

“TECHNOLOGY, CAUSATION, AND THE FIRST AMENDMENT: THE NEED FOR UPDATED LEGISLATION”

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I. INTRODUCTION

Our laws work slowly for a number of good reasons. However, when it comes to the fast-moving world of technological development, legislators must begin to look ahead at the role technology will play in criminal law while still protecting the First Amendment. Currently, the intersection between technology, the First Amendment, and the criminal law element of “causation” is cloudy at best. It is vital to decide how to shape laws that properly address the advent of a digital age without infringing on important rights.

Most statutory criminal laws drafters did not contemplate modern technology, and the First Amendment restricts criminalizing most speech and/or expression—which presents a complicated conflict between them. This note will examine three distinct, yet intertwined parts, that should go into the complex analysis of the way technology interacts with causation within the confines of the First Amendment. Part I will discuss how the First Amendment guides the enactment and interpretation of criminal laws and its applicability to digital technology. Part II will examine the issues that current technology poses for the criminal law element of causation and why these issues are indicative of a need to update our laws with contemporary technological advancements in mind. Part III will explore a framework for possible solutions.

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II. USING THE FIRST AMENDMENT AS A GUIDE

The First Amendment protects most speech, including speech that is offensive, hurtful, or hateful.¹ The foundation of the First Amendment’s protection is safeguarding speech that society may find “misguided, or even hurtful.”² “Outrageousness” is not the standard used to determine freedom of speech because that standard would present “an inherent subjectiveness . . . [that] would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression.”³

Instead, the exacting standard guides the enactment of criminal laws.⁴ A statute that seeks to “suppress[] or restrict[] speech must be judged by the sometimes inconvenient principles of the First Amendment.”⁵ Content-based restrictions are presumed invalid, and the government bears the burden to prove that laws restricting or prohibiting speech are constitutional.⁶ The government generally “has no power to restrict expression because of its messages, its ideas, its subject matter, or its contents.”⁷ There are few well-established categories of speech that fall outside of the First Amendment’s protection; these exceptions include defamation, obscenity, speech likely to incite criminal actions or fraud, and speech integral to criminal conduct.⁸

The United States Supreme Court’s holding in *Stevens* is illustrative of the wide-reaching protection of the First Amendment in terms of criminal law.⁹ In that case, the Supreme Court held that a federal law banning the depiction of animal cruelty was unconstitutional under the First Amendment.¹⁰ The reasoning underlying this holding is multifaceted, but one main reason was the overly broad wording of the law.¹¹ The Court zoned in on the different ways to interpret “animal

¹ See *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017); *United States v. Alvarez*, 567 U.S. 709, 717 (2012); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011); *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

² *Snyder*, 562 U.S. at 458 (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 574 (1995)).

³ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988).

⁴ *Alvarez*, 567 U.S. at 715.

⁵ *Id.*

⁶ *Id.* at 716–17; *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 660 (2004).

⁷ *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983)).

⁸ See *United States v. Stevens*, 559 U.S. 460, 468–70 (2010); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976); *Bradenburg v. Ohio*, 395 U.S. 444, 447–49 (1969); *Roth v. United States*, 354 U.S. 476, 483 (1957); *Beauharnais v. Illinois*, 343 U.S. 250, 254 (1952); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).

⁹ *Stevens*, 559 U.S. at 470.

¹⁰ *Id.* at 482.

¹¹ *Id.* at 475–76.

cruelty.”¹² For example, “killing” an animal could mean that depictions of hunting or humane animal slaughter were forbidden.¹³

The notion that a ban on depictions of “animal cruelty” is overly broad highlights the often-opposing interests between criminal legislation and the First Amendment. On the one hand, the objective of criminal laws is to, among other considerations, deter and punish individuals who commit actions and/or omissions that harm society.¹⁴ The First Amendment often cuts against that goal, requiring careful deliberation and drafting of criminal legislation that considers speech and expression, such as in *Stevens*. *Stevens* demonstrates how free speech and criminal legislation frequently differ in their concerns.¹⁵ Despite criminal laws highly regulating the act of animal cruelty and neglect, the Supreme Court struck down a ban on depictions of “animal cruelty.”¹⁶ Even though every state criminalizes the act of animal cruelty, the Supreme Court held that a law criminalizing the depiction of animal cruelty violates the First Amendment.¹⁷ Thus, *Stevens* aids in the conclusion that although society may widely-regard a specific act—such as animal cruelty—as a crime, the *portrayal* of that action through words or depictions is not necessarily criminal. Legislators must strike a delicate and nuanced balance between the right to free expression and the necessity of safeguarding society from harm.

The First Amendment’s free speech protections necessarily extend to contemporary technology.¹⁸ Social media websites, text messaging, forum threads, and comment sections all provide ways to communicate—often anonymously. Even before the dawning of the social media era, the Supreme Court held that the First Amendment protects a speaker’s anonymity.¹⁹ More precisely, Justice Black noted that, “[t]here can be no doubt that . . . an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression.”²⁰ Accordingly, the protection of anonymous “internet trolls” and nameless forum commenters, in most circumstances, is solidified within the First Amendment.

The durability of the First Amendment cannot be understated: surely, the Framers could not predict the technological devices existing in the present day and,

¹² *Id.*

¹³ *Id.* at 475.

¹⁴ See *Laws that Protect Animals*, Animal Legal Defense Fund, <https://aldf.org/article/laws-that-protect-animals> (last visited Apr. 12, 2020) (comprehensive list of laws protecting animals); See generally Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958).

¹⁵ *Stevens*, 559 U.S. at 464–82.

¹⁶ *Id.*

¹⁷ *Stevens*, 559 U.S. at 470–82; See *Laws that Protect Animals*, *supra* note 14.

¹⁸ See generally, e.g., *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786 (2011); *Ashcroft*, 542 U.S. at 656; *Reno v. ACLU*, 521 U.S. 844 (1997).

¹⁹ *Talley v. California*, 362 U.S. 60, 64 (1960).

²⁰ *Id.*

yet, the First Amendment is wholly applicable to contemporary means of expression like status updates, wall posts, text messages, and forum threads. Likely, the durability is due largely to the presence of cases requiring courts to use a modern interpretation of the Constitution.²¹ In *Brown*, the Supreme Court invalidated a law banning the sale of “violent” video games to minors and held that the First Amendment protected video games.²² The Court explained that, “whatever the challenges of applying the Constitution to ever-advancing technology, ‘the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary’ when a new and different medium for communication appears.”²³

This reasoning is what has supported the First Amendment for over two centuries. Moreover, this rationale pinpoints the core reason for considering how present and future technology will fit within our nation’s criminal legislation. At some point—possibly in the near future—methods of communication will advance to a point that even we cannot foresee. If society has astutely decided that the fundamental principles of freedom of speech are to remain unchanged, there is a pressing need to examine instances where technology, criminal law, and the First Amendment have not fully connected, before the failure to modernize causes future confusion about how technology should fit into the criminal law.

III. TECHNOLOGY AND THE CRIMINAL ELEMENT OF CAUSATION

Laws, including criminal laws, frequently have discrete distinctions that differ based on whether said law is a state or federal law, and is also dependent upon which state the law governs. Yet, the element of causation is a long-established legal principle that is rooted in common law, exists in tort and criminal laws, state and federal laws, and applies regardless of the state.²⁴ In criminal jurisprudence, causation—put simply—requires that an individual’s conduct produce a specified result.²⁵ Generally, criminal liability exists only if the conduct was both the actual and proximate cause of the specified result.²⁶ Conduct is the actual cause of a result if “but for” the conduct the “result in question would not have occurred.”²⁷ Proximate cause “defies easy summary [because] [i]t is a ‘flexible concept’ that does not lend itself to ‘a black-letter rule that will dictate the

²¹ See, e.g., *Brown*, 564 U.S. 786; *Ashcroft*, 542 U.S. 656; *Reno*, 521 U.S. 844.

²² *Brown*, 564 U.S. at 799–805.

²³ *Id.* at 790 (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

²⁴ See Paul K. Ryu, *Causation in Criminal Law*, 106 U. PA. L. REV. 773 (1958) (discussing the history and analysis of causation in criminal law); See, e.g., *Paroline v. United States*, 572 U.S. 434, 446 (2014); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457 (2006); *Hartman v. Moore*, 547 U.S. 250, 259 (2006).

²⁵ *Burrage v. United States*, 571 U.S. 204, 210 (2014).

²⁶ *Id.* (citing Wayne R. LaFave, 1 SUBST. CRIM. L. § 6.4(a), 464–66 (2d ed. 2003)).

²⁷ Model Penal Code § 2.03(1)(a) (Am. Law Inst. 1985).

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result in every case.”²⁸ But broadly, proximate cause mandates liability only for foreseeable outcomes of a person’s conduct.²⁹ The importance of the causation requirement is apparent: people should not incur criminal convictions for situations in which “the causal link between conduct and result is so attenuated that the consequence is more aptly described as [a] mere fortuity.”³⁰

A mere relation between conduct and a result is not enough to establish causation.³¹ In *Burrage*, a defendant was subjected to a penalty enhancement provision after the defendant distributed heroin to an individual who later died due to drug overdose.³² There were multiple substances in the deceased’s toxicology report, no evidence that the heroin alone resulted in the death of the victim, and no evidence that the deceased would not have died but for the use of heroin.³³ The Supreme Court held that the defendant was not liable under the penalty enhancement provision because the distributed heroin was not independently sufficient to result in death.³⁴

The technological world is not exempt from crime, but analyzing digital conduct complicates the already convoluted element of causation.³⁵ The widely publicized Michelle Carter case is a prime example of issues that the causation element poses when it comes specifically to technology. In that case, a judge convicted Michelle Carter, a 17-year-old teenage girl, of involuntary manslaughter after her boyfriend, Conrad Roy, committed suicide.³⁶ Carter and Roy were primarily involved in a long-distance relationship, using texting as a key method of communication.³⁷ Even before their relationship began, Roy struggled with suicidal thoughts and attempted suicide multiple times.³⁸ Initially, Carter encouraged Roy to seek professional help and undergo therapy.³⁹ When Roy rejected the notion of obtaining help, the communications between them changed.⁴⁰ Carter began assisting Roy’s suicidal behavior, downplaying his concerns, and offering suggestions for ways to commit suicide.⁴¹ Eventually, Roy committed suicide.⁴² An investigation led to the discovery of text messages wherein Carter encouraged

²⁸ *Paroline*, 572 U.S. at 444 (quoting *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008)).

²⁹ *Anza*, 547 U.S. at 469–70.

³⁰ *Paroline*, 572 U.S. at 445 (citing *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 838–39 (1996)).

³¹ See *Burrage*, 571 U.S. at 212–14.

³² *Id.* at 208–19.

³³ *Id.*

³⁴ *Id.* at 218–19.

³⁵ See, e.g., *Commonwealth v. Carter*, 481 Mass. 352 (2019); *United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009).

³⁶ *Carter*, 481 Mass. at 353–54.

³⁷ *Id.* at 354.

³⁸ *Id.*

³⁹ *Id.* at 355.

⁴⁰ *Id.*

⁴¹ *Id.* at 355–56.

⁴² *Carter*, 481 Mass. at 355–56.

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Roy’s suicide.⁴³ Carter also expressed to a friend that when Roy exited the vehicle and called her, she told him he should get back in.⁴⁴ The court affirmed Carter’s involuntary manslaughter conviction based on the rationale that there was causation when Roy got out of the truck and Carter told him to return.⁴⁵

The *Carter* case was extensively covered in the media, sparking debates, and resulting in an HBO documentary.⁴⁶ The notoriety of the case was probably due to the shocking text messages and the lack of legal precedent concerning the tragic circumstances. The Supreme Judicial Court of Massachusetts opined that verbal conduct could “overcome a person’s willpower to live, and therefore . . . cause a suicide.”⁴⁷ The flaw in this justification is that Roy could have turned off his cell phone, stopped talking to Carter, turned off the generator, sought professional help, or any number of other actions that would have prevented his death. Carter was not near Roy, nor was she threatening him or otherwise forcing him to commit suicide.⁴⁸ Like in *Burrage*, where the defendant was not liable for distributing heroin to a victim who overdosed because the heroin was not the independent cause of the victim’s death, similarly, Michelle Carter was not and could not have been the independent cause of Roy’s death.⁴⁹ Indeed, Carter could have called the authorities for help—and that may very well be a crime—however, Roy’s mental illness, acts, and omissions caused his death. Carter’s messages and encouragement were appalling, at the least, but her verbal words alone could not have caused Roy’s suicide within the well-recognized legal ideas of causation.

In contrast, a mother in California created a fake MySpace account to communicate with one of her daughter’s 13-year-old classmates.⁵⁰ It was alleged that those communications ultimately led to the classmate’s suicide.⁵¹ The court, in that case, did not analyze causation, nor were there any legal allegation that the mother was the actual or proximate cause of the suicide of the 13-year-old girl.⁵² Instead, the jury convicted the mother of committing a crime based on MySpace’s Terms of Service by creating a fictitious account to intentionally communicate with the child.⁵³ The district judge acquitted the defendant after the verdict, finding that without more, intentional violations of a website’s terms of service could not constitute a crime under the Computer Fraud and Abuse Act. The court reasoned

⁴³ *Id.* at 355–56.

⁴⁴ *Id.* at 357–59.

⁴⁵ *Id.* at 359–60.

⁴⁶ *I Love You, Now Die: The Commonwealth v. Michelle Carter* (HBO Documentary 2019), <https://www.hbo.com/documentaries/i-love-you-now-die-the-commonwealth-v-michelle-carter>.

⁴⁷ *Carter*, 481 Mass. at 359 (quoting *Commonwealth v. Carter*, 474 Mass. 624, 633 (2016)).

⁴⁸ *Id.* at 361.

⁴⁹ *Burrage*, 571 U.S. at 206–18.

⁵⁰ *Drew*, 259 F.R.D. at 452.

⁵¹ *Id.*

⁵² *See id.* at 452–68.

⁵³ *See id.*

that such an interpretation would not give enough notice to individuals and also permit the government too much discretion in enforcing this law.⁵⁴

The stark difference between the *Drew* case and the *Carter* case exemplifies the foremost underlying issue in attempting to force conduct rooted in contemporary technology into legal principles that developed long before modern technology was even a thought. The laws are applied inconsistently and in a manner that is far too discretionary and dependent on the interpretation of individual prosecutors and judges.

IV. EXPLORING SOLUTIONS

Technological developments have increased at an exponential rate.⁵⁵ The development of technology is based on the prior round of development in such a way that the rate of technological growth continues to accelerate with each round of invention.⁵⁶ Today, it is possible to have face-to-face conversations through communitive mediums such as FaceTime from across the world with little lag. Consequently, conduct constituting a criminal act that would have once required in-person involvement does not require so today. Courts have handled technology by fitting advancements into already existing law. But cases like *Carter* are indicative of the need to fit the law into technology instead. Eventually, technological advancements will likely progress to a point where channels of communications simply cannot be shoved into existing criminal law particularly when it comes to the element of causation. The First Amendment makes this need all the greater.

Like all criminal legislation, it is necessary to use the First Amendment to guide the enactment of any legislation involving criminalizing expressive conduct, like text messaging. Legislation involving cyberbullying could be demonstrative of a way to better shape laws involving digital communication.⁵⁷ While nearly every state requires schools to enact policies that handle bullying, including cyberbullying, only a few states actually criminalize cyberbullying.⁵⁸ Leaving cyberbullying enforcement to schools no longer works in our society. As demonstrated in *Drew*, adults have ample access and know-how to inflict distress upon individuals through the internet. Instead, a better solution is to analyze current criminal acts—such as harassment and stalking—and draft pieces of legislation

⁵⁴ *Id.* at 467–68.

⁵⁵ See Max Roser & Hannah Ritchie, *Technological Progress*, OurWorldInData.org, <https://ourworldindata.org/technological-progress> (last visited Mar. 8, 2020).

⁵⁶ See Alison E. Berman & Jason Dorrier, *Technology Feels Like It's Accelerating—Because It Actually Is*, SingularityHub (Mar. 22, 2016), <https://singularityhub.com/2016/03/22/technology-feels-like-its-accelerating-because-it-actually-is>.

⁵⁷ See Sameer Hinduja & Justin Patchin, *Cyberbullying Legislation and Case Law*, Cyberbullying.org, <https://cyberbullying.org/cyberbullying-legal-issues.pdf> (last updated Jan. 2015).

⁵⁸ See *id.*

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specifically centered around technology. A preemptive solution is necessary, given the surety that technology will only continue to progress.

Additionally, the idea of causation requires either an updated or expanded legal analysis with a specific focus on how technology fits into that element. Actual and proximate cause are vastly different when considering conduct committed via text messaging versus conduct committed in person. This is evident in the *Carter* case. While Carter’s behavior was certainly far from commendable, the courts should not have to unilaterally expand existing jurisprudence without action from the legislature. Certainly, if a person near Roy’s truck had yelled “get back in the truck,” that person likely would not have been deemed the cause of Roy’s death. The key difference between this hypothetical and the real case is the amount of contact, and thus influence, between a stranger and those engaged in a relationship. Having the ability to overcome the mind is likely a key factor in this determination. Yet, the slippery slope between what constitutes causation is apparent: what words and/or action(s) are deemed criminal, and how many text messages separate strangers from friends?

Causation is an incredibly important element of criminal law. The best framework is to look at our existing laws and then draft new legislation that specifically fits technology into the causation element. Specifically, identifying when harassment, threats, emotional and mental abuse, and stalking that occur through technology are the cause of specific criminal acts.

V. CONCLUSION

A court’s role is to interpret the law, not to create the law. Had there been legislation in place, the criminality of Carter’s verbal conduct would be more obvious. In response, it is time to adopt legislation that centers around technology. The failure to address the legal issues that technology has already presented is a failure to modernize, which could result in our nation playing an unfeasible game of “catch-up.” Examining the law based on the technology shaping legal issues, rather than expanding the law, is the most logical solution.