CONSTITUTIONAL LAW — FIRST AMENDMENT — MINNESOTA SUPREME COURT DETERMINES THAT FALSE CLAIMS USED TO ADVISE OR ENCOURAGE SUICIDE DO NOT FALL WITHIN THE *ALVAREZ* FRAUD EXCEPTION. — *State v. Melchert-Dinkel*, 844 N.W.2d 13 (Minn. 2014).

In *United States v. Alvarez*,[1] the Supreme Court struck down the Stolen Valor Act of 2005[2] on First Amendment grounds.[3] The statute had criminalized making false claims that one had been "awarded any decoration or medal authorized by Congress for the Armed Forces of the United States."[4] Writing for the plurality, Justice Kennedy stated that "[w]here false claims are made to effect a fraud or secure moneys or other valuable considerations . . . it is well established that the Government may restrict speech without affronting the First Amendment."[5] Given that the Stolen Valor Act prohibited false speech "absent any evidence that the speech was used to gain a material advantage,"[6] Justice Kennedy determined that the statute burdened a significant amount of protected speech.[7] Thus, he applied the "most exacting scrutiny" to the statute and found that it failed to pass muster.[8]

Recently, in *State v. Melchert-Dinkel*,[9] the Minnesota Supreme Court upheld a prohibition on speech that assists suicide, but struck down a prohibition on speech that advises or encourages suicide.[10] Reviewing a conviction based on the use of "deceit, fraud, and lies" to advise and encourage suicide,[11] the court appears to have interpreted *Alvarez*'s "material advantage" language as meaning that fraud is unprotected only when it is made to gain a material advantage. Future courts might be persuaded to adopt such a reading of *Alvarez*'s material-advantage language because it is in keeping with the general rule that First Amendment exceptions are meant to be narrow. Courts, however, should not succumb to that temptation — that reading of *Alvarez* is implausible in light of the case's language and common

---

1 132 S. Ct. 2537 (2012).

2 18 U.S.C. § 704 (2006), *invalidated by* United States v. Alvarez, 132 S. Ct. 2537 (2012).

3 *Alvarez*, 132 S. Ct. at 2551 (plurality opinion); *accord id.* (Breyer, J., concurring in the judgment).

4 *Id.* (plurality opinion) (quoting 18 U.S.C. § 704(b)).

5 *Id.* at 2547.

6 *Id.* at 2548.

7 *See id.* at 2547–48.

8 *Id.* at 2548 (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994)) (internal quotation marks omitted). In his concurrence, Justice Breyer applied intermediate scrutiny to the statute and refrained from engaging in a categorical analysis, but he reached the same result as Justice Kennedy. *Id.* at 2551 (Breyer, J., concurring in the judgment).

9 844 N.W.2d 13 (Minn. 2014).

10 *Id.* at 23–24.

11 *Id.* at 21 (internal quotation marks omitted).

law backdrop. Yet even if courts do adopt this reading, litigants might still prevent its narrowing effect by characterizing harm to one person as material advantage to another.

William Francis Melchert-Dinkel, a 46-year-old man[12] who lived in Minnesota,[13] posed as a "depressed and suicidal young female nurse" on suicide websites.[14] Responding to posts on these websites, Melchert-Dinkel conversed with suicidal individuals,[15] "feign[ing] caring and understanding to win [their] trust."[16] He "encourag[ed] [them] to hang themselves, falsely claim[ed] that he would also commit suicide, and attempt[ed] to persuade them to let him watch the hangings via webcam."[17] In total, Melchert-Dinkel "entered into approximately five suicide pacts."[18]

Two of the individuals with whom Melchert-Dinkel corresponded committed suicide.[19] After investigating the second death, law enforcement officials were able to connect Melchert-Dinkel's Internet aliases to his email address.[20] Melchert-Dinkel admitted that he had posed as the suicidal nurse and authored the Internet messages.[21] He was then prosecuted under a statute that "makes it illegal to 'intentionally advise[], encourage[], or assist[] another in taking the other's own life.'"[22] The Minnesota state district court found that "Melchert-Dinkel intentionally advised and encouraged" his victims and convicted him,[23] rejecting both his facial and as-applied First Amendment challenges to the statute.[24] Melchert-Dinkel appealed.[25]

The Minnesota Court of Appeals affirmed.[26] Writing for the court, Judge Ross[27] held that the statute was constitutional both on its face and as applied. Beginning with the facial challenge,[28] Judge Ross stated that the covered speech was "an integral part of another's sui-

---

12 State v. Melchert-Dinkel, 816 N.W.2d 703, 705 (Minn. Ct. App. 2012).

13 *Melchert-Dinkel*, 844 N.W.2d at 16.

14 *Id.*

15 *Melchert-Dinkel*, 816 N.W.2d at 711–12.

16 *Melchert-Dinkel*, 844 N.W.2d at 16.

17 *Id.*

18 State v. Melchert-Dinkel, No. 66-CR-10-1193, 2011 WL 893506, at *18 (Minn. Dist. Ct. Mar. 15, 2011).

19 *Id.*

20 *Melchert-Dinkel*, 816 N.W.2d at 706.

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

22 *Id.* at 16 (alterations in original) (quoting MINN. STAT. § 609.215 subdiv. 1 (2012)).

23 *Melchert-Dinkel*, 2011 WL 893506, at *19.

24 *See id.* at *20.

25 *Melchert-Dinkel*, 816 N.W.2d at 712.

26 *Id.* at 720.

27 Judge Ross was joined by then-Judge Wright and by Judge Muehlberg of the Minnesota district court, sitting by designation.

28 *Melchert-Dinkel*, 816 N.W.2d at 713.

cide."[29] Judge Ross then determined that even though suicide had been decriminalized in Minnesota,[30] the covered speech was categorically unprotected because the state still maintained a strong policy against suicide.[31] Judge Ross also held that the prohibition was not overbroad, for the statute required a sufficiently "direct connection between the prohibited speech and the harmful conduct to be avoided."[32] Then, addressing the as-applied challenge, Judge Ross noted that "[t]he First Amendment does not shield fraud" and found that Melchert-Dinkel's speech easily fell within this exception from First Amendment protection.[33]

The Minnesota Supreme Court reversed and remanded.[34] Writing for the majority, Justice Anderson[35] held that the statute's prohibition on assisting suicide was constitutional but that its prohibitions on advising and encouraging were not. Justice Anderson determined that the statute was content-based and thus inherently suspect, but also recognized that it would be exempted from First Amendment scrutiny if the covered speech fell within a First Amendment exception.[36] He observed that "speech integral to criminal conduct"[37] and speech "directed to inciting or producing imminent lawless action"[38] are two examples of such exceptions. However, for both, he determined that the decriminalization of suicide proved dispositive[39]: not only was the speech not integral to criminal conduct or lawless action because suicide is not a crime, but also courts are not permitted to morph the *criminal*-conduct exception into an exception that captures all "speech integral to 'harmful, proscribable conduct.'"[40]

Justice Anderson next considered whether "the speech used by Melchert-Dinkel [fell] under the 'fraud' exception to the First Amendment."[41] Relying on *Alvarez*'s plurality opinion, Justice Anderson noted that "speech is not unprotected simply because the speaker

---

[29] *Id.* at 714.

[30] *Id.* The suicides took place in the United Kingdom and Canada, *Melchert-Dinkel*, 844 N.W.2d at 16–17, but suicide had also been decriminalized in those jurisdictions, *id.* at 19.

[31] *See Melchert-Dinkel*, 816 N.W.2d at 714.

[32] *Id.* at 716.

[33] *Id.* at 718 (quoting Illinois *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 612 (2003)) (internal quotation mark omitted).

[34] *Melchert-Dinkel*, 844 N.W.2d at 25.

[35] Justice Anderson was joined by Chief Justice Gildea and Justices Dietzen and Stras. Justices Wright and Lillehaug took no part in the consideration or decision of the case.

[36] *Melchert-Dinkel*, 844 N.W.2d at 19.

[37] *Id.*

[38] *Id.* at 20 (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam)) (internal quotation marks omitted).

[39] *See id.* at 19–21.

[40] *Id.* at 20 (quoting State v. Melchert-Dinkel, 816 N.W.2d 703, 713 (Minn. Ct. App. 2012)).

[41] *Id.* at 21.

knows that he or she is lying."[42] Rather, "a plurality of the Court recognized in *Alvarez* [that] the government can restrict speech when false claims are made to 'gain a material advantage,' including money or 'other valuable considerations,' such as offers of employment."[43] Justice Anderson determined that "there are a multitude of scenarios in which the speech prohibited by [the challenged statute] would not be fraudulent, and thus [the First Amendment's fraud] exception does not protect the statute from a facial challenge."[44] He also noted that the court could not "see how, even under the unusual facts of this case, Melchert-Dinkel gained a material advantage or valuable consideration from his false speech."[45] He concluded: "Accordingly, we reject the State's argument that the 'fraud' exception to the First Amendment applies here."[46]

Finally, because the speech prohibited by the statute was not categorically exempt from First Amendment protection, Justice Anderson subjected the statute to strict scrutiny: the restriction would be upheld only if it "(1) [were] justified by a compelling government interest and (2) [were] narrowly drawn to serve that interest."[47] Justice Anderson determined that Minnesota undoubtedly had a compelling interest in "preserving human life."[48] Moreover, he found that the definition of "assist" required that any speech deemed to reach the level of assistance be directly and causally linked to the suicide.[49] Thus, he concluded that a prohibition on assisting suicide was sufficiently narrowly tailored.[50] However, the prohibitions on advising and encouraging suicide could include speech "more tangential to the act of suicide,"[51] potentially including "general discussions of suicide with specific individuals or groups."[52] As a result, the court struck down the advising and encouraging prohibitions.[53]

In assessing whether the statute at issue was a valid proscription of unprotected fraudulent speech, the Minnesota Supreme Court seemed

---

[42] *Id.*

[43] *Id.* (first quoting United States v. Alvarez, 132 S. Ct. 2537, 2548 (2012) (plurality opinion); then quoting *id.* at 2547).

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

[45] *Id.*

[46] *Id.*

[47] *Id.* (citing Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011)).

[48] *Id.* at 22.

[49] *Id.* at 23.

[50] *Id.*

[51] *Id.* at 23–24.

[52] *Id.* at 24.

[53] *Id.* Justice Page dissented. He agreed with the majority except that he believed the state had failed to prove beyond a reasonable doubt that Melchert-Dinkel's speech amounted to assisting suicide. *Id.* at 25 (Page, J., dissenting). Thus, he determined that the court should have dismissed the case outright rather than remanded it. *Id.*

to read the *Alvarez* plurality opinion as exempting fraud from First Amendment protection only when it is "made to 'gain a material advantage.'"[54] Courts may be tempted to adopt this reading of *Alvarez* because it is in keeping with the general rule that First Amendment exceptions are meant to be narrow, but they should not do so because such a reading is implausible in light of the case's language and common law backdrop. Yet even if courts adopt such a reading, litigants can still seek to fit all types of fraud within the fraud exception by characterizing harm to one person as material advantage to another.

In the *Alvarez* plurality opinion, Justice Kennedy endeavored to discern the scope of the false claims First Amendment exception. To start his inquiry, Justice Kennedy determined that the Stolen Valor Act of 2005 imposed a "content-based speech regulation"[55] and noted that "[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."[56] However, he observed that "content-based restrictions on speech have been permitted . . . when confined to the few 'historic and traditional categories [of expression] long familiar to the bar.'"[57] Although "[t]he Court ha[d] never endorsed the categorical rule . . . that false statements receive no First Amendment protection,"[58] he observed that "[w]here false claims are made to effect a fraud or secure moneys or other valuable considerations . . . it is well established that the Government may restrict speech without affronting the First Amendment."[59] Because the Stolen Valor Act of 2005 "by its plain terms applie[d] to a false statement made at any time, in any place, to any person,"[60] and "d[id] so entirely without regard to whether the lie was made for the purpose of material gain,"[61] Justice Kennedy determined that the Stolen Valor Act of 2005 could not be upheld as a restriction on categorically unprotected speech.[62]

In *Melchert-Dinkel*, Justice Anderson seems to have interpreted the *Alvarez* plurality opinion as attaching a material-advantage require-

---

[54] *Id.* at 21 (majority opinion) (quoting United States v. Alvarez, 132 S. Ct. 2537, 2548 (2012) (plurality opinion)).

[55] *Alvarez*, 132 S. Ct. at 2543 (plurality opinion).

[56] *Id.* (quoting Ashcroft v. ACLU, 535 U.S. 564, 573 (2002) (internal quotation marks omitted)) (internal quotation marks omitted).

[57] *Id.* at 2544 (second alteration in original) (quoting United States v. Stevens, 130 S. Ct. 1577, 1584 (2010)) (internal quotation marks omitted).

[58] *Id.* at 2545.

[59] *Id.* at 2547. Relatedly, Justice Kennedy acknowledged that courts have upheld "prohibition[s] of . . . false statement[s] made to . . . Government official[s], . . . laws punishing perjury[,] and . . . prohibitions on the false representation that one is speaking as a Government official or on behalf of the Government." *Id.* at 2545–46 (citations omitted).

[60] *Id.* at 2547.

[61] *Id.*

[62] *See id.*

ment to the fraud exception. In flatly rejecting the state's argument "that Melchert-Dinkel's speech [was] unprotected because it amounted to *fraud*,"[63] Justice Anderson recited the *Alvarez* plurality's observation that "the government can restrict speech when *false claims* are made to 'gain a material advantage.'"[64] He then immediately determined that the statute at issue was not protected from the facial challenge because "there are a multitude of scenarios in which the speech prohibited by [the statute] would not be *fraudulent*."[65] Thus, Justice Anderson appears to have equated *Alvarez*'s reference to false claims made to secure a material advantage with *Alvarez*'s reference to fraudulent speech, and in turn to have imputed the material-advantage requirement to the fraud exception. In fact, this imputation seems all the more likely because it could explain why the court noted that it "fail[ed] to see how . . . Melchert-Dinkel *gained a material advantage* or valuable consideration from his false speech," before it "reject[ed] the State's argument that the '*fraud*' exception to the First Amendment applie[d]."[66]

The narrowness of this reading of *Alvarez*'s material-advantage language could be attractive to courts because the exceptions to First Amendment protection are supposed to be narrow.[67] However, such a reading is implausible for two reasons. First, the actual *Alvarez* material-advantage language states that false claims lack protection when they are "made to effect a fraud *or* secure moneys or other valuable considerations."[68] The use of "or" indicates that the "secur[ing] moneys or other valuable consideration"[69] inquiry is separate from any relevant fraud inquiry. In other words, the direction to courts is to look for material advantage only when false claims do *not* amount to fraud. If Justice Kennedy had intended to indicate that fraud is exempt from protection only when the perpetrator of the fraud sought a material advantage, "and" would have been the natural word to use.

Second, such a reading is inconsistent with how fraud is conventionally defined in both tort and contract law.[70] The tort of fraud of-

---

[63] *Melchert-Dinkel*, 844 N.W.2d at 21 (emphasis added).

[64] *Id.* (quoting *Alvarez*, 132 S. Ct. at 2548 (plurality opinion)) (emphasis added).

[65] *Id.* (emphasis added).

[66] *Id.* (emphases added).

[67] *See* State v. Huffman, 612 P.2d 630, 634 (Kan. 1980) ("The First Amendment guarantee of freedom of speech forbids the States to punish use of language and words except in certain 'narrowly limited classes of speech.'" (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942))); *see also* NAACP v. Button, 371 U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.").

[68] *Alvarez*, 132 S. Ct. at 2547 (plurality opinion) (emphasis added).

[69] *Id.*

[70] "Fraud may be treated as either ex contractu (contract) or ex delicto (tort), both from jurisdiction to jurisdiction and from case to case within the same jurisdiction." PETER A. ALCES,

ten requires a demonstration that harm was suffered, but not that advantage was sought.[71] In fact, this is the case in Minnesota.[72] And contract law does not differ substantially: *Williston on Contracts*, for example, includes among the list of elements required for a case of actual fraud "damage to the plaintiff" but not advantage to the defendant.[73] In either case, then, "[t]he fact that the defendant has not realized a benefit is not dispositive."[74] It is possible that the *Alvarez* plurality intended to define the fraud exception in a way that differed from the way fraud is often defined in states' common law. However, Justice Kennedy seemed to indicate that the plurality intended *not* to disturb settled doctrine. After all, when he examined language cited by the government that seemed to indicate that all false speech is unprotected speech, he wrote that the government's quotations "derive from cases discussing defamation, fraud, or some other legally cognizable harm."[75] He concluded further, after reviewing examples of regulations on false speech such as laws punishing perjury: "This opinion does not imply that any of these targeted prohibitions are somehow vulnerable."[76]

Nonetheless, if courts read the *Alvarez* plurality's material-advantage language as applying to fraud, savvy litigants might still be able to limit the effects on First Amendment doctrine by reframing harm to plaintiffs as material advantage for defendants. For instance, here Melchert-Dinkel entered into suicide pacts.[77] A suicide pact is essentially a contract, albeit one probably unenforceable on public policy

---

THE LAW OF FRAUDULENT TRANSACTIONS § 2:27 (2006). Although other forms of fraud exist at common law, the *Alvarez* plurality did not tie the fraud speech exception to any particular common law definition of fraud.

71 *See* RESTATEMENT (SECOND) OF TORTS § 525 (1977) (omitting material advantage from the requirements of fraud and instead noting that "[o]ne who fraudulently makes a misrepresentation of fact . . . is subject to liability . . . for pecuniary loss"); *see also, e.g.*, Coffey v. Wininger, 296 N.E.2d 154, 160 (Ind. Ct. App. 1973) (omitting material advantage from jury instruction explaining fraud and instead requiring jury to find "[t]hat . . . plaintiffs sustained damage"); Dutton & Vaughan, Inc. v. Spurney, 600 So. 2d 693, 698 (La. Ct. App. 1992) (listing an "essential element[] of fraud" as "the intent to defraud *or* gain an unfair advantage" (emphasis added)). Constructive fraud, however, often does have a material-advantage requirement. *See, e.g.*, Rice v. Strunk, 670 N.E.2d 1280, 1284 (Ind. 1996) (including among the elements of constructive fraud both "injury to the complaining party" and "the gaining of an advantage by the party to be charged").

72 *See* Davis v. Re-Trac Mfg. Corp., 149 N.W.2d 37, 38–39 (Minn. 1967) (omitting material advantage from the requirements of fraud and instead noting that a person who brings a fraud claim "must suffer damage," *id.* at 39).

73 26 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 69:3 (Richard A. Lord ed., 4th ed. 2003).

74 ALCES, *supra* note 70, § 2:20.

75 United States v. Alvarez, 132 S. Ct. 2537, 2545 (2012) (plurality opinion).

76 *Id.* at 2546.

77 State v. Melchert-Dinkel, No. 66-CR-10-1193, 2011 WL 893506, at *18 (Minn. Dist. Ct. Mar. 15, 2011).

grounds.[78] Since a suicide pact is an exchange of promises to harm oneself, the promised harm could be characterized as the suicide pact's "valuable consideration" in the contract sense of the term.[79] However, this approach might not work in every case. After all, in *Melchert-Dinkel*, either the Minnesota Supreme Court did not consider the possibility of characterizing harm to Melchert-Dinkel's victims as advantage to Melchert-Dinkel, or the court was not persuaded by it, since Justice Anderson indicated that Melchert-Dinkel had not received a material advantage.[80]

Even when a litigant fails to convince a court that her loss is the other side's gain, she still has a chance of prevailing under the applicable scrutiny analysis, whether exacting or intermediate.[81] For instance, in *Melchert-Dinkel*, the assisting suicide provision survived strict scrutiny.[82] However, if and when courts determine that strict scrutiny is the appropriate standard of review, chances of success are low, as strict scrutiny is often characterized as "fatal in fact."[83] Thus, litigants who wish to prevail in cases of fraud where no material advantage seems to exist probably have the best chance of success if they argue, in the first instance, that since Justice Kennedy wrote that false claims lack protection when they are "made to effect a fraud *or* secure moneys or other valuable considerations,"[84] fraud is always categorically exempt from First Amendment protection.

---

[78] *See* RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (1981) ("A promise . . . is unenforceable on grounds of public policy if . . . the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms."); *see also Melchert-Dinkel*, 844 N.W.2d at 20 ("[S]uicide . . . remains harmful conduct that the state opposes as a matter of public policy." (quoting State v. Melchert-Dinkel, 816 N.W.2d 703, 714 (Minn. Ct. App. 2012)) (internal quotation marks omitted)).

[79] *Compare* Hamer v. Sidway, 27 N.E. 256, 257 (N.Y. 1891) ("A *valuable consideration*, in the sense of the law, may consist . . . in some . . . forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." (emphasis added) (quoting WILLIAM R. ANSON, PRINCIPLES OF THE LAW OF CONTRACT 61 (O.W. Aldrich ed., 1880 ed.)) (internal quotation marks omitted)), *with Alvarez*, 132 S. Ct. at 2547 ("Where false claims are made to . . . secure . . . *valuable considerations*, . . . it is well established that the Government may restrict speech without affronting the First Amendment." (emphasis added)).

[80] *Melchert-Dinkel*, 844 N.W.2d at 21.

[81] *Compare Alvarez*, 132 S. Ct. at 2548–51 (plurality opinion) (subjecting the Stolen Valor Act of 2005 to "exacting scrutiny," *id.* at 2548), *with id.* at 2551–52 (Breyer, J., concurring in the judgment) (determining that the Act should be subject to intermediate scrutiny).

[82] *Melchert-Dinkel*, 844 N.W.2d at 23.

[83] Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 794 (2006) (quoting Gerald Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)) (internal quotation mark omitted). *But see id.* at 795 ("Reporting the results of a census of every strict scrutiny decision published by the district, circuit, and Supreme courts between 1990 and 2003, this study shows that strict scrutiny is far from [an] inevitably deadly test . . . .").

[84] *Alvarez*, 132 S. Ct. at 2547 (plurality opinion) (emphasis added).