Roy had chosen an instantaneous method of committing suicide.⁵¹

A more coherent approach would have drawn on a simpler, conduct-based theory: Carter's conduct, namely her constant pressuring and definitive command to "get back in" the truck,⁵² overwhelmed Roy's free will such that his act in obeying that command could be attributed to her. The SJC itself alluded to this theory when it described Carter's actions as "overb[earing]"⁵³ and "overwhelm[ing]"⁵⁴ Roy's willpower. The underlying rationale is intuitive and well accepted: "[a]n actor who does not personally satisfy an objective element, such as conduct, but who directly causes the required element by other means should be treated as if he satisfied the element himself."⁵⁵ Unsurprisingly, this

⁴⁹ Professor Arthur Leavens critiques this kind of differentiation between acts and omissions as artificial and unhelpful because it makes criminal liability "turn on . . . superficial distinctions" that can be manipulated by the court, rather than a true assessment of the "causal connection between the actor's conduct and the particular harm." Arthur Leavens, *A Causation Approach to Criminal Omissions*, 76 CALIF. L. REV. 547, 585 (1988). Instead, Leavens argues that an examination of the actor's "course of conduct" leading up to the harm — including both acts and omissions — would be simpler and achieve more commonsense results. *Id.* at 584.

⁵⁰ See, e.g., *Hatitley*, 130 F.3d at 1406 (affirming voluntary manslaughter conviction when, after the defendant and others beat up the victim, they left him "beaten and shirtless in the freezing desert wash"); *Jones v. State*, 43 N.E.2d 1017, 1019 (Ind. 1942) (affirming murder conviction after the defendant raped a girl, causing her such distress she fell into a stream and drowned). *Commonwealth v. Levesque*, cited by Judge Moniz, is an example of a case where the victims — firefighters — physically could have avoided the danger posed by the fire set by the defendants but were required to face it by the nature of their job. 766 N.E.2d 50, 55 (Mass. 2002). This pattern raises a difficult question that could have been avoided: does a duty to rescue arise when the victim can rescue himself but chooses not to?

⁵¹ This outcome is unlikely. *Persampieri v. Commonwealth*, 175 N.E.2d 387, 389 (Mass. 1961), discussed in the SJC's *Carter* opinion, see *Carter*, 52 N.E.3d at 1062, affirmed an involuntary manslaughter conviction where a woman shot herself on the prompting of her husband, despite the husband seeking aid afterward. *Persampieri*, 175 N.E.2d at 389.

⁵² This understanding of Carter's behavior reflects Leavens's holistic "course of conduct" approach to causation analysis. See Leavens, *supra* note 49, at 584.

⁵³ *Carter*, 52 N.E.3d at 1063.

⁵⁴ *Id.* at 1064.

⁵⁵ Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 631 (1984).

logic is applied throughout criminal law,⁵⁶ and has even been used to hold a defendant responsible for the suicide of another.⁵⁷ Applying it here makes explicit the assumption Judge Moniz implied in his articulation of omission liability — Carter caused Roy to get into the truck — but, unlike an omission theory, the analysis ends there. It is thus simpler, but achieves the same result. It also explains why Carter’s conduct renders her liable despite Roy’s actions toward the same end: his acts were not his own in that moment. Finally, this theory leads to consistent results across different fact patterns. A defendant who overwhelmed a victim’s will and caused the victim to commit suicide would be liable regardless of the particular suicide method used.

This conduct-based theory’s most important consequence, however, is the high and clear bar it sets for the criminalization of the encouragement of suicide.⁵⁸ Much of the criticism of the *Carter* verdict has centered on the concern that it criminalizes speech by shoehorning it into a crime meant to prohibit acts of physical, rather than verbal, violence.⁵⁹ Critics accordingly view the decision as a dramatic expansion of criminal liability that may chill family conversations about assisted suicide⁶⁰

⁵⁶ See *id.* at 631–39. Professor Paul Robinson describes various settings in which an actor was found to have satisfied a conduct element, despite a third party literally performing that conduct, due to a “strong causal connection,” *id.* at 638, between the defendant’s and the third party’s conduct. *Id.* at 631–39. In particular, Robinson highlights the imputation of causation to masterminds of criminal plots, see *id.* at 633 & n.80 (citing *Asher v. United States*, 394 F.2d 424, 428 (9th Cir. 1968)), to employers for orders given to employees, see *id.* at 631–32 (citing *Morse v. United States*, 174 F. 539 (2d Cir. 1909)), and to a woman who persuaded someone with mental illness to commit murder, see *id.* at 632 (citing *Fritz v. State*, 130 N.W.2d 279 (Wis. 1964)).

⁵⁷ See, e.g., *Stephenson v. State*, 179 N.E. 633, 649 (Ind. 1932) (affirming the defendant’s murder conviction after a woman whom he kidnapped and raped committed suicide, noting in particular she was “in the custody and absolute control” of the defendant); see also MODEL PENAL CODE § 210.5(1) (AM. LAW INST. 1985) (providing “[a] person may be convicted of criminal homicide” if “he purposely causes . . . suicide by force, duress or deception” (emphasis added)).

⁵⁸ Of course, given the individual and social costs of suicide, see, e.g., Madelyn S. Gould & Alison M. Lake, *The Contagion of Suicidal Behavior*, in *CONTAGION OF VIOLENCE* 68, 68–72 (Deepali M. Patel et al. eds., 2013), some may prefer a lower threshold of liability for the encouragement of suicide as a policy matter. Indeed, states can and have set various thresholds by statute, presumably delineating liability in accordance with the legislature’s policy preferences. See, e.g., CAL. PENAL CODE § 401 (West 2010); LA. STAT. ANN. § 14:32.12 (2016). Like a conduct-based manslaughter theory, such statutory proscriptions achieve more clarity than does Judge Moniz’s omission-based manslaughter standard, but it is nevertheless important to recognize that broadly drawn suicide-encouragement bans may implicate the First Amendment. See *State v. Melchert-Dinkel*, 844 N.W.2d 13, 23–24 (Minn. 2014).

⁵⁹ See, e.g., Brittani Ready, Comment, *Words As Weapons: Electronic Communications That Result in Suicide and the Uncomfortable Truth with Criminal Culpability Based on Words Alone*, 36 ST. LOUIS U. PUB. L. REV. 113, 139–41 (2017); Amanda Knox, Op-Ed, *Michelle Carter Deserves Sympathy and Help, Not Prison*, L.A. TIMES (Aug. 3, 2017, 1:10 PM), <http://www.latimes.com/opinion/op-ed/la-oe-knox-michelle-carter-20170803-story.html> [https://perma.cc/5UAT-GLU4].

⁶⁰ Press Release, Am. Civil Liberties Union of Mass., Statement on Michelle Carter Guilty Verdict (June 16, 2017), <https://aclum.org/uncategorized/aclu-massachusetts-statement-michelle-carter-guilty-verdict/> [https://perma.cc/GX7B-8WRD].

or overcriminalize bullying.⁶¹ These concerns make sense as a reaction to an omission-based theory which, despite Judge Moniz's apparent attempt to limit liability, articulates no definite standard to determine when a duty to act is created or to evaluate the scope of that duty.

When considered as a reaction to the theory that Carter's pattern of *conduct* overrode Roy's will, however, it becomes clear that critics' concerns are exaggerated. Recall the facts the SJC pointed to in holding that, as a matter of law, Carter's speech could be wanton or reckless conduct: Carter was in an intimate relationship with Roy, she was virtually present at the time of his suicide, and she had applied constant pressure over the course of weeks leading up to the suicide, all while knowing of his "delicate mental state."⁶² According to the SJC, this collection of extreme circumstances — *not verbal encouragement alone* — permitted a reasonable factfinder to find Carter "overbore" Roy's willpower such that his act of getting back into the truck was not his own.⁶³ A conduct-based theory derived from the *Carter* decision, then, maintains that a defendant may be held responsible for the suicide of another if the factfinder determines the defendant overwhelmed that person's free will after considering factors such as: the nature of their relationship, the defendant's knowledge regarding the victim's mental state or vulnerability, the defendant's literal or figurative presence at the time of suicide, the frequency and extent of communication between the two, and the intensity of the defendant's urging.⁶⁴ This straightforward test provides clear guidance for courts going forward and imposes a high standard that certainly would not sweep in run-of-the-mill bullying or "worthwhile end-of-life discussions between loved ones."⁶⁵

That Michelle Carter's involuntary manslaughter conviction is defensible on a conduct-based theory that she overwhelmed her boyfriend Conrad Roy's will is not to say that people cannot sensibly disagree as to whether Carter *caused* Roy's death. After all, that is a question for the factfinder. But a conduct-based theory makes clear that her guilt does not stem from her words alone, as critics have suggested, but rather from her consistent course of coercive behavior in light of Roy's mental health difficulties and the close relationship they shared. This high standard for liability should provide free speech advocates some solace, as it leaves little room for the broad criminalization of speech they fear.

⁶¹ Soave, *supra* note 2.

⁶² Commonwealth v. Carter, 52 N.E.3d 1054, 1063 (Mass. 2016).

⁶³ *Id.*

⁶⁴ Admittedly, Judge Moniz highlights Carter's knowledge of Roy's mental state at the time she told him to "get back in" the truck. ABC News, *supra* note 34, at 07:12. It is unclear, however, the exact role this consideration plays in his analysis since it could theoretically contribute to intent, recklessness, or even causation through greater foreseeability, *see* Leavens, *supra* note 49, at 582 n.118. By contrast, factors like awareness of mental health difficulties or a close personal relationship inhere in a conduct-based theory, because they directly pertain to whether someone can plausibly overbear the will of another and cause them to commit suicide.

⁶⁵ Press Release, *supra* note 60.