

IF WORDS CAN KILL, HOW SHOULD CRIMINAL LAW INTERVENE?

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INTRODUCTION

On February 6, 2019, the Massachusetts Supreme Court affirmed the conviction of Michelle Carter for involuntary manslaughter regarding the suicide of her boyfriend Conrad Roy.¹ The court held that Carter, knowing Roy's fragile mental health and suicidal thoughts, encouraged him through numerous text messages to commit suicide and instructed him to complete his final suicidal plan.² One failed defense asserted by Carter was that the conviction "violated her right to free speech under the First Amendment."³ This has spurred heated debate about criminalizing speech that encourages or assists in suicide, and raised the question: *if words have the power to kill, how should criminal law intervene?*

The remainder of this post will discuss the uncertainty and the inadequacy of existing laws as they relate to this issue. Part I describes the type of speech that has not been given First Amendment protection and identifies the two requirements that may be embedded in statutes criminalizing suicide-inducing speech: causation and specific targeting. Parts II and III evaluate the causation and specific targeting requirements, respectively.

PART I

The First Amendment of the United States Constitution states that "Congress shall make no law . . . abridging the freedom of speech . . ."⁴ But this freedom is not absolute, and, over time, the United States Supreme Court has carved out narrow exceptions to the First Amendment.⁵ Pertinent here, the Supreme Court has never considered whether a statute prohibiting assisting suicide violates the right to free speech.⁶ And while the vast majority of states condemn or outright criminalize urging,

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¹ Commonwealth v. Carter, 115 N.E.3d 559, 562 (Mass. 2019).

² *Id.* at 562-65.

³ *Id.* at 570.

⁴ U.S. Const. amend. I.

⁵ See *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571 (1942).

⁶ See *State v. Melchert-Dinkel*, 844 N.W.2d 13, 22 (Minn. 2014).

encouraging, or assisting another to commit suicide,⁷ only California, Minnesota, and Georgia courts have confronted this issue so far. As such, there is a dearth of guidance about how such regulation might take shape in the years ahead.

Content-based restrictions on speech must survive strict scrutiny—a “notoriously difficult standard”⁸—which requires that the restriction “furthers a compelling interest and is narrowly tailored to achieve that interest.”⁹ The first prong of the standard is easily satisfied when considering statutes that regulate speech encouraging and/or assisting in suicide: states clearly have a compelling interest in preserving human life.¹⁰ However, the second prong poses more difficulty.¹¹ The challenge lies in balancing two important state interests: preserving human life and the free exchange of ideas.¹² What kind of speech, and how much of it, should be prohibited to preserve human life, while ensuring that the freedom of speech is not unnecessarily abridged?

Two considerations provide some guidance in ensuring that the appropriate balance of interests is achieved: causation and specific targeting. The regulated speech must be close to the act of suicide on the causal chain. Many forms of speech induce a mood of depression that could contribute to suicidal thoughts, but that does not mean the speech constitutes a “direct incitement to imminent violence.”¹³ A free and democratic society will not restrict individuals’ expression just to avoid the dissemination of ideas that may adversely affect the feelings of some individuals.¹⁴ Yet it is difficult to define at what point laws should intervene on the causal chain. Second, the prohibited speech must have specifically targeted the victim’s suicide. This requirement ensures that generally-targeted, public discussion on suicide retain First Amendment protection.

PART II

To criminalize speech that induces suicide, a “direct causal link”

⁷ 96 A.L.R.6th 475 (originally published in 2014).

⁸ Sean Sweeney, *Deadly Speech: Encouraging Suicide and Problematic Prosecutions*, 67 CASE W. RES. L. REV. 941, 970 (2017) [hereinafter Sweeney].

⁹ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010) (internal citation omitted).

¹⁰ See *Planned Parenthood Ass’n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 485 (1983); Sweeney, *supra* note 8, at 970.

¹¹ *Citizens United*, 558 U.S. at 340 (internal citation omitted).

¹² See *McCollum v. CBS, Inc.*, 202 Cal. App. 3d 989, 999 (Ct. App. 1988) (internal citation omitted).

¹³ See *McCollum*, 202 Cal. App. 3d at 1001 (“Merely because art may evoke a mood of depression as it figuratively depicts the darker side of human nature does not mean that it constitutes a direct “incitement to imminent violence.”).

¹⁴ See *id.* at 1005–06.

between the speech and the suicide must exist.¹⁵ Defining such a link is not a simple task.¹⁶ *State v. Melchert-Dinkel* is one of the few cases that provide some guidance.¹⁷ In *Melchert-Dinkel*, the defendant encouraged two individuals to commit suicide and advised them on methods through online communications.¹⁸ The individuals subsequently killed themselves.¹⁹ The district court found that the defendant “intentionally *advised* and *encouraged*” the victims’ suicides and convicted him of aiding suicide under the Minnesota statute.²⁰ On appeal, the defendant argued that the statute violated his First Amendment rights.²¹ The Minnesota Supreme Court agreed, holding that the state can proscribe speech that *assists* suicide, but not speech that *encourages* or *advises* suicide.²² The court reasoned that “assist” “signifies a level of involvement in the suicide beyond merely expressing a moral viewpoint” and “involves *enabling* the person to commit suicide.”²³ In contrast, the definitions of “encourage” and “advise” cover speech that is more remote to the act of suicide.²⁴ In *Melchert-Dinkel*, the Minnesota Supreme Court seemed to suggest an “enablement” requirement in defining causation: the regulated speech must have “enabled” the suicide, and anything that more tangentially caused the suicide should not be prohibited.

Melchert-Dinkel provides helpful reasoning because other state statutes share similar wordings to the Minnesota statute considered by the court.²⁵ However, the guidance is incomplete two ways. First, the opinion fails to define “enable.” The dictionary definition of “enable” is “[t]o give power to do something; to make able.”²⁶ Therefore, an enablement requirement could be interpreted to mean that the prohibited conduct must be a “but-for” causation: *but for the defendant’s acts or speech, the victim would not have been able to commit suicide*. But is this the interpretation intended by the Minnesota Supreme Court?

¹⁵ United States v. Alvarez, 567 U.S. 709, 725 (2012).

¹⁶ See Nicholas LaPalme, *Michelle Carter and the Curious Case of Causation: How to Respond to A Newly Emerging Class of Suicide-Related Proceedings*, 98 B.U. L. REV. 1443, 1451 (2018).

¹⁷ See 844 N.W.2d 13.

¹⁸ See *id.* at 16-17.

¹⁹ See *id.*

²⁰ *Id.* at 17 (emphasis in original).

²¹ See *id.* at 18.

²² See *Melchert-Dinkel*, 844 N.W.2d at 23-24 (emphasis added).

²³ *Id.* (emphasis added).

²⁴ See *id.* at 23-24.

²⁵ See Sweeney, *supra* note 8, at 960. For example, the California statute states that “[a]ny person who deliberately *aids*, *advises*, or *encourages* another to commit suicide is guilty of a felony.” Cal. Penal Code § 401 (West) (emphasis added); the Georgia statute provides that “[a]ny person with actual knowledge that a person intends to commit suicide who knowingly and willfully *assists* such person in the commission of such person’s suicide shall be guilty” Ga. Code Ann. § 16-5-5 (West) (emphasis added).

²⁶ *Enable*, BLACK’S LAW DICTIONARY (10th ed. 2014).

Second, the *Melchert-Dinkel* court only found that speech instructing another on suicide methods was prohibited, but it did not state that such speech is the *only* type prohibited.²⁷ This is an important gap. If the “but-for” interpretation is correct, there is a class of speech that does not advise on suicide methods but could still be a “but-for” trigger for one’s decision to commit suicide. For example, one could abandon a ripe suicidal plan “but-for” the last mental trigger to execute the plan. Would a restriction on speech that extinguished the last bit of hope for the victim to live survive strict scrutiny?

The facts presented in *Commonwealth v. Carter* would pose a difficult situation for the *Melchert-Dinkel* court. In *Carter*, the victim suffered from fragile mental health and attempted suicide several times.²⁸ Despite abandoning his prior attempts, the victim continued researching suicide methods and shared his findings with the defendant, who helped him to plan his suicide and made him “promise” to kill himself.²⁹ On the day of the victim’s death, he filled his truck with carbon monoxide, but then got out of the truck.³⁰ The defendant, well aware of the victim’s fragile mental state and the truck’s toxicity, successfully instructed him to get back in over the phone.³¹

The *Melchert-Dinkel* framework fails to account for such a situation. For example, the defendant’s text messages about suicide methods may not constitute speech that “enabled” the victim to commit suicide. And, while the defendant assisted in formulating the suicide plan, the victim, on his own, had attempted suicide several times and researched suicide methods.³² Given these facts, it would be difficult to prove that the defendant’s speech was a “but-for” cause of the victim’s death.³³ But the Massachusetts Supreme Court did not allow the defendant’s speech to go free, finding the most damning conduct to be her instruction for the victim to reenter his truck. The court considered this “wanton or reckless pressuring of a vulnerable person to commit suicide.”³⁴

If the *Carter* defendant appeared in front of the *Melchert-Dinkel* court, would the court prohibit her speech that immediately compelled the victim to complete suicide? If yes, how would the court elaborate on its

²⁷ *See id.*

²⁸ *See* 115 N.E.3d at 562.

²⁹ *Id.* at 563.

³⁰ *Id.* at 565.

³¹ *Id.*

³² *See id.* 562-63.

³³ *See* Brittani Ready, *Words as Weapons: Electronic Communications That Result in Suicide and the Uncomfortable Truth with Criminal Culpability Based on Words Alone*, 36 ST. LOUIS U. PUB. L. REV. 113, 132 (2017) (“Given [Roy]’s state of mental health, the prosecution would have a difficult task proving that Conrad would not have committed suicide without Carter’s text messages.”).

³⁴ *Carter*, 115 N.E.3d at 572.

“enablement” requirement? Would the court explicitly carve out more speech to be prohibited, other than speech instructing on suicide methods? The guidance provided by the Minnesota Supreme Court in *Melchert-Dinkel* is clearly incomplete.

PART III

The second consideration concerns whether the victim has been “specifically targeted.”³⁵ Abridging all public discussions about suicide would encroach on an indefinite amount of freedom of speech and would fail strict scrutiny. But determining what it means to specifically target the victim poses difficulty.

In *Final Exit Network, Inc. v. State*, the Supreme Court of Georgia held a state statute violated the First Amendment in criminalizing any “public[] advertis[ements]” or “offer[s] to assist” in suicide.³⁶ The court found that the government failed to explain “why a public advertisement or offer to assist in an otherwise legal activity is sufficiently problematic to justify an intrusion on protected speech rights.”³⁷ In comparison, the Minnesota statute prohibits assisting “another in taking the other’s own life.”³⁸ The word “another” refers to an individual, instead of a larger audience.³⁹ Likewise, the California statute states that “[a]ny person who deliberately aids, advises, or encourages another to commit suicide is guilty of a felony.”⁴⁰

Though state statutes and courts attempt to protect general discussions on suicide by requiring that the prohibited speech must target “another,” rather than “others,” this standard leaves a situation unexplored. What about speech advancing a general moral viewpoint that is nevertheless expressed to the victim in a private setting? In this situation, the “altruistic” speaker informs the victim of a genuine belief that *anyone* in the victim’s miserable situation should resort to suicide as a relief. Should we preserve such speech for its intellectual worth as a moral viewpoint or prohibit it because it was expressed towards an individual?

State v. Final Exit Network, Inc. involved such a situation.⁴¹ Final Exit was a nonprofit organization that advocates for the right to die.⁴² Upon an individual’s request for “exit services,” Final Exit conducted a lengthy assessment of whether the member is “an appropriate candidate for exit services,” such as whether the member suffers from a “horrible disease”

³⁵ *Melchert-Dinkel*, 844 N.W.2d at 22.

³⁶ See *Final Exit Network, Inc. v. State*, 722 S.E.2d 722, 724-25 (2012).

³⁷ *Id.* at 724.

³⁸ Minn. Stat. Ann. § 609.215 (West) (emphasis added).

³⁹ *Melchert-Dinkel*, 844 N.W.2d at 22.

⁴⁰ Cal. Penal Code § 401 (West) (emphasis added).

⁴¹ *State v. Final Exit Network, Inc.*, 889 N.W.2d 296 (Minn. Ct. App. 2016).

⁴² *Id.* at 299.

and has tried everything possible to endure living.⁴³ Final Exit would then provide the approved members with an “exit guide” to inform them of suicide methods.⁴⁴ Applying *Melchert-Dinkel*, the Minnesota Court of Appeals found Final Exit liable for its speech specifically instructing on suicide methods—but not for its advocacy for the right to die.⁴⁵ It did not give a definitive verdict on Final Exit’s provision of individual assessment and approval of a member’s suicide service requests.

This lack of a definitive answer should not be read as a tacit approval of speech that supports one’s suicidal thoughts in the form of expressing a general moral viewpoint. Rather, the opinion was based on “the ‘context of the specific circumstances’ presented.”⁴⁶ The lack of personal motive likely prompted the court to not convict Final Exit for its assessment and approval of suicide requests. *State v. Final Exit Network, Inc.* is a tricky case for the specific targeting requirement, as the organization adopts a uniform assessment that nevertheless applies to individual members.⁴⁷

As the specific facts of future cases come to light, we might receive a clearer guidance on the specific targeting requirement, such as whether a selfish personal motive is critical.

CONCLUSION

In regulating speech that encourages and/or assists in suicide, courts should carefully grapple with the blurry definitions of causation and specific targeting to meet the strict scrutiny test. Future cases shall invite a clear guidance from courts.

⁴³ See *id.* at 299-300.

⁴⁴ See *id.* at 300.

⁴⁵ See *id.* at 307.

⁴⁶ See *id.*

⁴⁷ See *id.* at 300.