CAUSE OF DEATH? SPEECH: THE PROBLEMS WITH CRIMINALIZING THE "ENCOURAGEMENT" OF SUICIDE

NIKO DIMOPOULOS*

* J.D. Candidate 2021, Quinnipiac University School of Law.
Many thanks to Professor Gilles of Quinnipiac University School of Law for his guidance in writing this note and to the editors and staff of Quinnipiac Health Law Journal for their excellent editorial support.

Table of Contents

I. Introduction 213
II. Constitutional Principles 216
A. Vagueness 216
B. Overbreadth 217
C. Free Speech Principles 218
III. The "Speech Integral to Criminal Conduct" Exception 220
A. The Exception 220
B. Why the Exception Does Not Cover "Encouragement" of Another's Suicide 222
IV. Why Conrad's Law is Unconstitutional 228
A. Vagueness 229
B. Overbreadth 230
C. Free Speech Principles 232
D. Causation 233
V. Conclusion 235

I. Introduction

"Get back in."[1] Michelle Carter, a twenty-two-year-old from Massachusetts, was convicted of involuntary manslaughter and served a fifteen-month prison sentence for uttering those three words to Conrad Roy III.[2] Those three words, according to the Supreme Judicial Court of Massachusetts, caused Conrad's death.[3] But how? This note will examine how courts have justified attaching criminal liability to "encouraging" another to commit suicide.

History shows that suicide has never been a socially accepted act.[4] Punishments for suicide over time, however, have been eliminated.[5] While the old punishments that accompanied suicide no longer do, "the condemnation and stigma attached to suicide have not abated, and society still wants to discourage suicide as an act that has significant negative moral implications."[6] That is likely one of the reasons why some states continue to criminalize assisting another in his suicide.[7] Beyond "assisting," some states have also sought to criminalize the perimeter of "assisting," which has been called "encouraging."[8] After Conrad's death and Michelle Carter's trial, twenty Massachusetts legislators proposed "Conrad's Law," which would criminalize "encouraging" suicide.[9]

Conrad was of "fragile mental health" and had previously attempted suicide by overdosing on over-the-counter medication, drowning, water poisoning, and suffocation before his final, successful attempt.[10] After "extensive" research on suicide methods, his successful

[1] Commonwealth. v. Carter, 481 Mass. 352, 358 (2019).

[2] Emily Shapiro & Doug Lantz, *Michelle Carter Sentenced to 2.5 Years for Texting Suicide Case*, (Nov. 12, 2019), https://abcnews.go.com/US/michelle-carter-set-sentenced-texting-suicide-case/story?id=48947807.

[3] *Carter*, 481 Mass. at 363.

[4] *See* Sean Sweeny, *Deadly Speech: Encouraging Suicide and Problematic Prosecutions*, 67 CASE W. RES. L. REV. 941, 945 (2017).

[5] *Id.* at 946.

[6] *Id.* at 947.

[7] *Id.* at 952.

[8] *See, e.g.*, *id.* at 941 n.1 (discussing prosecutions and other relevant court actions in various states that have attempted to criminalize "encouraging").

[9] *See* H.R. 4186, 191st Gen. Ct., 1st Ann. Sess. (Mass. 2019); S. 2382, 191st Gen. Ct., 1st Ann. Sess. (Mass. 2019) (containing identical language as the House's bill and filed as a concurrent bill to the House's bill).

[10] Commonwealth v. Carter, 481 Mass. 352, 354 (2019).

attempt on July 12, 2014, was by carbon monoxide poisoning.[11] In the trial judge's words, "[Conrad's] research was extensive. He spoke of it continually. He secured the generator. He secured the water pump. He researched how to fix the generator. He located his vehicle in an unnoticeable area and commenced his attempt by starting the pump."[12]

At some point after he had been ingesting the fumes, he got out of the truck and called Michelle because "it was working."[13] While there was no documentary evidence of what was said on the call,[14] the police investigation found a text message from Michelle to one of her friends where Michelle said that she told Conrad to "get back in [the truck]."[15] He did, and he died.[16] The Supreme Judicial Court of Massachusetts affirmed Michelle's conviction for involuntary manslaughter.[17] That unconstitutional decision results from a faulty application of common law to an extraordinarily unique set of facts. While Conrad's Law did not exist when prosecutors charged Michelle with Conrad's death, the Supreme Judicial Court's reasoning for upholding her conviction is pertinent to the development of Conrad's Law.[18]

There is no doubt that Michelle's conduct was morally reprehensible to most people of reasonable sensibilities. But her immorality alone cannot create criminal liability. In *Northern Securities Co. v. United States*,[19] Justice Holmes proffered the adage, "Great cases like hard cases make bad law."[20] Hard cases make bad law, he said, "because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment."[21] The distorted judgment, Holmes contended, results from "a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well-settled principles of law will bend."[22] Carter's case was susceptible to precisely those 'appeals to the feelings' because of its

[11] *Id.* at 363.
[12] *Id.* at 362.
[13] Commonwealth. v. Carter, 474 Mass. 624, 629 n.8 (2016).
[14] *See id* at 629.
[15] *Carter*, 481 Mass. at 358.
[16] *Carter*, 474 Mass. at 625.
[17] *Carter*, 481 Mass. at 371.
[18] *See id.*; H.R. 4186, 191st Gen. Ct., 1st Ann. Sess. (Mass. 2019); S. 2382, 191st Gen. Ct., 1st Ann. Sess. (Mass. 2019).
[19] Northern Securities Co. v. United States, 193 U.S. 197 (1904).
[20] *Id.* at 400 (Holmes, J., concurring).
[21] *Id.*
[22] *Id.* at 400-01.

widespread coverage and the turpitude of Carter's conduct. The Supreme Court of the United States denied Carter's petition for certiorari, and she has completed her prison sentence.[23] The Massachusetts Legislature proposed a law to punish conduct like Carter's, presumably having realized that involuntary manslaughter is an inappropriate charge for such conduct.[24]

Michelle's case garnered national attention and inspired Massachusetts legislators to propose "Conrad's Law."[25] By the language of the Bill, it appears that the authors sought to criminalize Michelle's conduct and other forms of "encouraging" suicide.[26] An individual can be imprisoned under the following construction of the Bill:

> A person shall be punished by imprisonment in the state prison for not more than 5 years if they know of another person's propensity for suicidal ideation [and]: (1) (i) Exercise substantial control over the other person through . . . deceptive or fraudulent manipulation of the other person's fears, affections, or sympathies . . . (ii) intentionally . . . [encourage] that person to commit or attempt to commit suicide; and (iii) as a result of the . . . encouragement, in whole or in part, that other person commits or attempts to commit suicide.[27]

While the authors' motivations are undoubtedly sincere, whenever a law restricts pure speech, it must be squared with the Constitution. There are three Constitutional grounds upon which laws that criminalize encouraging suicide can be invalidated: vagueness, overbreadth, and general free speech principles.

---

[23] Carter v. Massachusetts., 140 S. Ct. 910 (2020) (mem.).

[24] *See* H.R. 4186, 191st Gen. Ct., 1st Ann. Sess. (Mass. 2019); S. 2382, 191st Gen. Ct., 1st Ann. Sess. (Mass. 2019).

[25] Mass. H.R. 4186; Mass. S. 2382.

[26] *See* Mass. H.R. 4186; Mass. S. 2382.

[27] Mass. H.R. 4186; Mass. S. 2382.

II. Constitutional Principles

A. Vagueness

Under the Constitution, the government has the power to deprive its people of life, liberty, and property.[28] However, it cannot do so without first affording the person being deprived of those rights "due process of law."[29] "Vague laws contravene the 'first essential of due process of law' that statutes must give people 'of common intelligence' fair notice of what the law demands of them."[30] A vague law "hand[s] responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide."[31] Thus, vague laws violate the separation of powers principle because the people's elected officials are the only people that can "make an act a crime."[32] Therefore, courts cannot "construe a criminal statute to penalize conduct it does not clearly proscribe."[33] The right to fair notice of what the law demands is one of many "designed to maximize individual freedoms within a framework of ordered liberty."[34]

Vagueness takes on a special bite in First Amendment settings because the dominant concern is notice to the individual.[35] In First Amendment settings, "the doctrine demands a greater degree of specificity than in other contexts."[36] That specificity must reflect "reasonably clear lines" between what conduct is and is not permissible.[37]

Congress has, over time, restricted constitutional rights by statute.[38] Those limitations, however, "are examined for substantive

[28] U.S. CONST. amend. V, § 2.

[29] *Id.*

[30] United States v. Davis, 139 S. Ct. 2319, 2325 (2019) (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)).

[31] *Id.*

[32] *Id.* (quoting United States v. Hudson, 11 U.S. 32 (1812)).

[33] *Id.* at 2333.

[34] Kolender v. Lawson, 461 U.S. 352, 357 (1983).

[35] *See* Smith v. Goguen, 415 U.S. 566, 574 (1974).

[36] *Id.* at 573.

[37] *Id.* at 574.

[38] *See, e.g.*, Bl(a)ck Tea Society v. City of Boston, 378 F.3d 8, 12 (1st Cir. 2004) ("Despite the importance of that right, the prophylaxis of the First Amendment is not without

authority and content as well as for definiteness or certainty of expression."[39] To prevent restrictions on constitutional rights from themselves violating the constitution, courts created the void-for-vagueness doctrine.[40] The doctrine "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[41] While the doctrine forwards ancillary benefits like "actual notice to citizens," the "principal element of the doctrine" is "the requirement that a legislature establish minimal guidelines to govern law enforcement."[42] If legislators fail to communicate a statute's terms clearly, that would give rise to "a standardless sweep [that] [would allow] policemen, prosecutors, and juries to pursue their personal predilections."[43] In the case of pure speech, a restriction must not only surmount the principles of freedom of speech but must also be carefully calculated so as not to be void-for-vagueness.[44]

B. Overbreadth

Overbreadth analysis is more searching when a statute aims at pure speech than when it aims mostly at conduct. When a statute purports to regulate "only spoken words," the potential societal harm that could occur from allowing unprotected speech to go unpunished is less important than the risk of protected speech being silenced.[45] An

limits. Reasonable restrictions as to the time, place, and manner of speech in public fora are permissible, provided that those restrictions 'are justified without reference to the content of the regulated speech, . . . are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information'") (alteration in original) (citation omitted).

[39] *Lawson*, 461 U.S. at 357.

[40] Connally v. General Const. Co., 269 U.S. 385, 391 (1926) ("That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.").

[41] *Lawson*, 461 U.S. at 357.

[42] *Id.* at 358 (citation omitted).

[43] *Id.* (first alteration in original) (citation omitted).

[44] *See id.* at 357.

[45] Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) (citation omitted).

overbroad statute cannot be enforced.[46] An overbroad statute is one that "punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep."[47] If the law's challenger can show that the law is overbroad, that "suffices to invalidate *all* enforcement of that law, until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression."[48]

Courts will invalidate laws that are overbroad because "enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions."[49] The "chilling effect" on constitutionally protected speech discourages speech entirely; this affects "society as a whole, which is deprived of an uninhibited marketplace of ideas."[50] There is a line beyond which the cost of avoiding a "chilling effect" is outweighed by a State's interest in "maintaining comprehensive controls over harmful, constitutionally unprotected conduct."[51] In the case of suicide, the state's legitimate interest in preserving human life permits the prohibition of assisting suicide but not of "encouraging" it.[52]

C. Free Speech Principles

The Framers unequivocally believed in the freedom of speech, such that it was enshrined into the Bill of Rights.[53] Truly free speech cannot, then, coexist with laws that penalize speech based on its viewpoint.[54] One of the most fundamental principles of the First Amendment is that "the Government is not allowed to prohibit the expression of an idea simply because society finds the idea itself

[46] Virginia v. Hicks, 539 U.S. 113, 118–19 (2003).
[47] *Id.* at 118-19 (citation omitted) (internal quotations omitted).
[48] *Id.* at 119 (emphasis in original) (citation omitted) (internal quotations omitted).
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] State v. Melchert-Dinkel, 844 N.W.2d 13, 23-24 (Minn. 2014).
[53] U.S. CONST. amend. I.
[54] Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991); *see also* Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment").

offensive or disagreeable.[55] Though society may find some speech offensive, that fault alone is not enough to justify suppression by the government. "Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."[56] As Justice Brandeis said, "[the Founders] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . and that the fitting remedy for evil counsels is good ones."[57]

The first step to determine if a defendant may be punished for his speech is to decide whether the First Amendment protects the speech. The Supreme Court has, over time, identified "historic and traditional categories [of expression] long familiar to the bar,"[58] that do not enjoy First Amendment protection. Those categories are "advocacy intended, and likely, to incite imminent lawless action; obscenity; defamation; speech integral to criminal conduct; so-called 'fighting words'; child pornography; fraud; true threats; and speech presenting some grave and imminent threat the government has the power to prevent."[59]

The Supreme Court has historically ruled either that those categories are "not within the area of constitutionally protected speech" or that First Amendment protections do not extend to them.[60] The First Amendment does not protect those categories of speech because "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required because the balance of competing interests is clearly struck."[61] Therefore, whether the speech at issue is protected is highly determinative as to whether the Court will uphold the government's restriction of that speech.

A law that restricts speech that falls under one of those unprotected categories is subject to "rational basis scrutiny."[62] Rational

[55] *Simon & Schuster, Inc.*, 502 U.S. at 118 (quoting United States v. Eichman, 496 U.S. 310, 319 (1990)).

[56] *Id.* (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988)).

[57] Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring).

[58] United States v. Alvarez, 567 U.S. 709, 717 (2012) (alteration in original) (citation omitted).

[59] *Id.* (citations omitted).

[60] R.A.V. v. St. Paul, 505 U.S. 377, 383 (1992).

[61] United States v. Stevens, 559 U.S. 460, 470 (2010) (quoting N.Y. v. Ferber, 458 U.S. 747, 763-64 (1982).

[62] *R.A.V.*, 505 U.S. at 406 (White, J., concurring).

basis scrutiny merely requires that the restriction on the speech be rationally related to a legitimate interest of the state.[63] If the restriction is rationally related to a legitimate state interest, then the law is upheld.[64] The prohibition of encouraging another person to commit suicide is rationally related to the State's (greater than) legitimate interest in preserving human life. Thus, if the speech covered by Conrad's Law were unprotected, therefore subjecting Conrad's Law to rational basis scrutiny, the Law would be upheld. In fact, the *Carter* Court found that the defendant's speech was unprotected because it fell under the "speech integral to criminal conduct" exception.[65]

III. The "Speech Integral to Criminal Conduct" Exception

A. The Exception

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[66] "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[67] Since the First Amendment was enacted, courts have permitted few limitations on the freedom of speech and have been resistant to permit new ones.[68] Obscenity, defamation, fraud, incitement, and speech integral to criminal conduct are "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[69] Relevant here is the "speech integral to criminal conduct" exception established in *Giboney v. Empire Storage & Ice Co.*[70]

In Kansas City, Missouri, in the mid-1900s, one hundred sixty of the two hundred retail ice peddlers in the city were members of the Ice and Coal Drivers and Handlers Local Union.[71] The members of the

[63] *Id.*
[64] *Id.*
[65] Commonwealth v. Carter, 481 Mass. 352, 368 (2019).
[66] U.S. CONST. amend. I.
[67] United States v. Stevens, 559 U.S. 460, 468 (2010) (alteration in original) (quoting Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 573 (2002)).
[68] *See id.*
[69] *Id.* at 468–69 (citations omitted).
[70] Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 492 (1949).
[71] *See id.*

union wanted the nonmembers to join, though most refused.[72] The union sought to "make it impossible for nonunion peddlers to buy ice to supply their retail customers in Kansas City," in order to force them to join the union.[73] To do that, the union tried to get the ice distributors to agree to not sell to the nonunion peddlers.[74] Empire Storage and Ice Company refused, so the union picketed Empire's place of business for "the avowed immediate purpose of . . . [compelling] Empire to agree to stop selling ice to nonunion peddlers."[75]

Empire's options were: (1) continue selling ice to nonunion peddlers and lose substantial business, (2) stop selling ice to nonunion peddlers and be exposed to suit, or (3) "invoke the protection of the law."[76] Empire argued that, through its picketing, the union was trying to force Empire to break the law because being forced to not sell to the nonunion members or selling only to the union members would violate a state anti-trade-restraint statute.[77] Since the union prevented any of its members from buying from Empire, Empire lost eighty-five percent of its business.[78] The trial court ordered the union to stop picketing, which was later affirmed by the State Supreme Court.[79] The United States Supreme Court reasoned that the holding did not violate the union's First Amendment right to freedom of speech because, "It rarely has been suggested that the constitutional freedom for speech . . . extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute."[80]

As a result of the *Giboney* decision, statutes that criminalize "encouraging" another to commit suicide find support in the above exception for "speech integral to criminal conduct."[81] That exception has been used to uphold laws against distributing and possessing child pornography, soliciting crime, announcing discriminatory policies, informing people about how crimes can be committed, recommending medical marijuana to patients, and engaging in retaliatory union speech,

[72] *See id.*
[73] *Id.*
[74] *See id.*
[75] *Id.*
[76] *Id.* at 493.
[77] *See id.*
[78] *See id.*
[79] *See id.*
[80] *Id.* at 498.
[81] Commonwealth. v. Carter, 481 Mass. 352, 368 (2019).

engaging in intentionally distressing speech about people, and more.[82] States have now tried to similarly enforce statutes that criminalize "encouraging" another to commit suicide by arguing that the speech falls into the exception.[83] It does not.

B. Why the Exception Does Not Cover "Encouragement" of Another's Suicide

Laws against the "encouragement" of another to commit suicide have already been struck down in some jurisdictions.[84] The facts of *State v. Melchert-Dinkel*[85] are most similar to those in *Commonwealth. v. Carter*.[86] Melchert–Dinkel responded to posts on suicide websites while pretending to be a young, suicidal female nurse.[87] He pretended to care about the two people whose posts he commented on in order to gain their trust.[88] Then he encouraged each to commit suicide and lied, saying he would do the same.[89] He tried to convince them to "let him watch the hangings via webcam."[90] Both of the people that Melchert-Dinkel corresponded with committed suicide.[91]

Law enforcement officials eventually determined that both decedents had communicated with Melchert-Dinkel by tracking his computer's IP address.[92] Melchert–Dinkel was tried and found guilty on two counts of aiding suicide.[93] The relevant statute states, "Whoever intentionally advises, *encourages*, or assists another in taking the other's own life may be sentenced to imprisonment for not more than 15 years or to payment of a fine of not more than $30,000, or both."[94]

[82] Eugene Volokh, *The Speech Integral to Criminal Conduct Exception*, 101 CORNELL L. REV. 981, 983 (2016).
[83] State v. Melchert-Dinkel, 844 N.W.2d 13, 19 (Minn. 2014).
[84] *See id.* at 24.
[85] State v. Melchert-Dinkel, 844 N.W.2d 13 (Minn. 2014).
[86] Commonwealth. v. Carter, 481 Mass. 352 (2019).
[87] *Melchert-Dinkel*, 844 N.W.2d at 16.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *See id.* at 17.
[92] *Id.*
[93] *Id.*
[94] Minn. Stat. § 609.215(1) (2020) (emphasis added).

On appeal, the State argued that the statute was valid because it proscribed speech that is "integral to [an] unlawful act,"[95] and that it was "narrowly tailored to serve the State's compelling interests in preserving life and protecting vulnerable members of society."[96] The court of appeals subsequently held that "'speech that intentionally advises, encourages, or assists another to commit suicide is an integral part of both 'the criminal conduct of physically assisting suicide' and another person's suicide, which is 'harmful conduct that the state opposes as a matter of public policy.'"[97] The State, however, decriminalized suicide in 1911.[98] Therefore, the Supreme Court of Minnesota found that the court could not apply the "speech integral to criminal conduct" exception since suicide was not illegal.[99]

Suicide remains harmful conduct, but to apply the exception to harmful conduct, and not solely criminal conduct, would be an inappropriate "expansion of the exception."[100] The State can still restrict speech, however, if the restriction passes strict scrutiny.[101] Strict scrutiny requires that the law "(1) is justified by a compelling government interest and (2) is narrowly drawn to serve that interest."[102] The State "must specifically identify an actual problem in need of solving, and the curtailment of free speech must be actually necessary to the solution."[103] Additionally, "There must be a direct causal link between the restriction imposed and the injury to be prevented."[104]

While the State has a compelling interest in preserving human life,[105] the court was not persuaded that the "advising" and "encouraging" prohibitions were narrowly tailored.[106] The Minnesota statute did not define "advises" or "encourages," so the court gave the terms their plain meanings.[107] It found that "advise" meant "inform," that

[95] *Melchert-Dinkel*, 844 N.W.2d at 18.
[96] *Id.*
[97] *Id.* (quoting State v. Melchert–Dinkel, 816 N.W.2d 703, 714 (Minn. App. 2012)).
[98] *Id.* at 19.
[99] *Id.*
[100] *See id.* at 20.
[101] *See id.* at 21.
[102] *Id.*
[103] *Id.* (quoting Brown v. Ent. Merchants Ass'n, 564 U.S. 786, 798 (2011)).
[104] *Id.* at 21-22 (quoting United States v. Alvarez, 567 U.S. 709, 725 (2012)).
[105] *Id.* at 22 (citing Planned Parenthood Ass'n of Kansas City v. Ashcroft, 462 U.S. 476, 485 (1983)).
[106] *Id.* at 22, 24.
[107] *Id.* at 23.

"encourage" meant "give courage, confidence or hope," and that neither necessitated "a direct, causal connection to a suicide."[108] The legal difference is significant because assisting consists largely of conduct and very little speech, whereas advising and encouraging consist almost entirely of speech.[109] The State's compelling interest in banning the speech is not furthered by banning "encouragement" because the encouragement of suicide is tangential to the act of suicide.[110]

The Minnesota advise/encourage provisions would permit the prosecution of "general discussions of suicide with specific individuals or groups."[111] Just because some view discussion of suicide as repugnant, it is still an "expression of a viewpoint on a matter of public concern," deserving of "special protection as the highest rung of the hierarchy of First Amendment values."[112] The *Melchert-Dinkel* court ultimately concluded that the "advise" and "encourage" prohibitions failed strict scrutiny because they were not narrowly tailored to the State's goal and were severable from the statute.[113]

After Carter filed her petition for certiorari, the Supreme Court ordered the State of Massachusetts to file a reply brief.[114] In the State's reply brief, it argued that the statute at issue in *State v. Melchert-Dinkel*, which in part criminalized encouraging another's suicide, "has no analog in Massachusetts.[115]" Therefore, "the Minnesota court's reasoning is inapposite [to Carter's case]."[116] The proposal of Conrad's Law raises a nearly exact analogue as it too criminalizes encouraging another's suicide.[117]

The State of Massachusetts does not "condone, authorize or approve suicide,"[118] but there is no criminal statute punishing the act. Since suicide is not a crime in Massachusetts, as in Minnesota,

[108] *Id.*
[109] *Id.*
[110] *Id.* at 23-24.
[111] *Id.* at 24.
[112] *Id.* (quoting Snyder v. Phelps, 562 U.S. 443, 452 (2011)).
[113] *Id.*
[114] *Carter v. Massachusetts*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/carter-v-massachusetts/ (last visited Nov. 16, 2019).
[115] Brief in Opposition at 7, Carter v. Massachusetts, 140 S. Ct. 910 (2020) (mem.) (No. 19-62), 2019 WL 6327269, at *7.
[116] *Id.*
[117] H.R. 4186, 191st Gen. Ct., 1st Ann. Sess. (Mass. 2019); S. 2382, 191st Gen. Ct., 1st Ann. Sess. (Mass. 2019).
[118] MASS. GEN. LAWS ch. 201D § 12 (2020).

encouraging someone to do it cannot possibly fall under the "speech integral to *criminal* conduct" exception to First Amendment protection. None of the other categories of unprotected speech apply to "encouraging" suicide, so a higher level of scrutiny is necessary to evaluate Conrad's Law.[119]

In *U.S. v. Alvarez*,[120] the majority struck down a statute that criminalized falsely claiming that one was awarded a military honor.[121] Faced with a content-based regulation on speech, the Court articulated and applied a specific framework for analyzing that type of regulation.[122] Conrad's Law is a content-based regulation and should therefore be subject to the preceding *Alvarez* analysis.

The content-based regulation of speech in *Alvarez* was held to a standard of "exacting scrutiny,"[123] because the Court rejected a "free-wheeling approach"[124] based on "an ad hoc balancing of relative social costs and benefits."[125] Exacting scrutiny requires that "the Government's chosen restriction on the speech at issue be 'actually necessary' to achieve its interest,"[126] and that "[t]here must be a direct causal link between the restriction imposed and the injury to be prevented."[127] If the government can show the restriction's actual necessity and its direct causal link to the potential injury, it must nonetheless use only the "least restrictive means among available, effective alternatives."[128] The difficulty of proving actual necessity and a direct causal link make it "rare that a regulation restricting speech because of its content will ever be permissible."[129]

Additionally, the statute could not stand because the Government did not, and could not, show "why counterspeech would not suffice to achieve its interest," since counterspeech and refutation are the appropriate response.[130] The same logic applies to discussions of the benefits of suicide because some people see moral value in

[119] Mass. H.R. 4186; Mass. S. 2382.
[120] United States v. Alvarez, 567 U.S. 709, 726 (2012).
[121] *Id.* at 730.
[122] *Id.* at 719.
[123] *Id.* at 724 (quoting Turner Broad. Sys., Inc. v. F.C.C. 512 U.S. 622, 642 (1994)).
[124] *Id.*
[125] *Id*. (quoting United States v. Stevens, 559 U.S. 460, 470 (2010)).
[126] *Id.* at 725 (quoting Brown v. Ent. Merchants Ass'n, 564 U.S. 786, 799 (2011)).
[127] *Id.*
[128] *Id.* at 729 (quoting Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 666 (2004)).
[129] *Ent. Merchants Ass'n*, 564 U.S. at 799.
[130] United States v. Alvarez, 567 U.S. 709, 726 (2012).

advocating for suicide in certain situations. A belief in the moral value of suicide is more appropriately rebutted with "counterspeech" than criminalization. Whether or not the "right" to suicide is inherent in the human condition, the "[f]reedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person."[131] The First Amendment principles protect not only speech that society deems acceptable, but even detestable speech.[132]

A law is "directed to speech alone" if it regulates speech that is not: obscene, defamatory, tantamount to a crime, an impairment of some constitutional right, an incitement to lawlessness, or calculated or likely to imminently harm the State.[133] However, according to Justice Kennedy, such speech cannot be regulated in any event.[134] Kennedy argued that conducting a strict scrutiny analysis for that type of speech is "ill advised" because using the test would imply "that States may censor speech whenever they believe there is a compelling justification for doing so," for which there is no precedent.[135] Modern analysis of content-based regulations of speech use the strict scrutiny analysis.[136]

A subclass of content-based regulations is viewpoint discrimination. Viewpoint discrimination occurs when a statute "targets not subject matter, but particular views taken by speakers on a subject."[137] If a court determines that a statute discriminates on the basis of viewpoint, that is sufficient to trigger strict scrutiny analysis.[138] It need not consider whether the statute is capable of some other legally justifiable application.[139] When the Court finds that a particular statute "aims at the suppression of views," whether the law *could have* covered some of the speech through a viewpoint-neutral statute is irrelevant to the viewpoint-based statute's validity.[140]

When a statute discriminates based on the speaker's viewpoint, "the violation of the First Amendment is all the more blatant."[141] Thus,

[131] *Id.* at 728.

[132] *See id.* at 729-30.

[133] Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd., 502 U.S. 105, 124 (1991) (Kennedy, J., concurring in the judgment).

[134] *Id.*

[135] *Id.* at 124-25.

[136] Nat'l Inst. of Fam. and Life Advocs. v. Becerra, 138 S.Ct. 2361, 2371 (2018).

[137] Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 828–30 (1995).

[138] Iancu v. Brunetti, 139 S.Ct. 2294, 2302 (2019).

[139] *Id.*

[140] *Id.*

[141] *Rosenberger*, 515 U.S. at 829 (citing R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992)).

"[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[142] For example, the doctrine prohibiting viewpoint discrimination allows the Federal Government to criminalize threats of violence directed at the President, but it does not allow the criminalization of only those threats "that mention his policy on aid to inner cities."[143] Such selectivity "creates the possibility that the [government] is seeking to handicap the expression of particular ideas."[144]

In the mid-1900s, New York had a statute that prevented a movie from being released because it propagated the idea "that adultery under certain circumstances may be proper behavior."[145] The Supreme Court recognized that the statute prevented the movie's producers from advocating for a particular idea – adultery – and that the statute could not stand because it "struck at the very heart of constitutionally protected liberty."[146] Conrad's Law engages in exactly this type of viewpoint discrimination.

An individual's decision to end his own life must be excruciatingly difficult. He must think of whether it is worth it and, if it is, how it is to be accomplished. The victims referenced thus far chose very different means to end their lives. How those victims decided on which means is known only to them. One may think that while those individuals could commit suicide themselves, the law should nonetheless punish those who encouraged them to do so. However, that is precisely the viewpoint discrimination that the government has no authority in which to engage. Through Conrad's Law, the government prohibits expression of the viewpoint that suicide is an individual's best option.

In *Cruzan v. Director, Missouri Department of Health*,[147] the guardians of a woman that was in a "persistent vegetative state" due to a car accident sued the State of Missouri to permit "hospital employees

[142] *Id.* (citing Perry Ed. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 46-47 (1983)).

[143] *R.A.V.*, 505 U.S. at 388.

[144] *Id.* at 394.

[145] Kingsley Intern. Pictures Corp. v. Regents of Univ. of N.Y., 360 U.S. 684, 688 (1959).

[146] *Id.*

[147] Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 265 (1990).

to terminate the artificial nutrition and hydration procedures,"[148] which "would cause her death."[149] The crash victim had previously expressed that she would not want to continue receiving medical care in such circumstances, and close relatives and friends were convinced she would want to forgo continued medical care.[150]

Concurring with the majority in holding that in certain circumstances an individual has a right to refuse life-sustaining medical treatment,[151] Justice Scalia wrote separately to discuss the individual's end-of-life decision. He pointed out that "the point at which life becomes 'worthless' . . . [is not] set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory."[152] That is to say that no one, least of all the government, can know when it is "right" for an individual to end his life. Under Conrad's Law, if an individual discourages another's suicide, the discourager is not punished.[153] If he encourages the other's suicide, he is punished.[154] That is unconstitutional viewpoint discrimination. "Viewpoint discrimination is poison to a free society,"[155] and, "[a]t a time when free speech is under attack, it is especially important for [the Supreme Court] to remain firm on the principle that the First Amendment does not tolerate viewpoint discrimination."[156]

IV. Why Conrad's Law is Unconstitutional

Conrad's Law is unconstitutional because, in its current form, it is vague and/or overbroad and violates firmly rooted free speech principles. If the Massachusetts Legislature removed the provisions that punish encouragement, then the Law would be within the government's power to enforce.

[148] *Id.* at 266-67.
[149] *Id.*
[150] *Id.* at 301–02 (Brennan, J., dissenting).
[151] *Id.* at 293 (Scalia, J., concurring).
[152] *Id.*
[153] H.R. 4186, 191st Gen. Ct., 1st Ann. Sess. (Mass. 2019); S. 2382, 191st Gen. Ct., 1st Ann. Sess. (Mass. 2019).
[154] *Id.*
[155] Iancu v. Brunetti, 139 S. Ct. 2294, 2302 (2019) (Alito, J., concurring).
[156] *Id.* at 2302-03.

A. Vagueness

One of the main rules regarding vagueness doctrine is the standard that requires statutes to "give people of common intelligence fair notice of what the law demands of them."[157] Conrad's Law defines "suicide" but not "encourage."[158] The word "encourage" seems self-explanatory, and where a statute's wording is "plain," courts apply it "according to its terms."[159] Whether or not "the language is plain" turns on a reading of the words "in their context and with a view to their place in the overall statutory scheme."[160] Conrad's Law distinguishes between "aid[ing]" an encourag[ing]."[161] When interpreting a statute, the canon against surplusage "counsels against construing a statute so that any of its text is duplicative or of no consequence."[162] They must, therefore, have different meanings upon which the statute's validity stands.

Some common definitions for "encourage" include: "to instigate,"[163] "to incite to action,"[164] "to embolden,"[165] "to help,"[166] "to inspire with courage, spirit, or hope,"[167] or "to attempt to persuade."[168] The word "aid" is understood to mean, "to assist or facilitate the commission of a crime, or to promote its accomplishment,"[169] or "to provide with what is useful or necessary in achieving an end."[170] Put simply, "encourage" refers to emotions as opposed to "aid," which refers

[157] United States v. Davis, 139 S. Ct. 2319, 2325 (2019) (quoting Connally v. General Const. Co., 269 U.S. 385, 391 (1926)).

[158] H.R. 4186, 191st Gen. Ct., 1st Ann. Sess. (Mass. 2019); S. 2382, 191st Gen. Ct., 1st Ann. Sess. (Mass. 2019).

[159] King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (quoting Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 251 (2010)).

[160] *Id.* (quoting F.D.A. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).

[161] Mass. H.R. 4186; Mass. S. 2382.

[162] Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857, 899 (2017).

[163] *Encourage*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Encourage,* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/encourage (last visited Nov. 16, 2019).

[168] *Id.*

[169] *Aid and Abet*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[170] *Aid*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/aid (last visited Nov. 16, 2019).

to physical assistance. However, the common understanding that the word "encourage" deals with emotions is not enough to provide "fair notice of what the law demands."[171]

The organization Compassion in Dying offers a variety of services to people nearing the end of life; the organization works with diverse communities and provides a free information line, as well as publications and resources.[172] The organization specializes in helping people create living wills and discussing "their goals and priorities when living with a life-changing illness."[173] Since Conrad's Law purports to punish speech alone, the experts at Compassion in Dying, should they utter the wrong combination of words to a consumer, face prison time. How will they know what combination of words will land them in jail? Nobody knows. The Law's lack of "sufficient definiteness [so that] ordinary people can understand what conduct is prohibited"[174] leads directly to the "standardless sweep [that] [would allow] policemen, prosecutors, and juries to pursue their personal predilections."[175] The law is simply too vague to apply.

B. Overbreadth

An overbroad statute is invalid on its face if it restricts "a substantial amount of protected speech."[176] The purpose for the requirement that a "substantial" amount of protected speech be restricted in order for a statute to be deemed overbroad is the desire for a balance between refraining from "inhibiting the free exchange of ideas,"[177] and avoiding invalidating a law that prevents harm and is constitutional in some applications.[178] Both interests are important, and invalidation for overbreadth is "strong medicine that is not to be casually employed."[179]

---

[171] United States v. Davis, 139 S. Ct. 2319, 2325 (2019) (quoting Connally v. General Const. Co., 269 U.S. 385, 391 (1926)).

[172] *Who We Are*, COMPASSION IN DYING, https://compassionindying.org.uk/about-us/ (last visited Nov. 16, 2019).

[173] *Id*.

[174] Kolender v. Lawson, 461 U.S. 352, 357 (1983).

[175] *Id.* at 357-58 (first alteration in original) (citation omitted).

[176] United States v. Williams, 553 U.S. 285, 292 (2008).

[177] *Id.*

[178] *Id.*

[179] *Id.* at 293 (quoting L.A. Police Dep't v. United Reporting Pub. Corp., 528 U.S. 32, 39 (1999).

To determine whether a statute is overbroad, a court will interpret the statute to understand what speech is covered[180] and then decide if the amount of protected speech is "substantial."[181] Conrad's Law is overbroad because of substantially similar reasons as to why it is vague. An overbroad statute is one that "punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep."[182] Here, the only possible "plainly legitimate sweep" is the prohibition against encouraging (whichever definition one applies) a minor to commit suicide. For the same reason laws distinguish between minors and adults in other aspects of the law, the application of Conrad's Law to individuals "encouraging" minors to commit suicide is within the Law's "plainly legitimate sweep." In all other applications, the encouragement should be protected.

Some conduct requires the participant to have a certain appreciation for the risks involved. Massachusetts recognized that fact and has imposed minimum age requirements for, to name a few examples, drinking, smoking, gambling, engaging in sexual activity, operating motor vehicles, and dropping out of high school.[183] Because minors are usually incapable of appreciating the risks involved in certain conduct, the State has an interest in preventing them from engaging in such conduct. Surely if the State wants to prevent a minor from buying a scratch ticket, it also should want to prevent minors from committing suicide. While adults are free to drink themselves into alcohol poisoning and smoke themselves into lung cancer, minors are not. Suicide should be no different.

The consequence of an overbroad law, specifically one that provides for criminal penalties on speech, is the "chilling" effect. The "chilling effect" on constitutionally protected speech discourages speech entirely, which affects "society as a whole, which is deprived of an uninhibited marketplace of ideas."[184] Here, not only would organizations like Compassion in Dying be forced to cease operation, people would be forbidden from discussing end-of-life options with their loved ones.

[180] *Williams*, 553 U.S. at 292-93.

[181] *Id.* at 297.

[182] Virginia v. Hicks, 539 U.S. 113, 118–19 (2003).

[183] *See* Mass. Gen. Laws Ann. ch. 138, § 34; ch. 270, § 6; ch. 23K, § 25(h); ch. 265, § 23; ch. 90, § 8; ch. 76, § 18.

[184] *Id.* at 119–20.

The authors of Conrad's Law attempted to narrow the scope of the law, but it remains broad regardless. The first element of Conrad's Law is "know[ledge] of another person's propensity for suicidal ideation."[185] The Law defines "knowledge of suicidal ideation" as "actual knowledge of prior attempts to die from suicide; of a person's planned methods to die from suicide; that a person intends to die from or attempt to die from suicide; or that a person has expressed such suicidal inclinations."[186] Moreover, the Law requires, at least, a suicide attempt as a result of the encouragement.[187] However, those attempts to narrow the scope of the law do not save it because, as exemplified by the result in *Melchert-Dinkel*, the content of the message and the view it expresses remain protected by the First Amendment.

C. Free Speech Principles

Conrad's Law fails to survive the "exacting scrutiny" applied to content-based regulations.[188] The first requirement, that the restriction is "actually necessary to achieve its interest,"[189] is not satisfied. The government's compelling interest in prohibiting "encouragement" of another's suicide is the State's interest in preserving human life.[190] Therefore, an individual who attempts suicide must have done so solely due to the other person's encouragement for the restriction to be "actually necessary." Because if the individual attempting suicide does so for any other reason or in addition to the encouragement, logic demands that the encouragement was not "actually necessary." Moreover, Conrad's Law summarily resolves this issue because, by the statute's language, one may be criminally liable if the person attempting suicide does so "in whole or in part" as a result of the encouragement.[191] The statute itself does not require the encouragement to be actually necessary for the encourager to be criminally liable.[192] That means the "direct causal link between the restriction imposed and the injury to be

[185] H.R. 4186, 191st Gen. Ct., 1st Ann. Sess. (Mass. 2019); S. 2382, 191st Gen. Ct., 1st Ann. Sess. (Mass. 2019).

[186] Mass. H.R. 4186; Mass. S. 2382.

[187] Mass. H.R. 4186; Mass. S. 2382.

[188] *See* United States v. Alvarez, 567 U.S. 709, 709 (2012).

[189] *See Alvarez*, 567 U.S. at 725.

[190] State v. Melchert-Dinkel, 844 N.W.2d 13, 22 (Minn. 2014).

[191] Mass. H.R. 4186; Mass. S. 2382.

[192] Mass. H.R. 4186; Mass. S. 2382.

prevented,"[193] that must exist, does not. Thus, the first prong of "exacting scrutiny" is not satisfied.

The second prong of "exacting scrutiny" requires the government to use "least restrictive means among available, effective alternatives."[194] In the context of suicide, the issue becomes whether there is some way to prevent vulnerable people from being nudged into suicide that places less of a burden on speech than prohibiting "encouraging" suicide. The problem is that each case of suicide, which implicates the government's interest in preserving human life, is plagued by distinct circumstances. How can one determine the means that could have prevented the suicides in *Melchert-Dinkel*[195], *Carter*[196], or the most recent case against Inyoung You?[197] An individual that is about to commit suicide has put themselves in an inherently dangerous situation. Whether he is sitting in a car filled with carbon monoxide,[198] standing on a chair with a noose around his neck, or teetering atop the edge of a bridge [199]or parking garage,[200] the individual's physical presence in that situation presents the biggest danger to human life. Therefore, anyone who physically assisted an individual in creating that situation is justly punished by the law. However, when dealing with pure speech, as the Courts in those cases were, the encouragers played no role in the victims' physical presence in the dangerous situations.

D. Causation

Generally, the concept of causation in the criminal context is the same as in the civil context, i.e., liability requires a showing of actual and proximate causation unless the statute provides otherwise.[201] Actual

[193] *Alvarez*, 567 U.S. at 725.

[194] *Id.* (citation omitted).

[195] *Melchert-Dinkel*, 844 N.W.2d at 17 (one victim "hanged himself" and the other jumped off of a bridge).

[196] Commonwealth. v. Carter, 474 Mass. 624, 625 (2016) (victim died of carbon monoxide poisoning).

[197] Erin Donaghue, *"I'll Go Die Like You Want,"* CBS NEWS (Nov. 22, 2019), https://www.cbsnews.com/news/inyoung-you-accused-of-texting-boyfriend-alexander-urtula-to-commit-suicide-pleads-not-guilty-today-2019-11-22/ (victim "leapt to his death from a . . . parking garage").

[198] *See Carter*, 474 Mass. at 625.

[199] *See Melchert-Dinkel*, 844 N.W at 17.

[200] *See* Donaghue, *supra* note 205.

[201] *See* Paroline v. United States, 572 U.S. 434, 444 (2014).

causation is where one event causes the next.[202] Proximate cause is the basic requirement that there exists "some direct relation between the injury asserted and the injurious conduct alleged."[203] That relationship can be evaluated by analyzing the resulting event's "foreseeability or the scope of the risk created by the predicate conduct."[204]

In *Carter*, the court was dealing with the defendant's words alone. Using a form of linguistic acrobatics, the court, in order to remove the First Amendment's protection from the defendant's words, held, "We are therefore not punishing words alone . . . but reckless or wanton words causing death."[205] Up until the call, the court found that Conrad was "the cause of his own suicidal actions . . . ."[206] However, the court reasoned that Michelle's criminal liability arose when she said "get back in," which "[broke] that chain of [Conrad's] self-causation,"[207] and "overpower[ed] [Conrad's] will to live,"[208] making Michelle the legal cause of his death.[209] She was "not physically present" but, because of the magic of telephones, the court declared that her presence was "at least virtual."[210] According to the court, it is as if Michelle herself wrenched the truck door open, shoved Conrad back in, and held the door closed as Conrad suffocated to death. Yet, Michelle was neither the actual nor proximate cause of Conrad's death.

The court tried to justify its conclusion by restricting its holding to the "systematic campaign of coercion on which the virtually present defendant embarked -- captured and preserved through her text messages -- that targeted the equivocating young victim's insecurities and acted to subvert his willpower in favor of her own."[211] The court compounds the confusion created by its holding by implying that Michelle may not have been criminally liable if she provided "support, comfort [or] even *assistance* to a mature adult who, confronted with [such circumstances as a terminal illness], has decided to end [his] life."[212] That implication

[202] *Id.*
[203] *Id.* (citation omitted).
[204] *Id.* at 445.
[205] Commonwealth v. Carter, 481 Mass. 352, 367-68 (2019).
[206] *Id.* at 362.
[207] *Id.*
[208] *Id.* at 367.
[209] *Id.* at 371.
[210] Commonwealth. v. Carter, 474 Mass. 624, 624 n.13 (2016).
[211] *Carter*, 481 Mass. at 367 (citation omitted).
[212] *Id.* at 369 n.15 (emphasis added).

would exempt non-physician-assisted suicide from criminal liability while continuing to criminalize Michelle's mere words. To reach the result that it did, the court had to bend long-standing law, so the proposal of Conrad's Law seems like a recognition of that fact. However, Conrad's Law cannot solve the problem the court faced and created.

V. Conclusion

The facts underlying *Carter* were tragic. Moving forward, society should seek to prevent another case like Conrad's. The responsibility falls on society to voluntarily care for the Conrads of the world because individuals' freedom to think as they will and to speak as they think must be held in the highest esteem in a free society. The Conrads of the world certainly need help, but the law proposed in his name will not and cannot provide it.

Conrad's Law, and its sister statutes in other states, undoubtedly were authored in good faith. However, it is invalid because it is overbroad, if not void, due to its vagueness, and it violates the letter and the spirit of the First Amendment's Freedom of Speech Clause. The decriminalization of suicide is evidence of a trend toward more freedom for individuals. Were Conrad's law to be enforceable, individuals would be subject to severe violations of their constitutional rights in the name of good intentions. "Liberty is meaningless where the right to utter one's thoughts and opinions has ceased to exist."[213]

[213] Frederick Douglass, *Plea for Free Speech in Boston*, SPEECH VAULT (June 8, 1880), http://speeches-usa.com/Transcripts/fredrick_douglas-boston.html.