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PUBLISHED BY THE DONALD E. BIEDERMAN ENTERTAINMENT
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ENTERTAINMENT AND SPORTS INDUSTRIES

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EDITOR'S NOTE

ARTICLES

Antitrust Confronts Big Data: U.S. and European Perspectives
Warren Grimes

The Audience Problem in Online Speech
Janny H. C. Leung

Fixing FOIA: How Third-Party Intervention Thwarts Transparency
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Editor's Note

As we complete Volume 9, the *Journal* is pleased to offer four scholarly articles that run the gamut of domestic, international and comparative law; articles with innovative scholarship and fresh perspectives as the world slowly emerges from the calamity of the COVID-19 pandemic.

Warren Grimes' "Antitrust Confronts Big Data: U.S. and European Perspectives" offers a comparative look at regulatory initiatives being taken against Alphabet (Google), Amazon, Apple, and Facebook in the United States and Europe. A leading scholar of antitrust law, Grimes is the Irving D. & Florence Rosenberg Professor of Law at Southwestern Law School.

In "The Audience Problem in Online Speech Crimes," Janny H. C. Leung creatively applies law and social scientific research developed during the distributor-controlled mass communication era to digital audiences in an online environment. Leung is professor of applied linguistics and Director of the Program in Law and Literary Studies at Hong Kong University.

Authors Amy Kristin Sanders and William D. Kosinski posit an "unraveling" of FOIA rights as a result of third-party interventions approved by the U.S. Supreme Court in "Fixing FOIA: How Third-Party Intervention Thwarts Transparency." Sanders is a media law scholar and professor of journalism at the University of Texas; Kosinski is a graduate of the University.

Finally, Russell L. Weaver, a distinguished professor at the University of Louisville, Louis D. Brandeis School of Law, develops a novel piece of academic literature in "Fake News and the COVID-19 Pandemic." Weaver looks at the implications of misinformation as it relates to the global pandemic and possible solutions that would require the courts, legislature, and private social media companies to take action.

I am grateful to the *Journal's* student editors, led by Abigail Lombardo and Martha Vasquez Hernandez, for their can-do attitude in the face of COVID-19 restrictions that required them all to work from home.

As always, feedback of any kind is welcome.

Michael M. Epstein
Supervising Editor

ANTITRUST CONFRONTS BIG DATA: U.S. AND EUROPEAN PERSPECTIVES

Warren Grimes*

“Republicans and Democrats agree that these companies have too much power, and that Congress must curb this dominance Mark my words, change is coming.”

– U.S. Representative David Cicilline¹

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I. INTRODUCTION

What do Alphabet (Google), Apple, Amazon, and Facebook have in common? None of these big data technology firms existed in current form 40 years ago. Today, each of these dominant U.S.-based firms is among the world’s largest.² Each offers goods and services to users

* Irving D. & Florence Rosenberg Professor of Law, Southwestern Law School.

¹ Congressman Cicilline is the Chairman of the House Judiciary Committee’s Subcommittee on Antitrust, Commercial and Administrative Law. *Antitrust, Commercial, and Administrative Law (116th Congress)*, HOUSE COMM. ON THE JUDICIARY, <https://judiciary.house.gov/subcommittees/antitrust-commercial-and-administrative-law-116th-congress/> (last visited Apr. 14, 2021); David McLaughlin & Rebecca Kern, *Tech Gets Congress Antitrust Warning: ‘Change is Coming,’* BLOOMBERG (Feb. 25, 2021, 8:01 AM), <https://www.bloomberg.com/news/articles/2021-02-25/antitrust-reform-is-coming-for-tech-giants-lawmakers-say>.

² Press Release, Google, Google Launches World’s Largest Search Engine (June 26, 2000), <http://googlepress.blogspot.com/2000/06/google-launches-worlds-largest-search.html>; SUBCOMM. ON ANTITRUST, COMMERCIAL & ADMINISTRATIVE

and, in the process, collects and analyzes data from users.³ That data is a valuable commodity which the firm uses to gain commercial advantage, often by exercising a gatekeeper's control over a data-related service.⁴

Although big data firms began operations inauspiciously and with little or no regulatory interference, each now faces uncertainty as the world turns toward ramped up antitrust enforcement.⁵ This paper examines developments in the United States and Europe that include various enforcement initiatives along with proposals for new legislation. In these evolving developments, competition law issues stand alongside and intertwined with issues involving protection of consumer privacy.

Although the outcome of these processes is uncertain, a world in which big data firms could move unimpeded by antitrust and other regulatory intervention is at an end. Privacy regulation and antitrust enforcement are more robust in Europe than in the United States, but, on both sides of the Atlantic, enforcers and legislators are moving to constrain dominant data firms' perceived abusive behavior.

II. OVERVIEW OF THE ISSUES

Collection of information from consumers' interactions with the internet began with little or no consumer awareness. Once consumers grasped that their internet actions were being recorded, analyzed and disseminated for profit-making or political purposes, opposition mounted. Perhaps because of the greater cultural sensitivity to privacy abuse, Europe was ahead of the United States in designing comprehensive privacy protection schemes.⁶ With California leading

LAW OF THE COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REP. AND RECOMMENDATIONS 9, 132, 247, 332 (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519 [hereinafter INVESTIGATION OF COMPETITION IN DIGIT. MKTS.].

³ INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 2, at 6, 10.

⁴ *Id.* at 131.

⁵ *See id.* at 377.

⁶ Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data and Repealing Directive

the way,⁷ state and federal privacy-protecting initiatives are now advancing in the United States.⁸

Today, despite widespread concern about privacy, many consumers have only the vaguest understanding of how the world of internet data collection works. There are substantial information gaps that affect a privacy choice made by a consumer. One survey of online platform users in ten major countries found that a majority did not understand how “free” online services, such as those offered by Google and Facebook, were funded.⁹ An even larger percentage did not understand the process that was used to rank responses to search engine inquiries.¹⁰ In what is known as the privacy paradox,¹¹ consumers may object to collection and dissemination of personal data, but still tolerate that use for apps that they value. The paradox can be traced to a variety of factors, including the complexity of the system, the lack of meaningful consumer choices, and the difficulty of enforcing privacy rules.¹² For example, Google collects data from a variety of uses, ranging from any use of a Google search engine, visits to YouTube, or signing on to Google apps such as YouTube music.¹³ A user might be comfortable with allowing Google to share

95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1 [hereinafter GDPR].

⁷ California Consumer Privacy Act of 2018, CAL. CIV. CODE §§ 178.100-178.199.100 (West, Westlaw through Ch. 13 Reg. Sess.). The Act was amended by ballot Proposition 24, approved by the voters on November 3, 2020. A.B. 1490, 2020-2011 Leg., Reg. Sess. (Cal. 2021). For an overview of California law, see Allaire Monticollo et al., *California Privacy Landscape Changes Again with Approval of New Ball Initiative*, 35 ANTITRUST 32 (2020).

⁸ At the federal level, the FTC, through its Bureau of Consumer Protection, has focused enforcement resources on misleading or deceptive online advertising and protection of data security and privacy. Richard Cunningham et al., *The Other Tech-Focused Initiative: The FTC’s Expanding Consumer Protection Efforts Targeting E-Commerce*, 34 ANTITRUST 51 (2020).

⁹ Pinar Akman, *A Web of Paradoxes: Empirical Evidence on Online Platform Users and Implications for Competition and Regulation of Digital Markets*, SSRN, at 7 (Mar. 29, 2021), <https://ssrn.com/abstract=3835280> (data collected from users in ten countries, including the U.S., China, India, the U.K., and Germany).

¹⁰ *Id.*

¹¹ Susanne Barth & Menno D.T. de Jong, *The Privacy Paradox—Investigating Discrepancies Between Expressed Privacy Concerns and Actual Online Behavior—A Systematic Literature Review*, 34 TELEMATICS & INFORMATICS 1038 (2017).

¹² *See id.* at 1040, 1049, 1051.

¹³ *See* INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 2, at 174.

information from some of these apps, but not with others. Some collected data helps sellers provide valued consumer choices.¹⁴ Knowing what music a consumer prefers to hear, or what video entertainment a consumer prefers to watch, can result in attractive offerings for the consumer. On the other hand, consumers may not be comfortable with the collection and release of data related to matters of location, race, ethnicity, health, gender preference, and a variety of other issues.¹⁵

Another concern is the bundled nature of many choices that big data firms offer consumers. Both Google and Facebook, for example, gather and analyze data received from the variety of operations and apps that they own, and sometimes gain access to data collected by firms they do not own.¹⁶ If a big data firm offers a consumer an all-or-nothing choice to share all data or be blocked from participation, many consumers may opt to give blanket consent, notwithstanding a preference for more refined choices.

As Google gradually expanded its reach and acquired other firms that could also be a source of online data, there was a lack of clarity about what role, if any, antitrust should play in protecting privacy. Contemporary antitrust analysis has focused on price and output, and courts may find it awkward to assess privacy protection under this narrow framework. At the same time, an increasing number of experts agree that the Sherman Act protects the competitive process, including not only a consumer's interest in a competitive price, but also in a variety of other values associated with competition, including consumer choice, quality, and innovation.¹⁷ There is an open door to consider consumer privacy interests as a component of choice and quality. For example, if given a choice, many users of a search engine might choose one that better protects user privacy, valuing this option as a higher quality of service.

When dominance prevails, consumer choices tend to be sparse. Network efficiencies add to the barriers of entry already facing a firm

¹⁴ See *Final Report of the Directorate-General for Competition (EC) on the Competition Policy for the Digital Era*, at 44 (May 20, 2019), <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

¹⁵ See INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 2, at 45–46.

¹⁶ *Id.* at 148–49.

¹⁷ Warren Grimes, *Breaking Out of Consumer Welfare Jail: Addressing the Supreme Court's Failure to Protect the Competitive Process*, 15 RUTGERS BUS. L. REV. 49, 53–63 (2020) (surveying views of scholars on reach of antitrust laws).

that wishes to gather personal data and compete against big data firms. Dominant firms already possess a rich trove of personal data. The reach of a large data set is likely to provide for more accurate targeting of potential buyers, an advantage that advertisers will value and pay to obtain. A new entrant with a less comprehensive data set may have difficulty in attracting advertisers, even if it offers its advertisements at a lower price.¹⁸

Efforts to protect the privacy of internet users may have an unintended but perverse impact on competition. The European Union's (EU) General Data Protection Regulation (GDPR)¹⁹ was designed to protect individual privacy. In doing so, however, it may make it more difficult to enter and compete against large firms such as Google and Facebook. Consumers may agree to allow the use of data by large established firms because they desire the comprehensive services provided in return. When a small or new competitor makes the same request to use data, the consumer, not seeing any comprehensive benefit, may decline to allow access.²⁰ The end result is that the nascent competitor cannot get access to the data that the dominant firms have.

One possible way to make it easier for competing firms to survive might be to allow small rivals to pool their data, thereby achieving a minimum scope that makes their targeted advertisements attractive alternatives. This solution could raise privacy and antitrust issues of its own but deserves consideration.

Another issue is the two-sided nature of most of these firms' data collection operations. Two-sided markets are not new to antitrust. A 1953 Supreme Court case involved a newspaper that profited from two revenue-generating sides of the newspaper business: selling subscriptions to readers and selling advertising to outsiders.²¹ A firm

¹⁸ Bundesgerichtshof [BGH] [Federal Court of Justice] June 23, 2020, Entscheidungen des Bundesgerichtshofes in Zivilsachen, [BGHZ], 69/19 (Ger.), <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2020-6&Seite=4&nr=109506&pos=121&anz=279>. For a summary of the case in English, see https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2020/23_06_2020_BGH_Facebook.pdf?__blob=publicationFile&v=2.

¹⁹ GDPR, *supra* note 6.

²⁰ Florian C. Haus, *Recent Developments in Data Privacy and Antitrust in Europe*, 35 ANTITRUST 63, 64 (2020) (explaining why the GDPR has made it more difficult for small rivals of big data firms).

²¹ *Times Picayune Pub. Co. v. United States*, 345 U.S. 594 (1953).

such as Google offers its search engine for use by consumers, but the search engine is a vehicle for collecting user data as a commercial venture in order to sell targeted advertising. In this example, the search engine is operated at no direct charge to consumers (other than their loss of privacy or their exposure to targeted advertisements). Google profits handsomely, however, from the sale of ads that the data collection enables.

In antitrust parlance, these markets are known as two-sided platforms. The issue of how to treat two-sided markets has generated substantial discussion in the academic literature.²² A straight forward antitrust approach to two-sided markets is simply to ask, in the first instance, whether a firm's market power-based conduct results in substantial distortions undermining the competitive process on either side of its platform. If so, the burden of proof should shift to the defendant to justify these restraints.

In *Ohio v. American Express Co.*²³, Amex made money from its credit cards by charging merchants a fee each time the credit card was used and by charging card holders annual fees, late payment fees, or interest on unpaid balances.²⁴ Amex refused to allow merchants to steer their customers to rival cards charging lower merchant fees. The Court majority rejected arguments of the plaintiff States and the U.S. Justice Department's amicus brief that found these anti-steering actions to be a substantial distortion in competition, concluding that a firm that operates in two-sided markets violates the Sherman Act only if, looking at both sides of the market, a plaintiff can demonstrate a net consumer injury.²⁵ The decision is controversial.²⁶ Instead of accepting evidence of a clear and substantial distortion on one side of the market, the Court concluded that the government plaintiffs had failed to establish a violation because of Amex's speculative and impossible-to-prove arguments that anti-steering conduct benefitted consumers through credit card rebates or other enhanced services that Amex

²² See, e.g., John B. Kirkwood, *Antitrust and Two-Sided Platforms: The Failure of American Express*, 41 CARDOZO L. REV. 1805 (2020); Herbert Hovenkamp, *Platforms and the Rule of Reason: The American Express Case*, 2019 COLUM. BUS. L. REV. 35 (2019).

²³ 138 S. Ct. 2274 (2018).

²⁴ *Id.* at 2282.

²⁵ *Id.* at 2287.

²⁶ For criticism of the *American Express Co.* decision, see Kirkwood, *supra* note 22; Hovenkamp, *supra* note 22; Grimes, *supra* note 17, at 74–77.

provided card holders.²⁷ Amex card users had no opportunity to decide whether the rebates and other enhanced services were worth the extra charge that Amex imposed on merchants and, indirectly, on anyone buying from those merchants.²⁸

III. DEVELOPMENTS IN THE UNITED STATES

Each of the big data firms got its start in the United States. These firms grew to dominance in a world of benign neglect. In the United States, internal growth and growth by merger were largely ignored until recently. According to the American Antitrust Institute, the federal antitrust agencies (the Antitrust Division of the Justice Department and the Federal Trade Commission) challenged only one merger involving digital technology over the two decades ending in 2020.²⁹ On the political front, these firms were either ignored or supported by both Democrat and Republican regulators and legislators. All of this has changed in the last few years. In the waning months of the Trump administration, government enforcers initiated investigations and brought major enforcement actions against Amazon, Google, and Facebook.³⁰

In August 2020, news outlets reported that the Federal Trade Commission, joined by state attorneys general in California and New York, was investigating Amazon's online marketplace.³¹ A focus of the investigation was secret use of data from third-party sellers.³²

²⁷ See *American Express Co.*, 138 S. Ct. at 2287–91.

²⁸ See *id.*

²⁹ *AAI Applauds States' and FTC's Major Antitrust Cases Against Facebook*, AM. ANTITRUST INST. (Dec. 10, 2020) <https://www.antitrustinstitute.org/aai-applauds-states-and-ftcs-major-antitrust-cases-against-facebook/> (the only reportable merger transaction resulting in a challenge by a federal agency was Google-ITA).

³⁰ See McLaughlin & Kern, *supra* note 1; see also Shannon Boyd et al., *How are Apple, Amazon, Facebook, Google Monopolies? House Report Counts the Ways*, NPR (Oct. 6, 2020, 5:16 PM), <https://www.npr.org/2020/10/06/920882893/how-are-apple-amazon-facebook-google-monopolies-house-report-counts-the-ways>.

³¹ Spencer Soper, *Amazon's Market Power to be Investigated by New York AG*, BLOOMBERG (Aug. 3, 2020, 11:10 AM), <https://www.bloomberg.com/news/articles/2020-08-03/amazon-s-market-power-is-said-to-be-investigated-by-new-york-ag>.

³² Tyler Sonnemaker, *Amazon is Reportedly Facing a New Antitrust Investigation into Its Online Marketplace Led by the FTC and Attorneys General in New York and California*, BUS. INSIDER (Aug. 3, 2020, 12:53 PM),

Amazon reportedly used marketplace-procured data from rival sellers to launch competing products.³³ EU competition authorities began a similar investigation in July 2019.³⁴

Moving beyond investigation, in May 2021, the Attorney General for the District of Columbia filed an antitrust suit against Amazon.³⁵ This suit was based on the District of Columbia's antitrust law (similar to federal antitrust law) and seems likely to be litigated in the district courts (not in federal court). The complaint alleges that Amazon effectively requires all third-party sellers to offer the lowest price on the Amazon platform—no lower price may be offered by the third-party's own web site or on any other online platform.³⁶ Amazon does not explicitly prohibit lower prices offered elsewhere, but Amazon can remove or sanction any seller that offers the same product on more favorable terms on another online platform.³⁷

The effect of Amazon's conduct is to maintain or extend its online monopoly power by raising prices and depriving consumers of choice.³⁸ Amazon charges third-party sellers substantial fees for using its online marketplace.³⁹ Although these fees could be avoided or lessened if the seller used a lower cost online marketplace, the complaint alleges that the third-party seller is precluded from offering lower prices if it wants to continue to sell on the dominant Amazon platform.⁴⁰

Well before the Amazon suit, in October 2020, the Antitrust Division of the Justice Department, joined by eleven state attorneys general, sued Google for alleged violations of Section 2 of the Sherman

<https://www.businessinsider.com/amazon-antitrust-probe-ftc-new-york-california-online-marketplace-2020-8>.

³³ *Id.*

³⁴ See discussion *infra* Part IV.

³⁵ Complaint, District of Columbia v. Amazon.com, Inc., No. 2021-CA-001775 (D.C. Super. Ct. filed June 1, 2021) (BL, Ct. Docket Entry BL-5) [hereinafter Complaint Against Amazon]; Press Release, Dist. of Columbia Att'y Gen., AG Racine Files Antitrust Lawsuit Against Amazon to End Its Illegal Control of Prices Across Online Retail Market (May 25, 2021), <https://oag.dc.gov/release/ag-racine-files-antitrust-lawsuit-against-amazon>.

³⁶ Complaint Against Amazon, *supra* note 35, at 16.

³⁷ *Id.* at 3.

³⁸ *Id.* at 23.

³⁹ *Id.* at 3–4; see also AMAZON, <https://sell.amazon.com/pricing.html> (last visited June 7, 2021).

⁴⁰ Complaint Against Amazon, *supra* note 35, at 20–21.

Act.⁴¹ Government suits alleging Section 2 monopoly abuse are a relative rarity. That alone made this event newsworthy. A central thrust of the complaints was that Google entered into contractual arrangements with manufacturers of Android devices such as cell phones, tablets, smart television sets, and smart speakers that required that Google be the default or exclusive operating system.⁴² The complaint alleged that these restrictions made it difficult for rivals to gain a foothold and created a self-reinforcing cycle of monopoly in search engines and search advertising.⁴³

In December 2020, thirty-eight states brought an additional Section 2 Sherman Act complaint against Google.⁴⁴ The suit alleged that Google manipulated results on its search engine to favor its own products and services over rivals.⁴⁵ According to the complaint, Google rivals, faced with unfavorable search results, were forced to pay Google for advertising that runs alongside the search results.⁴⁶ The suit claimed that Google's favoritism prevented internet users from seeing the best options for dining, travel, and other products and services.⁴⁷ The government plaintiffs planned to seek consolidation of all Google antitrust claims for trial.⁴⁸

The claims against Google echo many of the concerns already raised by competition law enforcers in Europe.⁴⁹ The same can be said for the Federal Trade Commission's December 2020 suit against

⁴¹ Press Release, Dep't. of Just., Justice Department Sues Monopolist Google for Violating Antitrust Laws (Oct. 20, 2020), <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Complaint, *Colorado v. Google*, No. 20-cv-03715 (D.D.C. filed Dec. 17, 2020), EFN No. 3 [hereinafter *Complaint Against Google*]; see also Tony Romm, *Nearly 40 States Sue Google Alleging Search Manipulation, Marking the Third Antitrust Salvo Against the Tech Giant*, WASH. POST (Dec. 17, 2020, 11:50 AM), <https://www.washingtonpost.com/technology/2020/12/17/google-search-antitrust-lawsuit/>.

⁴⁵ *Complaint Against Google*, *supra* note 44, at 9.

⁴⁶ *Id.* at 69.

⁴⁷ *Id.*

⁴⁸ The government plaintiffs successfully consolidated claims in January 2021. Order Granting in Part and Denying in Part Plaintiff's Motion to Consolidate, *Colorado v. Google*, No. 20-cv-03715 (D.D.C. filed Jan. 7, 2021), EFN No. 67.

⁴⁹ See *infra* Part IV.

Facebook, alleging a violation of Section 5 of the FTC Act.⁵⁰ A coordinated, separate suit was brought by forty-eight state attorneys general, alleging violations of Section 2 of the Sherman Act and Section 7 of the Clayton Act.⁵¹ The district court dismissed both actions in June of 2021, holding in part that the FTC had failed to plead facts establishing Facebook's monopoly power in a relevant market.⁵² Only the FTC was granted leave to amend (the state attorneys general may appeal). The Commission wasted no time in amending its complaint, alleging more details to establish Facebook's monopoly power and abuse of that power through a "buy or bury" scheme to crush emerging competition for social networking in the cell phone market.⁵³

The government plaintiffs seek comprehensive relief, including divestiture of Instagram and WhatsApp, two Facebook acquisitions that had previously been unchallenged by government enforcers. Perhaps more directly than the suits against Google, the claims against Facebook will require the plaintiffs to establish harm through loss of privacy protection choices. To the extent that consumers do not pay to use the social networking or other apps' services, they do so indirectly by allowing Facebook to collect and analyze consumer data, which is then used to sell targeted advertisements.

As described in Part II, the claims against both Google and Facebook involve challenges linked to the two-sided platform, one side of which is to provide free services to users. These obstacles have not prevented successful enforcement initiatives in Europe, but will be litigated in U.S. courts, as defendants will likely invoke the *Amex* decision.⁵⁴

⁵⁰ Complaint for Injunctive and Other Equitable Relief, Fed. Trade Comm'n v. Facebook, Inc., No. 20-cv-03590 (D.D.C. filed Dec. 9, 2020), EFN No. 3 [hereinafter Complaint Against Facebook].

⁵¹ *New York v. Facebook, Inc.*, No. 20-cv-03589 (D.D.C. filed Dec. 9, 2020), EFN No. 4; *Privacy, Not Price, Takes Focus in Facebook Antitrust Suits*, LAW360 (Dec. 11, 2020, 4:29 PM), <https://www.law360.com/articles/1336691/privacy-not-price-takes-focus-in-facebook-antitrust-suits>; see AM. ANTITRUST INST, *supra* note 29.

⁵² Fed. Trade Comm'n v. Facebook, Inc., No. 20-3590, 2021 BL 240437 (D.D.C. June 28, 2021).

⁵³ First Amended Complaint for Injunctive and Other Equitable Relief, Fed. Trade Comm'n v. Facebook, Inc., No. 20-cv-03590 (D.C.C. filed Aug. 19, 2021), EFN No. 75-1.

⁵⁴ See *supra* notes 23–26 and accompanying text.

Although Apple has so far escaped a major government enforcement action in the United States, it has been sued for monopolization in private suits. A prominent example is a Sherman Act Section 2 suit brought by Epic Games.⁵⁵ Epic's popular game was available through Apple's App Store, but required Epic to pay Apple's commission, which can be as high as thirty percent for some apps.⁵⁶ Many large and small firms offering apps have argued that Apple's high commission fees are an abuse of the firm's monopoly position.⁵⁷ This suit was tried in May 2021 and is awaiting the Judge's decision.⁵⁸ Although there is doubt whether the trial judge will go this far, truly meaningful antitrust relief would allow competition in the selling of apps for the Apple system.⁵⁹

On the legislative front, Senator Amy Klobuchar (D. Minn.) has introduced legislation designed to strengthen the antitrust laws in ways that could directly affect the data technology industry.⁶⁰ The proposed bill would increase resources for federal enforcers, create a stronger presumption against anticompetitive mergers, and amend the Clayton Act to "prohibit 'exclusionary conduct' (conduct that materially disadvantages competitors or limits their opportunity to compete) that presents an 'appreciable risk of harming competition.'"⁶¹ The burden of proof in proving that a merger will not violate the law is shifted to merging firms in any case in which the merger (1) would significantly increase market concentration; (2) would involve a dominant firm's (defined as a firm with a fifty percent market share or in possession of significant market power) acquisition of competitors or nascent competitors; and (3) would constitute a mega-merger valued at more

⁵⁵ *Epic Games, Inc. v. Apple, Inc.*, 493 F. Supp. 3d 817, 817, 834 (N.D. Cal. 2020); see also Jack Nicas, *Apple's Fortnite Trial Ends with Pointed Questions and a Toast to Popeyes*, N.Y. TIMES (May 24, 2021), <http://nytimes.com/2021/05/24/technology/apple-epic-antitrust-trial.html>.

⁵⁶ *Epic Games, Inc.*, 493 F. Supp. 3d at 838.

⁵⁷ Nicas, *supra* note 55.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement*, U.S. SEN. AMY KLOBUCHAR (Feb. 4, 2021), <https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement>.

⁶¹ Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225 (117th Cong., 1st Sess.).

than \$5 billion.⁶² These provisions could have made it much easier for the government to challenge many big data firms' acquisitions over the past two decades.

The legislation has five Senate sponsors, all of them Democrats,⁶³ but big data firms have also drawn intense criticism from Republicans⁶⁴ and Republican state attorneys general have joined in actions against Google and Facebook. While the outcome of the legislative process is uncertain, the prospect of bipartisan support is reason to take this proposal seriously.

IV. DEVELOPMENTS IN EUROPE

Well before the enforcement initiatives by U.S. government enforcers, the EU and national state enforcers in Europe had taken action against big data firms. Many of these actions involved challenges to conduct that is being attacked in the major U.S. antitrust complaints against Google and Facebook.

In three separate enforcement actions against Google, EU competition authorities have levied €8.25 billion in fines against the firm. In June 2017, a fine of €2.42 billion was levied for Google's abuse of dominance in favoring its own comparison-shopping service.⁶⁵ In July 2018, a fine of €4.34 billion was levied for Google's use of contractual restrictions with manufacturers of Android mobile devices that strengthen Google's dominance.⁶⁶ In March 2019, the fine was €1.49 billion for abusive practices in online advertising that had exclusionary effects on Google's rivals.⁶⁷ In June of 2021, the European Commission announced an additional investigation of

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Cecilia Kang, *Democratic Congress Prepares to Take on Big Tech*, N.Y. TIMES (Jan. 26, 2021), <https://www.nytimes.com/2021/01/26/technology/congress-antitrust-tech.html> (describing Senator Klobuchar's initiative and Republican frustration with tech platforms that censor conservative voices).

⁶⁵ European Commission Press Release IP/17/1784, Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service (June 27, 2017).

⁶⁶ European Commission Press Release IP/18/4581, Antitrust: Commission Fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine (July 18, 2018).

⁶⁷ European Commission Press Release IP/19/1770, Antitrust: Commission Fines Google €1.49 Billion for Abusive Practices in Online Advertising (Mar. 20, 2019).

whether practices in the online advertising market favor Google over rival sellers of online ads.⁶⁸

In July 2019, EU competition authorities announced an investigation of Amazon's online marketplace.⁶⁹ The Commission is challenging Amazon's use, to benefit Amazon's own retail business, of non-public data from independent sellers that sell through the marketplace.⁷⁰ This investigation was announced roughly a year before the FTC and Attorneys General from California and New York were revealed as conducting a similar investigation.⁷¹

The EU Commission also has a pending investigation of Apple's activities involving potential "App" store favoritism that has exclusionary effects on rival producers of apps.⁷² Finally, the EU Commission investigated Facebook's acquisition of WhatsApp.⁷³ While the Commission cleared this transaction subject to future monitoring, a €110 million fine was levied against Facebook for providing misleading information about the takeover.⁷⁴ In the December 2020 suit brought by the FTC and various state attorneys general, the plaintiffs are seeking the divestiture of WhatsApp.⁷⁵

One of the most salient enforcement initiatives was brought not by the EU but by the German Federal Cartel Office (FCO) in March 2016.⁷⁶ The FCO announced its decision in this administrative

⁶⁸ European Commission Press Release IP/21/3134, Antitrust: Commission Opens Investigation into Possible Anticompetitive Conduct by Google in the Online Advertising Sector, (June 22, 2021).

⁶⁹ European Commission Press Release IP/19/4291, Antitrust: Commission Opens Investigation into Possible Anti-Competitive Conduct of Amazon (July 17, 2019).

⁷⁰ European Commission Press Release IP/20/2077, Antitrust: Commission Sends Statement of Objections to Amazon for the Use of Non-Public Independent Seller Data & Opens Second Investigation into Its E-Commerce Business Practices (Nov. 10, 2020).

⁷¹ See Sonnemaker, *supra* note 32.

⁷² European Commission Press Release IP/20/1073, Antitrust: Commission Opens Investigations into Apple's App Store Rules (June 16, 2020).

⁷³ European Commission Press Release IP/17/1369, Mergers: Commission Fines Facebook €110 Million for Providing Misleading Information about WhatsApp Takeover (May 18, 2017).

⁷⁴ *Id.*

⁷⁵ See AM. ANTITRUST INST., *supra* note 29.

⁷⁶ *Case Summary: Facebook, Exploitative Business Terms Pursuant to Section 19(1) GWB for Inadequate Data Processing*, Ref.: B6-22/16, BUNDESKARTELLAMT 1 (Feb. 15, 2019) [hereinafter BUNDESKARTELLAMT CASE SUMMARY],

proceeding in February 2019.⁷⁷ The FCO ordered Facebook to cease requiring German Facebook consumers to agree to use of off-Facebook data as a condition for using Facebook's online social networking.⁷⁸ Off-Facebook data included both data received from apps now owned by Facebook (WhatsApp, Oculus, Masquerade, and Instagram) and from non-Facebook controlled sources (websites visited and third-party mobile apps).⁷⁹ The FCO regarded Facebook's conduct as an "abuse of dominant position" prohibited by both European and German competition law provisions.⁸⁰

After an intermediate court, at Facebook's request, suspended the injunctive relief pending appeal, the German Federal Supreme Court of Justice (Bundesgerichtshof) issued an opinion upholding the injunctive relief.⁸¹ Although an interim holding, the opinion offers insightful and important competitive analysis of two-sided platforms in online businesses.⁸² The Court saw the consumer's lack of choice in controlling use of data as central, a point borne out by the remedy.⁸³ Facebook would be free to offer the consumer a personalized experience built upon use of both on-Facebook and off-Facebook data.⁸⁴ In doing so, however, Facebook must offer users a choice between the full data collection option and participation in the social network with no collection or use of off-Facebook data.⁸⁵ The court viewed consumer choice as an important metric in a competitive market.⁸⁶

The court wrote that a forced bundling of all Facebook apps conditioned upon consumer consent to a full collection of all data would not in itself be a violation of European or German competition

https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Bundesgerichtshof [BGH] [Federal Court of Justice] June 23, 2020, Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ], 69/19 (Ger.). For a description and analysis in English, see Haus, *supra* note 20.

⁸² See BGHZ 69/19 (2020) (Ger.).

⁸³ *Id.* para. 29.

⁸⁴ *Id.* para. 121.

⁸⁵ *Id.* para. 45.

⁸⁶ *Id.* para. 123.

law.⁸⁷ It became an abuse of dominant position when it exploited consumers or had an exclusionary effect upon rivals.⁸⁸ A firm not in a dominant position would presumably be allowed similar bundling without triggering provisions of European or German competition law.

These EU and German enforcement actions occurred against a backdrop of new EU legislative proposals governing both competition and privacy law: the Digital Services Act and the Digital Markets Act.⁸⁹ Both proposals address dominant internet platforms that function as gatekeepers.⁹⁰ From a European perspective, the dominance of U.S.-based big data firms is troubling, particularly if those firms' exclusionary conduct prevents smaller or start-up European firms from competing. Beyond this, the legislative proposals are designed to protect privacy and fairness to European businesses and consumers.⁹¹ They are intended to update and supplement currently existing regulations, creating uniform standards throughout the European Union.⁹²

The proposed Digital Services Act has a variety of provisions addressing online marketplaces and other online intermediaries.⁹³ Among these provisions are rules for removal of illegal goods, services or content, safeguards for those whose content has been erroneously removed, transparency measures governing online advertising and the algorithms used to recommend content, and new powers to scrutinize how platforms work, including facilitating access by researchers.⁹⁴

Compared to existing competition law provisions, the proposed Digital Markets Act more directly addresses competition-based issues such as the bottleneck monopoly that some gatekeeper platforms possess.⁹⁵ One example is the potential unfair use of data from businesses operating on these platforms.⁹⁶ Another is blocking users from uninstalling any pre-installed software or apps.⁹⁷ The rules in this

⁸⁷ *Id.* para. 64.

⁸⁸ *Id.*

⁸⁹ European Commission Press Release IP/20/2347, Europe Fit for the Digital Age: Commission Proposes New Rules for Digital Platforms (Dec. 15, 2020).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

Act would apply only to major providers most prone to unfair practices.⁹⁸ Antitrust investigations of Amazon on both sides of the Atlantic have focused on this issue. The rules would extend not just to online marketplaces, but also to search engines or social networks.⁹⁹

The European Parliament and the member states will be discussing the Commission's proposals in the run up to possible adoption.¹⁰⁰

V. ANALYSIS AND CONCLUSIONS

Europe seems well ahead of the United States in addressing both privacy and traditional competition issues linked to dominant data technology firms based in the United States. In part, this may be a reflection of European social attitudes toward privacy. There is, however, another possible reason: the "national champion" reluctance to curtail abusive behavior by firms headquartered in the jurisdiction of a government antitrust enforcer. Antitrust enforcers stress that they are guided by the rule of law, not by the nationality of a particular firm that might be engaging in anticompetitive conduct. Despite these denials, there are reasons to suspect that, particularly in close cases involving subjective analysis, enforcers or courts may bend their views to favor a firm headquartered in their home jurisdiction.

Months after the U.S. Justice Department won a signature antitrust decision in the Court of Appeals affirming most parts of a 2001 lower court decision against Microsoft,¹⁰¹ the Department settled the case on terms that many critics found too lenient.¹⁰² In its 2004 decision challenging Microsoft's abuse of dominance, the European Commission imposed different and arguably stronger sanctions on

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* For an overview of the proposed act and some of the issues that it raises, see Heike Schweitzer, *The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair: A Discussion of the Digital Markets Act Proposal*, 2021 ZEITSCHRIFT FÜR WETTBEWERBSRECHT (forthcoming 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3837341.

¹⁰¹ *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

¹⁰² Amy Harmon, *U.S. v. Microsoft: The Overview; Judge Backs Terms of U.S. Settlement in Microsoft Case*, N.Y. TIMES (Nov. 2, 2002), <https://www.nytimes.com/2002/11/02/business/us-vs-microsoft-overview-judge-backs-terms-us-settlement-microsoft-case.html> (describing the largely unsuccessful efforts of states to obtain more substantial relief from Microsoft).

Microsoft.¹⁰³ The U.S. Justice Department issued a press release critical of the Commission's decision.¹⁰⁴

This and other examples of different views between U.S. and EU competition authorities¹⁰⁵ are consistent with the greater reluctance of an antitrust authority to vigorously prosecute one of its own firms. To be sure, some of the differences reflect the greater influence in the United States of Chicago School thinking that favored a monopolist's freedom of action. In some cases, however, the varying views reflect not differences about what constitutes a violation, but rather differences in how quickly an antitrust case is brought, how vigorously it is prosecuted, or how stringent the remedies should be. In the case of big data prosecutions, the conduct that is being challenged is largely the same on both sides of the Atlantic. The EU, however, has been quicker to challenge this conduct and design remedies suitable for EU businesses and consumers.

That antitrust challenges against dominant multinational firms can occur in multiple jurisdictions is a positive development. Dominant firms often enjoy a strong home-country lobbying presence that can ward off needed antitrust enforcement. In the case of big data, the European interventions came earlier and may have emboldened U.S. prosecutors in their subsequent initiatives. In the long term, harmonization of worldwide competition law standards is an important goal. With or without harmonization, however, prosecutions are, and should be, open to any country in which a multinational firm operates.

The home country's actions still are critical. European enforcers, for example, are less able to impose structural remedies on non-European-based firms. EU authorities may be reluctant to require divestiture of component parts of a dominant U.S. firm. In contrast, the FTC's amended complaint against Facebook seeks the divestiture of two firms earlier acquired by Facebook (Facebook and each of the acquired firms are based in the United States).

¹⁰³ Case C-3/37.792, *Microsoft Corp. v. Comm'n*, 2004 E.C.R. 299-301.

¹⁰⁴ See Press Release, U.S. Dep't of Just., Assistant Att'y Gen. for Antitrust, R. Hewitt Pate, Issues Statement on the EC's Decision in Its Microsoft Investigation (Mar. 24, 2004), https://www.justice.gov/archive/atr/public/press_releases/2004/202976.pdf.

¹⁰⁵ LAWRENCE A. SULLIVAN ET AL., *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 887-97 (3d ed. 2016) (describing other cases in which U.S. and EU views differed).

As far as proposed legislation, European initiatives contain much more regulatory detail in confronting big data technology firms. The proposed Klobuchar bill, while containing meaningful antitrust reform, still leaves much detail of what constitutes an antitrust violation to the enforcers and the courts. This difference may reflect in part the potential for U.S. Senate gridlock that may fall heavily on proposals with regulatory detail.

There is a literacy gap for online platform users, with a majority still uninformed about how online services are funded or how targeted advertising works. Addressing this gap is critical to finding privacy regulation and antitrust solutions. Informed consumers will improve the functioning of the market and make regulatory solutions simpler and less burdensome.

In Europe and in the United States, the pending enforcement and legislative initiatives will be consequential, both in terms of mapping out limits for the future conduct of big data firms and in shaping future antitrust law for industries across the board. These developments are international in scope. What happens in one jurisdiction will have an impact on antitrust and regulatory initiatives elsewhere.

THE AUDIENCE PROBLEM IN ONLINE SPEECH CRIMES

Janny H. C. Leung*

Drawing from social scientific research, this article identifies and dissects three distinctive features of the digital audience—audience agency, audience obscurity, and audience dislocation—and illustrates their pertinence in the legal interpretation of online speech crimes. The analysis shows that these digital audience characteristics have the effect of enlarging existing jurisprudential gaps. The judicial challenge is particularly evident when judges have to apply laws that were developed in the mass communications era to digital communication, because such laws often contain assumptions about the audience that are no longer accurate. Case law from different common law jurisdictions in public order offenses, harassment, stalking, and threats are used as illustrative examples, along with recommendations about context-sensitive adjustments in the legal interpretation of each of these language crimes. Overall, I demonstrate the kind of interdisciplinary contextual analysis that would benefit a legal system in adapting to the challenges of a new and rapidly evolving speech environment.

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I. INTRODUCTION

A. Online-Offline Equivalence and Context Sensitivity in Speech Regulation

Since the early days of the internet, people have been concerned that unlawful speech could enjoy free rein in the “virtual” space.¹ With the disinhibition effect that comes with anonymity in online communication, cyberbullying, cyberstalking, and abusive speech have become commonplace. Troll armies have been used to silence journalists and outspoken critics, and flooding tactics have been used to drown readers with fake news and propaganda churned out by

¹ As the digital transformation ensues, the popular conceptual distinction between ‘real’ and ‘virtual’ has gradually lost meaning, and people do not see their offline and online activities as constituting separate parts of their lives. Instead, they draw both face-to-face and computer-mediated communication as resources to engage in various socio-cultural and professional practices. See Brook Bolander & Miriam A. Locher, *Beyond the Online Offline Distinction: Entry Points to Digital Discourse*, in 35 DISCOURSE, CONTEXT & MEDIA (2020), <https://doi.org/10.1016/j.dcm.2020.100383>. That said, there is evidence of online-specific behavioral patterns (such as disinhibition effect enabled by anonymity), and the online reader does not always have access to the offline lives of online speakers. John Suller, *The Online Disinhibition Effect*, 7 CYBERPSYCHOLOGY & BEHAVIOR 321, 322 (2004).

robots.² Since speech has been weaponized to suppress speech, critics complain that current laws are ill-equipped to tackle these new threats to speech, urging governments or intermediaries for more regulation of online speech.³

At the other end of the spectrum is the threat of legal sanctions for semi-private, casual, ‘cheap’ speech that may be distasteful and morally suspect but is either not illegal or *de minimus* when uttered offline.⁴ This threat is enabled by the permanence of digital communication and the permeation of what would traditionally be considered private speech into the public domain.⁵ With the digital turn, we are now held accountable for a much wider range of speech for a much more sustained length of time.⁶ College applicants have been rejected and employees have been fired for racist, sexist, politically incorrect or otherwise sensitive remarks, regardless of how long ago such remarks have been published.⁷ Informal, commonplace remarks in everyday communication that would not be taken seriously offline, accompanied by impoverished contextual information, may

² Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 548 (2018), reprinted in THE FREE SPEECH CENTURY 272, 272 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019).

³ See *id.* at 548–49.

⁴ Jacob Rowbottom, *To Rant, Vent, and Converse: Protecting Low Level Digital Speech*, 71 CAMBRIDGE L.J. 355, 374 (2012).

⁵ Daniel J. Solove, *Speech, Privacy, and Reputation on the Internet*, in THE OFFENSIVE INTERNET 15, 16 (Saul Levmore & Martha C. Nussbaum eds., 2010).

⁶ See *id.* at 23, 28.

⁷ See Solove, *supra* note 5, at 19; Frank Pasquale, *Reputation Regulation*, in THE OFFENSIVE INTERNET 107, 108 (Saul Levmore & Martha C. Nussbaum eds., 2010); see also Dan Levin, *Colleges Rescinding Admissions Offers as Racist Social Media Posts Emerge*, N.Y. TIMES (July 2, 2020), <https://www.nytimes.com/2020/07/02/us/racism-social-media-college-admissions.html>. In 2019, after a journalist “exposed” Carson King, a twenty-four-year-old man who raised more than \$1 million for a children’s hospital, for posting racist tweets when he was a teenager, the journalist’s own racist and sexist posts were subsequently uncovered. The newspaper let go of the journalist and apologized to the public for not having more thoroughly scrutinized their employees’ past inappropriate social media postings. Katie Shepherd, *Iowa Reporter Who Found a Viral Star’s Racist Tweets Slammed When Critics Find His Own Offensive Posts*, WASH. POST (Sept. 25, 2019, 9:19 PM), <https://www.washingtonpost.com/nation/2019/09/25/carson-king-viral-busch-light-star-old-iowa-reporter-tweets/>.

now face trial by media or the public, sometimes even coming under legal scrutiny when made on social media.⁸

These phenomena call for apparently conflicting legal solutions. Those who are concerned with harassment and bullying would generally like to see more criminalization of speech; those who are concerned about creeping criminalization would like to see less.⁹ Common to both ends of the spectrum is the sentiment that existing laws are no longer fit for purpose: they arguably underperform in regulating abusive speech and overreach in censoring casual speech.¹⁰ On the one hand, given inertia to change, some existing laws risk losing relevance in the digital age.¹¹ On the other hand, knee-jerk legal reactions tend to criminalize behavior which might be better treated as a social rather than a legal problem,¹² leading to excessive surveillance and immense waste of public resources on prosecuting netizens' silly jokes and banter.¹³

For many countries, the golden rule for drawing the line in the criminalization of speech is online-offline equivalence: what is illegal

⁸ For a discussion on their proposal inspired by Helen Nissenbaum's "contextual integrity," see Pasquale, *supra* note 7, at 112.

⁹ See generally Lyrissa Lidsky & Andrea Pinzon Garcia, *How Not to Criminalize Cyberbullying*, 77 MO. L. REV. 693 (2012) (presenting a discussion in the context of cyberbullying).

¹⁰ *Id.* at 698–97.

¹¹ For example, online speech that appears to incite violence escapes the imminence requirement in U.S. incitement law and has sometimes been prosecuted as a 'true threat' instead, with mixed success, even when the speaker has clearly intended for third parties to carry out the unlawful acts. See Lyrissa Barnett Lidsky, *Incendiary Speech and Social Media*, 44 TEX. TECH L. REV. 147, 152, 164 (2011) (arguing that the imminence requirement should be replaced by a focus on causality); see also *Planned Parenthood v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1088 (9th Cir. 2002) (finding a true threat where "wanted"-type posters identifying specific physicians who provided abortion services, after three prior incidents where similar posters incited the murders of three such doctors, impliedly threatened physicians when posted); *United States v. Fullmer*, 584 F.3d 132, 138–47, 157 (3rd Cir. 2009) (finding the website and work of animal activists a true threat where they threatened to burn down someone's home, following the physical assault of a previously targeted individual, and also that the activists would reasonably foresee that their target would interpret the threat as a "serious expression of intent").

¹² See Lidsky & Pinzon Garcia, *supra* note 9, at 697–99.

¹³ *Twitter Bomb Joke Case "a Scandal,"* BBC NEWS (July 27, 2012), <https://www.bbc.com/news/av/uk-19010842/twitter-airport-bomb-joke-case-a-scandal>.

offline should also be so online.¹⁴ Since this simple rule is silent on contextual differences between online and offline communication, its literal meaning tolerates divergent approaches to its actualization. For one thing, equivalence may be rule-based or outcome-based. Rule-based equivalence entails applying and extending existing laws to online situations, leaving room for divergent outcomes necessitated by contextual differences but ensuring that the laws are technology-neutral.¹⁵ Outcome-based equivalence requires context-sensitive adjustments, which entail resolving conflicts between assumptions in existing laws and the new context of application, and sometimes even reconceptualizing existing laws in light of changing circumstances.¹⁶ It is obvious that those who are concerned about over- or under-criminalization of online speech are not satisfied with rule-based equivalence, which maintains the status quo.¹⁷ They expect the speech freedoms that one enjoys offline to also be protected online, and offensive or threatening language that is illegal offline to also be illegal online. As online and offline contexts differ, rule-based equivalence tends to produce equality without equity. Achieving outcome-based equivalence begins with a thorough understanding of the online communication environment and its ramifications on existing applications of law, which will enable the law to be effectively re-tailored¹⁸. In other words, online-offline equivalence cannot be achieved by bluntly extending or restricting the reach of criminal law; coverage problems caused by contextual shifts ultimately need to be fixed by sharpening the law's context sensitivity.

¹⁴ See generally BERT-JAAP KOOPS, *Should ICT Regulation be Technology-Neutral?*, in STARTING POINTS FOR ICT REGULATION 77 (Bert-Jaap Koops et al. eds., 2006). For an extension of Koops' work, see Chris Reed, *Taking Sides on Technology Neutrality*, 4 SCRIPT-ED 263 (2007).

¹⁵ See, e.g., Bert-Jaap Koops et al., *A Typology of Privacy*, 38 U. PA. J. INT'L L. 483, 519 (2017) (discussing a similar application of extension and contextualization approaches as related to privacy).

¹⁶ See, e.g., *id.*

¹⁷ See KOOPS, *supra* note 14.

¹⁸ Admittedly, achieving outcome-based equivalence does not only require effective tailoring of the law but also overcoming practical challenges, such as jurisdictional barriers and limited resources in legal enforcement amidst the sheer quantity of communication that takes place online. In fact, these practical challenges may be seen as contextual factors that feed back into the tailoring process.

B. An Interdisciplinary Approach to Understanding Audience as Context

This article is devoted to one salient contextual shift in the digital age: the audience. The inquiry includes the apparently simple question of who one is communicating to, how different parties participate in an interaction, and the conditions under which an interaction occurs. The traditional conception of the addressee cannot be easily applied in the online context. It has been observed that “a key consequence of new media technologies is the transformation of the audience itself.”¹⁹ Although, understandably, the analysis of most speech crimes focuses on characteristics of the speaker, who is the bearer of legal responsibility, it is also obvious that characteristics of the speech recipient can inform the interpretation of the act and the intention of the speaker. This also holds true for conduct offenses that are complete upon sending and do not require receipt of a message; actual audience response or identification of the target audience contribute to the determination of the nature of the communication and the intentionality of the speaker. In our everyday communication, speakers rely on the speech recipients to draw inferences that bridge between what is said and what is communicated. Since inferences rely on contextual enrichment, the meaning of an utterance can only be determined by examining the speech environment, including audience characteristics. If one thinks about speech as action, there are conditions (called felicity conditions in Speech Act Theory)²⁰ under which the action will be deemed successful. These conditions are often contingent on characteristics of the audience, including their relationship with the speaker. For example, a statement such as “Your shoes are dirty” can be read as a mere observation, a friendly suggestion, or a command, depending on the relationship between the speaker and the recipient.²¹ As this article will show, with the proliferation of one-to-many broadcasts on digital media, not only is it

¹⁹ Sonia Livingstone, *New Media, New Audiences?*, 1 *NEW MEDIA & SOC'Y* 59, 64 (1999).

²⁰ Mitchell Green, *Speech Acts*, *STANFORD ENCYC. OF PHIL.*, <https://plato.stanford.edu/entries/speech-acts/> (Sept. 24, 2020).

²¹ For further examples, see LAWRENCE M. SOLAN & PETER M. TIERSMA, *SPEAKING OF CRIME: THE LANGUAGE OF CRIMINAL JUSTICE* 39 (2005).

not always clear who the speech recipient is, the digital audience also has distinguishable characteristics from their offline counterpart. This raises questions about whether the harm that speech laws set out to prevent is still applicable in the digital context.

Contrasting with a techno-centric approach, which attends to how the architecture of platforms, the role of algorithms, and social media logic interact with the law, this article focuses on communicative actions and interactional dynamics, and draws attention to how people navigate the digital communication environment. My discussion of online communication practices benefits from related social scientific literature including linguistic pragmatics, sociolinguistics, and media studies, though I avoid jargon as far as I could. Since the audience problem in digital communication crosses jurisdictional boundaries, I will discuss case law from a few common law jurisdictions (including Hong Kong, the United Kingdom, and the United States), though the juxtapositions are more of an attempt to show how different jurisdictions are grappling with the same transnational challenges in speech regulation than to engage in detailed comparisons of legal doctrines.

Drawing from social scientific research, Part II of this article spells out three distinctive features of the digital audience, including audience agency, audience obscurity, and audience dislocation. Audience agency describes how active the audience is in accessing content. For example, whether the audience exercises their individual freedom to proactively visit a website or a platform with an understanding of what to expect, or whether they are exposed to invasive content that they did not seek out, informs the nature of the communicative act. Audience obscurity refers to the difficulty in identifying the audience and distinguishing between the actual audience, the target audience, and the potential audience. Differentiating these audience types is nevertheless very useful in the assessment of criminal intentionality and impact of speech. It is therefore not sufficient to simply declare that context has collapsed on social media platforms; to better understand a communicative act, we must use contextual clues to analyze how the speaker has navigated context collapse. Finally, audience dislocation is concerned with the increased physical, temporal, and cultural distance between the speaker and the audience, which diminishes the control a speaker has

over the interpretation of their message. The problem is particularly acute where social groups have developed ways of talking that could be opaque to outsiders, increasing the chance that law enforcers will misconstrue the speaker meaning of an online speech.

Part III uses case law to trace the role of the audience in different language crimes, dissecting judicial struggles in applying relevant laws to online speech due to these evolving features of the digital audience. The first type of crimes discussed is public order offenses. Case law from Hong Kong and the United States shows that audience dislocation and audience agency have raised doubts about the applicability of public order offenses to online speech, because these laws tend to envision the physical presence of an immediate audience and an involuntary audience. By contrast, the United Kingdom has applied a wide range of statutory law in prosecuting offensive online speech, and such statutes tend not to have regard for audience characteristics. It is argued that taking audience characteristics into account help prevent excessive criminalization of consensual activities between adults and could be useful in delineating boundaries for free speech. The second types of crimes analyzed are harassment and stalking. One challenge in analyzing online harassment and stalking is the increasing number of cases involving communication that is not directed to the victim. Instead, such communication is shared with an obscure audience, or the content is accessed only when the victim exercises agency to look for it. The judicial struggle lies in determining what constitutes direct or indirect communication in the digital context. The analysis warns against a broad definition of communication that ignores whether the speaker intends for his/her message to reach the audience, so that speakers have sufficient freedom to talk *about* others in public debates. The third and final type of language crimes discussed is threat. Similar to harassment and stalking, a major challenge with online threat is when threatening statements are made online to an obscure audience without being directed to the victim. In some jurisdictions, threats communicated privately are taken more seriously than publicly made threats, which are more deemed more likely to be political hyperbole. This assumption is in tension with the observation that widely disseminated threats can create more fear. In fact, courts are split between these two conflicting assumptions. It is argued that the confusion is created by excessive reliance on public accessibility as a parameter for measuring the impact of a threat or assessing speaker

intentionality. Instead, what is needed is a more nuanced contextual analysis that attempts to differentiate between audience types and to gauge how a speaker has managed context collapse. Moreover, audience dislocation also heightens the need for adopting a subjective standard, assessed from the vantage point of the speaker, in determining criminal intentionality.

The analysis shows that digital audience characteristics have the effect of enlarging existing jurisprudential gaps, as courts apply inconsistent weight to them. The judicial challenge is particularly evident when judges have to apply laws that were developed in the mass communications era to digital communications, because such laws often contain assumptions about the audience that are no longer accurate. I conclude by summarizing audience-related context-sensitive adjustments that are necessary in the legal interpretation of online language crimes in order to achieve outcome-based equivalence. Overall, I seek to illustrate the kind of interdisciplinary contextual analysis that would benefit a legal system in adapting to the challenges of a new and rapidly evolving speech environment.

II. THE EVOLVING AUDIENCE IN THE DIGITAL AGE

The stereotypical face-to-face interaction is two persons talking to each other with alternating participant roles: speaker and hearer. Erving Goffman²² challenges this dyadic model of communication and observes that there are different ways of participating in a speech event rather than being the speaker or addressee (understood here as the second person). This is an idea that Allan Bell later elaborated upon in his audience design model. For example, ratified auditors, or unrated bystanders such as overhearers or eavesdroppers, may also be third-person recipients of a message.²³ The audience design model shows that speech audiences do not just passively receive a message after it is made; they contribute to shaping the message as it is being made.²⁴

²² ERVING GOFFMAN, *FORMS OF TALK* (1981).

²³ Allan Bell, *Language Style as Audience Design*, 13 *LANG. SOCIETY* 145, 172 (1984).

²⁴ See Jannis Androutsopoulos, *Moments of Sharing: Entextualization and Linguistic Repertoires in Social Networking*, 73 *J. PRAGMATICS (SPECIAL ISSUE)* 1, 7–8 (2014), <http://dx.doi.org/10.1016/j.pragma.2014.07.013>.

In face-to-face communication, speakers primarily accommodate their communicative style to their addressee, and to their auditors to a lesser extent. Mass communication, however, inverts the hierarchy of audience roles and prioritizes the auditors (such as television audience) over addressees (such as interviewees in a television show).²⁵ Since different forms of communication enable a different range of participation roles, Goffman's participation framework and Bell's audience design model have been extended to digital communication²⁶ and remain relevant today.

The design of digital communication platforms has not only diversified speaking and reception roles in online speech events but has also complicated the relationship between a speaker and the audience. Building from sociolinguistic and media research, I will identify three interrelated and salient features of the digital audience, which, as will be argued in Part III of this article, are pertinent in the legal determination of language crimes.

A. Audience Agency

Although the audience of mass media and the surface web²⁷ have both been equated with "the public," and they may even consist of the same people, there are important differences in how both audiences behave in these modes of communication. Even though the mass audience can choose what to watch and can interact with media producers to some extent (for example, through phone-in shows or submitting feedback), mass communication is typically a one-way process, and the audience have been described as largely passive and captive.²⁸

²⁵ See Michael Marcoccia, *On-Line Polylogues: Conversation Structure and Participation Framework in Internet Newsgroups*, 36 J. PRAGMATICS 115, 142 (2004), <https://doi.org/10.1016/j.pragma.2014.04.001>.

²⁶ See, e.g., *id.* at 140; Marta Dynel, *Participation Framework Underlying YouTube Interaction*, 73 J. PRAGMATICS 37, 40 (2014), <https://doi.org/10.1016/j.pragma.2014.04.001>.

²⁷ Referring to content on the world wide web that is available to the general public and indexed by standard search engines, the surface web is contrasted with the deep web which contains unindexed information that requires authorization for access.

²⁸ But see José van Dijck, *Users Like You? Theorizing Agency in User-Generated Content*, 31 MEDIA, CULTURE & SOC'Y 41, 42–43 (2009) (arguing that a passive mass media audience and an active digital audience is a false dichotomy). This article agrees that the level of user agency needs to be contextually determined.

Compared with audiences on mass media or those physically attending a public lecture or rally, digital media users take a much more active role in navigating and selecting information they receive through clicking on electronic links, following and unfollowing individuals and groups, and providing reactions to speech by voting up or down content that they like or dislike.²⁹ They read in a non-linear way as their attention becomes diverted, exercising agency in constructing their online experience. They do not only read, but may also comment on posts, participate in discussions, and select and share content, switching between the roles of auditors, addressees, and speakers; they can create their own threads and pages—thus becoming producers rather than recipients of content.³⁰ They agree or disagree with others, confront biases, query vagueness or ambiguity, and provide counter viewpoints, interactively negotiating the meaning of other speakers' communicative acts.³¹ They search for content or communities that appeal to their interest and connect with people they otherwise would not come across. Unlike the mass communication era, speaking to a wide audience is no longer a privilege that few could afford.

Importantly, there is a difference in agency³² between a netizen who encounters a statement on a website that he/she visits and a passer-by who accidentally overhears the same statement on the pavement when heading to the grocery store. Digital media users are not truly overhearers when they have chosen to expose themselves to speech on a particular website that they willingly visit with a reasonable expectation of the content that it carries; even if they are ratified, they could be self-selected auditors whose presence and identity are unknown to the speaker.³³

²⁹ *See id.* at 43–44.

³⁰ It has been pointed out that digital media users can be content producers, but most choose not to and remain passive recipients of content. *See id.* at 44.

³¹ *See* Androutsopoulos, *supra* note 24, at 6.

³² For a much wider conception of user agency than what is of interest here, see Dijck, *supra* note 28, at 42, 46, 49, 55.

³³ *See generally* Bell, *supra* note 23, at 200 n.23.

In mass communication, all receivers are ratified, but none is known. Audience roles therefore have to be distinguished in terms of the communicators' expectations: the target audience who is addressed, the

Of course, not all online communication involves the same degree of audience agency. Netizens may also be unwilling addressees when websites they visit show advertisements or other pop-up messages that they did not expect and would rather not see. For example, when spam emails arrive in their account, or when algorithms on social media suggest offensive posts written by people or bots whom they do not follow. In other words, digital media can be just as invasive as mass media, considering how much of our daily activities are now conducted online. How invasive a communicative act is and how much agency digital media users exercise are specific to each interaction, and such contextual determination can add nuance to the simple observation that a piece of information is publicly accessible, which applies to a vast amount of digital content.

Recognizing audience agency does not automatically deplete speakers of all responsibilities or suggest that the victims have only themselves to blame if they encounter offensive content. It must be acknowledged that technology has now become so integrated with our everyday life that it is almost impossible to opt out of it. This means that even though an internet user could avoid harm by avoiding a particular website, it would not be reasonable to expect him/her to stay away from major platforms or the internet altogether in order to avoid harm. However, as will be shown later in this article, there is value in assessing audience agency in language crimes analyses, as conflicts between audience agency and existing assumptions in the legal regulation of speech invite rethinking about the nature of the harm that these laws are trying to prevent.

B. *Audience Obscurity*

We are used to thinking about one-to-one communication as personal and private and one-to-many communication as public and impersonal. The design of social media platforms has challenged this distinction by converging social contexts that are relatively easy to distinguish in the offline context onto common platforms. Activities

auditors who are catered to, the overhearers who are not expected to be present in the audience, and the eavesdroppers who are expected to be absent from the audience.

Id.

that traditionally fall into different domains of life, both in the public and private realm, now exist side by side. By the default settings of social media platforms, everything is open, and everyone is a ratified audience. Building upon Goffman's analysis of the structures of social situations,³⁴ media studies scholars use the term 'context collapse' to describe how social media collapse distinct audiences belonging to different offline social spheres into a single context.³⁵ Wendy H. K. Chun, author of a trilogy of books on new media, argues that new media are so powerful precisely because "they mess with the distinction between publicity and privacy, gossip and political speech, surveillance and entertainment, intimacy and work, hype and reality."³⁶

Context collapse changes our communicative landscape not only by muddling existing social categories, but by obscuring the differences among target audience, actual audience, and potential audience. In face-to-face communication, contextual cues such as eye-gaze and physical positioning help us determine who the addressee is. When users make a post on social media, it is not always clear who the addressee is. The average Facebook user has 155 "friends,"³⁷ but it is unlikely that a speaker has his/her whole network in mind as the target audience when posting a status message. We do not have much information about the actual audience either. Even though some websites have visitor counts, and social media platforms encourage reader reactions (such as likes and upvotes), they do not generally publish information about who has read a post (i.e., the actual audience). Publicly available signals (such as follower count, likes, and comments) may not be a good indicator of audience size on social

³⁴ Petter Bae Brandtzaeg & Marika Lüders, *Time Collapse in Social Media: Extending the Context Collapse*, 4 SOC. MEDIA & SOC'Y (SPECIAL ISSUE) 1, 2 (2018), <https://doi.org/10.1177/2056305118763349>.

³⁵ *Id.* at 4; Alice E. Marwick & danah boyd, *I Tweet Honestly, I Tweet Passionately: Twitter Users, Context Collapse, and the Imagined Audience*, 13 NEW MEDIA & SOC'Y 114, 115 (2011), <https://doi.org/10.1177/1461444810365313>.

³⁶ WENDY HUI KYONG CHUN, *UPDATING TO REMAIN THE SAME: HABITUAL NEW MEDIA*, at ix (2016).

³⁷ See Sarah Knapton, *Facebook Users Have 155 Friends—but Would Trust Just Four in a Crisis*, TELEGRAPH (Jan. 20, 2016, 12:00 AM), <https://www.telegraph.co.uk/news/science/science-news/12108412/Facebook-users-have-155-friends-but-would-trust-just-four-in-a-crisis.html> (showing data from 2016).

media platforms such as Twitter.³⁸ One also cannot be certain about who may see a post (i.e., the potential audience). In addition to followers and friends, people may also forward, repost, or screen capture a message and share it with others; in a networked society, the potential reach seems limitless. A speech event broadcast to a small audience may also be returned as a result of a search query and be seen by more people than the speaker can anticipate.

Given that a small portion of the ratified audience may be favored, and others remain unknown to the speaker, there is often murkiness as to whether a speaker is communicating to a private or a public audience. Philosophers have suggested that somewhere between public and private lies a zone of obscurity.³⁹ Since people feel anonymous in a big crowd, they expect some degree of obscurity even in a public space.⁴⁰ Due to audience obscurity, speakers may also have difficulty anticipating their audience reach, which in turn affects their judgment about what is appropriate to say online. Internet users do not often feel that they are broadcasting to the whole world when they speak online.

³⁸ Cf. Michael S. Bernstein et al., *Quantifying the Invisible Audience in Social Networks*, in CHI 2013: CONFERENCE PROCEEDINGS 21, 24 (Susanne Bødker et al. eds., 2013), <https://doi.org/10.1145/2470654.2470658>.

Qualitative coding of survey responses reveals folk theories that attempt to reverse-engineer audience size using feedback and friend count, though none of these approaches are particularly accurate. We analyze audience logs for 222,000 Facebook users' posts over the course of one month and find that publicly visible signals — friend count, likes, and comments — vary widely and do not strongly indicate the audience of a single post.

Id. at 21.

³⁹ Evan Selinger & Woodrow Hartzog, *Obscurity and Privacy*, in SPACES FOR THE FUTURE: A COMPANION TO PHILOSOPHY OF TECHNOLOGY 119, 122–23 (Joseph C. Pitt & Ashley Shew eds., 2017), <https://doi.org/10.4324/9780203735657-12>.

⁴⁰ *See id.* In the offline world, people conduct themselves in the public based on their perception of the environment they are in: the immediate presence of others, the physical distance between themselves and others, the extent to which they are seen or heard. People may modify their conduct if they suspect that they are being observed. Imagine sitting on a bench with a friend in a public park. You engage in a private conversation, perceiving that there is enough distance from passersby. If other people start lingering around you, you might lower your voice, lean towards your friend, or even switch to a different mutual dialect. By doing so you are attempting to decrease the odds that other people could perceive or comprehend your words. You feel safe having a private conversation in a public space because you feel that you are protected by a zone of obscurity.

For the most part, they are right – in the attention economy, it is much harder to be heard than to speak.⁴¹ This conflicts with the common assumption that anything shared online is entirely public.

Recent works have refined our understanding of context collapse by showing, for example, that users actively manage their privacy, and that context collapse is the result of usage pattern rather than structurally determined by platform architectures.⁴² Jenny L. Davis and Nathan Jurgenson demonstrate that conditions of context collapse can be differentiated depending on the speaker's intentionality: context collusions, where contexts are collapsed on purpose, and context collisions, where contexts collapse by default or accident.⁴³ Much of what happens on social media is context collusion.⁴⁴ Collusions are enabled by platform design and driven by user practice.⁴⁵

Even under context collapse, online writers draw on their linguistic repertoires, semiotic resources, and epistemic assumptions to pick out part of a networked but heterogenous audience.⁴⁶ Evidence suggests that social media users target a much narrower set of imaginary audience than their potential audience by manipulating their self-presentation⁴⁷ and audience design.⁴⁸ For example, statistical analysis has demonstrated that non-standard lexical variables increase in frequency when the size of the audience decreases, indicating authors'

⁴¹ Simon A. Herbert, *Designing Organizations for an Information-Rich World*, in *COMPUTER COMMUNICATION & PUBLIC INTEREST* 37, 40–41 (Martin Greenberger ed., 1971).

⁴² Elisabetta Costa, *Affordances-in-Practice: An Ethnographic Critique of Social Media Logic and Context Collapse*, 20 *NEW MEDIA & SOC'Y* 3641, 3645 (2018), <https://doi.org/10.1177/1461444818756290>.

⁴³ Jenny L. Davis & Nathan Jurgenson, *Context Collapse: Theorizing Context Collusions and Collisions*, 17 *INFO. COMM'N & SOC'Y* 481 (2014).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See Jannis Androustopoulos, *Languaging When Contexts Collapse: Audience Design in Social Networking*, 4–5 *DISCOURSE, CONTEXT & MEDIA* 62, 71 (Jannis Androustopoulos & Kasper Juffermans eds., 2014), <https://doi.org/10.1016/j.dcm.2014.08.006>. This is most evident when speakers draw from their multilingual repertoires and choose to use a particular language to select speakers of that language among the ratified audience as their addressees. *Id.*

⁴⁷ See Marwick & boyd, *supra* note 35, at 115.

⁴⁸ See Bell, *supra* note 23, at 159.

linguistic accommodation to their audience.⁴⁹ In addition, offline context, such as speaker and recipient relations, may also provide clues to audience identification.⁵⁰

C. Audience Dislocation

Interestingly, users' perception of their audience might not be based in reality, reflecting online speakers' diminished control over the dissemination of their speech. A study that combines survey data with large-scale log shows that social media users consistently underestimate the size of the audience viewing their post.⁵¹ This leads us to a structural issue that underlies the challenge in audience identification and the determination of a speaker's meaning: the dislocation between the speaker and the audience.

Such dislocation affects the speaker as much as it affects the audience. For the speaker, lack of eye contact with the audience, besides lack of other reaction or feedback from the audience, is a chief contributing factor to online disinhibition,⁵² leading people to say things online that they would never say offline. For the reader, the temporal, spatial, and cultural dislocation may lead them to interpret a message in ways the speaker could not predict. As Lyrissa Lidsky and Linda Norbutt put it, "[s]peech that is innocuous in one country may be considered blasphemous and provoke violent responses in another; speech that is humorous in one community may be a grave insult in another; and speech that is harmless when posted may provoke violence when viewed."⁵³

Due to audience dislocation, one of the most salient features of social media genres is therefore the loss of control over one's

⁴⁹ Umashanthi Pavalanathan & Jacob Eisenstein, *Audience-Modulated Variation in Online Social Media*, 90 AM. SPEECH 187, 187 (May 1, 2015), <https://doi.org/10.1215/00031283-3130324>.

⁵⁰ See Bolander & Locher, *supra* note 1.

⁵¹ See Bernstein et al., *supra* note 38, at 23.

⁵² Noam Lapidot-Lefler & Azy Barak, *Effects of Anonymity, Invisibility, and Lack of Eye-Contact on Toxic Online Disinhibition*, 28 COMPUTS. HUM. BEHAV. 434, 435–36, 441 (2012), <https://doi.org/10.1016/j.chb.2011.10.014>.

⁵³ Lyrissa B. Lidsky & Linda R. Norbutt, *#I U: Considering the Context of Online Threats*, 106 CAL. L. REV. 1885, 1904 (2018).

messages.⁵⁴ Although one never has full control over reader reception, the potential disjuncture between illocution and perlocution in mediated communication is much greater than that in face-to-face communication.⁵⁵ Text-based online communication leaves the average reader with fewer contextual clues to understand speech compared to the same speech encountered on the street. When reading a textual status update on social media, for example, there is no facial expression or tone of voice;⁵⁶ no sense of physical surroundings, nor other behavior that reflects on the state of mind of the speaker.

The fragmentation of common experiences that the growth of digital media seems to have enabled⁵⁷ potentially limits the amount of shared culture and knowledge people have when they draw inferences from language. Communities of practice⁵⁸ have emerged in forums and subforums; auditors and overhearers may not have the insider knowledge necessary to decipher the intended meaning of a message communicated to an in-group addressee.

⁵⁴ Jan Chovanec & Marta Dynel, *Researching Interactional Forms and Participant Structures in Public and Social Media*, in 256 PARTICIPATION IN PUBLIC AND SOCIAL MEDIA INTERACTIONS 1, 10 (Marta Dynel & Jan Chovanec eds., 2015).

⁵⁵ See JOHN L. AUSTIN, HOW TO DO THINGS WITH WORDS (J. O. Urmson & Marina Sbisa eds., Harvard Univ. Press 2nd ed. 1975) (1962) (Speech Act theory distinguishes between illocutionary act—the intended meaning of the speaker—and perlocutionary act—the effect of the speech act on the hearer).

⁵⁶ *But see* Monica A. Riordan, *The Communicative Role of Non-Face Emojis: Affect and Disambiguation*, 76 COMPUTS. HUM. BEHAV. 75, 76 (2017), <https://doi.org/10.1016/j.chb.2017.07.009> (arguing that emojis can, to some extent, disambiguate a message by communicating affect).

⁵⁷ The empirical evidence for this media fragmentation is divided. Compare CASS R. SUNSTEIN, REPUBLIC.COM 2.0 (2007), and ELI PARISER, THE FILTER BUBBLE (2011), with Richard Fletcher & Rasmus Kleis Nielsen, *Are News Audiences Increasingly Fragmented? A Cross-National Analysis of Cross-Platform News Audience Fragmentation and Duplication*, 67 J. COMMUNICATION 476, 476 (2017) (finding “no support for the idea that online audiences are more fragmented than offline audiences, countering fears associated with audience segmentation and filter bubbles”), and James G. Webster & Thomas B. Ksiazek, *The Dynamics of Audience Fragmentation: Public Attention in an Age of Digital Media*, 62 J. COMMUN 39, 39 (2012) (“We find extremely high levels of audience duplication across 236 media outlets, suggesting overlapping patterns of public attention rather than isolated groups of audience loyalists.”).

⁵⁸ See JEAN LAVE & ETIENNE WENGER, SITUATED LEARNING: LEGITIMATE PERIPHERAL PARTICIPATION 29–39 (1991).

As mentioned above, with low cost of reproduction, a ratified audience can easily ratify a further audience without the original speaker's knowledge or consent. What is meant to be conveyed as a private message may be shared widely and reproduced beyond the original context of production—this further amplifies audience dislocation. The continued availability of content after its creation also suggests that the original speaker may not have the opportunity to repair and clarify their speech.⁵⁹ Despite diminished speaker control, courts often find that speakers need to take responsibility for their recklessness in putting offensive content in public ambit. At least one court in the England and Wales⁶⁰ has held that neither the passage of time nor the intervening act of an intermediary to forward a message to the victim breaks the chain of causation in result crimes.

III. THE ELUSIVE AUDIENCE IN ONLINE LANGUAGE CRIMES

In this section, I will move on to discuss how the audience characteristics identified have challenged the legal interpretation of three types of language crimes: public order offenses, harassment and stalking, and threat.

A. *Public Order Offenses*

Public order offenses sanction threatening, harassing, or insulting behavior in a public place in order to maintain public safety, order, and morality. They may be committed by words alone, as in racially inflammatory speech or obscene publications. Originally conceived to apply to physical public places, these laws aim to protect members of the public from incidental exposure to offensive or harmful behavior.

Some public order offenses have been extended to mass media. The regulation of mass media has been justified in part based on their captive audience, and the same justification may not work for digital media.⁶¹ As its first attempt to regulate pornography on the internet, U.S. Congress enacted the Communications Decency Act of 1996 to criminalize the transmission of obscene, indecent, or offensive

⁵⁹ Davis & Jurgenson, *supra* note 43, at 477–78.

⁶⁰ *S v. DPP* [2008] EWHC (Admin) 438 [13] (appeal taken from Eng.).

⁶¹ See *FCC v. Pacifica Found.*, 438 U.S. 726, 759–60 (1978) (Powell, J., concurring).

materials to minors on the internet.⁶² Two of the provisions were struck down by the U.S. Supreme Court in *Reno v. ACLU*⁶³ for being overbroad in violation of the First Amendment. The Court relied partly on the observation that special factors that justify government regulation of broadcast media do not apply to the internet because the digital audience is not like the mass media audience and the digital media is not restricted by scarce frequencies.⁶⁴ The Court noted that the use of the internet involves an element of choice, and despite the wide availability of obscene or indecent internet content, “users seldom encounter such content accidentally.”⁶⁵ In other words, internet users are rarely involuntarily exposed to such content if they do not search for it. The Court further held that unlike communications received by radio or television,⁶⁶ “the receipt of information on the internet requires a series of affirmative steps more deliberate and directed than merely turning a dial.”⁶⁷

Similarly, audience characteristics have affected the interpretation of the old common law offense of outraging public decency. A typical example of the offense involves a person exposing his body or engaging in a sexual act in a public space. An offending act does not have to be committed on public property as long as it is committed in a place that can be viewed by the public.⁶⁸

Hong Kong v. Chan Sek Ming was the first case in Hong Kong that contained an online act that allegedly outraged public decency.⁶⁹ The

⁶² 47 U.S.C.S. § 230.

⁶³ *Reno v. ACLU*, 521 U.S. 844, 879 (1997) (holding that the content-based blanket restriction in the Communications Decency Act of 1996 was overly broad and violated the First Amendment).

⁶⁴ *Id.* at 845, 865.

⁶⁵ *Id.* at 855.

⁶⁶ *Id.* at 845. Due to scarcity of available frequencies at its inception and its “invasive” nature, traditional broadcasting such as radio and television does not have full First Amendment protection in the United States.

⁶⁷ *Id.*

⁶⁸ When it comes to the *mens rea*, the defendant does not need to have the intent to outrage or be reckless about outraging others; only the intention of doing the act is required, regardless of what the defendant believes the likely effect might be.

⁶⁹ *Hong Kong v. Chan Sek Ming*, [2006] 4 H.K.C 264 (D.C.) (H.K.), <https://www.hklii.hk/en/cases/hkdc/2006/329>.

defendant, operating under the pseudonym of “MasterMind,” posted on an online message board called GOSSIP messages that solicited “any brothers” to join him in a “flash mob” rape and provided his email contact for interested parties.⁷⁰ Upon his arrest, the defendant claimed that he posted the messages as a joke.⁷¹ Although the judge recognized that the defendant might have only wanted to provoke a response and derive satisfaction from it, an specific intention to commit the offense was not required for his action to outrage public decency.⁷² Since other members of the public could view the content of his messages on the internet, the court held that the defendant’s act of posting the messages should be regarded as an act committed in public and that it did outrage public decency.

However, that verdict was partly reversed in *Hong Kong v. Chan Yau Hei*,⁷³ where the Court of Final Appeal in Hong Kong refused to apply the common law offense of outraging public decency to online speech because it viewed the internet as a public medium but not a physical place. The court failed to find evidence that the message posted could be seen in a physical place to which the public had access.⁷⁴ The publicity requirement for outraging public decency considers an act to be public if more than one person is present and

⁷⁰ Some users of the message board expressed their disgust at his posts, whilst a few expressed interest or admiration at his idea. One person emailed the defendant to see if he really wanted to pursue the plan, but the defendant did not reply to him. After the defendant’s posts were deleted on the message board for the first time, he posted the same message again. *See id.*

⁷¹ One witness that the defendant called testified that she had regularly chatted with the defendant in the message board about their fetishism in women’s pantyhose, and she observed that the message boards contained both serious discussions as well as plenty of jokes and bluffs. The judge in the District Court noted that the internet is a “strange world” where users sometimes post “worthless creations in the Internet forums with a view to arouse various fanciful discussions.” *See id.*

⁷² *Id.*

⁷³ *Hong Kong v. Chan Yau Hei*, [2014] 17 H.K.C.F.A.R. 110 (C.F.A.) (H.K.), <https://www.hklii.hk/en/cases/hkcfa/2014/18>. The case deals with a message that calls for the bombing of the Liaison Office of the Central People’s Government, posted to an internet discussion forum relating to proposals for political reform in Hong Kong. *Id.*

⁷⁴ *Id.*; *cf.* Hamilton [2007] EWCA (Crim) 2062, [2008] QB 224 (Eng.) (holding that the offense must be committed in public, that is, done in a place to which the public has access or in a place where what is done is capable of public view).

could have seen the act.⁷⁵ In other words, the offending act should be complete when it is carried out, not when someone views it later. Since the law envisions the physical presence of a potential audience when the act is being committed, it is unclear how the viewing of the act online can satisfy the requirement, given the temporal and physical dislocation of the audience.⁷⁶

But it is not only the physical dislocation of the audience that changes the interpretive context of public order offenses in the digital era. The rise of audience agency challenges the applicability of public order offenses to digital communication altogether. According to Joseph Fok, the presiding judge of *Chan Yau Hei*, the rationale for the common law offense of outraging public decency is to prevent harm or punish conduct where the behavior is “in your face.”⁷⁷ Unlike a message that is heard or displayed on a public street, which a pedestrian cannot avoid overhearing and therefore risks being outraged by it, the vast majority of speech made online is not “in the face” of internet users. Accessing the internet as a public medium requires effort and the exercise of agency on the part of the users.⁷⁸ The distinction that the public should be an *involuntary* rather than active audience is therefore key to understanding the publicity element in such an offense.

Upon review, the Hong Kong and U.S. cases point to an important difference between public speech heard on the street and online speech that is potentially accessible by the public, inviting a systematic review of the role of audience characteristics in public order offenses. The fact that it takes deliberate effort and agency to access most information online means that such information resides in a more obscure zone than what is traditionally understood as public speech, which we overhear

⁷⁵ See PETER ROOK & ROBERT WARD, *ROOK AND WARD ON SEXUAL OFFENCES: LAW AND PRACTICE* 617 (4d ed. 2004).

⁷⁶ LAW COMMISSION, *ABUSIVE AND OFFENSIVE ONLINE COMMUNICATIONS: A SCOPING REPORT*, 2018, HC 1682 No. 381, at 132–37 (UK).

⁷⁷ See generally Joseph Fok, *Outraging Public Decency: In Your Face and Up Your Skirt—the Dynamism and Limits of the Common Law*, 2016 HKU Faculty of Law Common Law Lecture Series, Oct. 27, 2016.

⁷⁸ See *Chan Yau Hei*, 17 H.K.C.F.A.R at 110 (“A message posted to an Internet discussion forum could only be seen by other people when accessed or downloaded in a comprehensible form and it was only then that their sense of decency might be outraged.”).

on the street or is broadcast through invasive mass media. According to Fok, accessing a website is perhaps more akin to opening a magazine⁷⁹: the audience is active in pursuing information. There is a difference between information that is available to readers who actively look for it, and information that one is exposed to when conducting other (online or offline) activities in a public space. If the rationale of outraging public decency is to prevent the public's incidental exposure to offensive behavior, then information that is only viewable by the public, who has taken affirmative steps to access it, should not fall within the same category.⁸⁰ Moreover, audience dislocation raises questions about whether an audience can be said to be present at the time of an online act. Being attentive to the changing context of communication, the Hong Kong and U.S. courts find that at least some existing public order laws have limited relevance to digital communication.

In the United Kingdom, there is no known case of outraging public decency prosecuted based on online behavior; instead, offensive online speech is primarily prosecuted using statutory law.⁸¹ Consider the following two cases⁸² prosecuted not under public order offenses but under the Obscene Publications Act of 1959, which has no publicity requirement.⁸³ The role of the audience was considered in *Stephane*

⁷⁹ See Fok, *supra* note 77, at 21; LAW COMMISSION, SIMPLIFICATION OF CRIMINAL LAW: PUBLIC NUISANCE AND OUTRAGING PUBLIC DECENCY, 2015, HC 213 No. 358, at 61 (UK).

⁸⁰ There may be exceptions where such information is made available on popular platforms that are difficult to avoid.

⁸¹ For example, *Sheppard & Whittle* [2010] EWCA (Crim) 824, [34] (Eng.), which does not deal with outraging public decency but the online publication of racially inflammatory materials (s. 19 Public Order Act 1986). The appellate court in this case considered the publication element of the offense to be satisfied when the material was made generally accessible to the public. The offense does not require proof that anyone actually read the material.

⁸² Another relevant case that will not be discussed in detail is *R v Walker* [2009] UKHL 22 (HL) (appeal taken from Eng.), which involves the online publication of an erotic story detailing the kidnap, sexual torture and murder of the pop group Girls Aloud. *Man Cleared Over Girls Aloud Blog*, BBC NEWS (June 29, 2009, 3:09 PM), http://news.bbc.co.uk/2/hi/uk_news/england/tyne/8124059.stm. The Crown Prosecution Service dropped the case after an information technology expert introduced evidence that the article could only be found by those who were specifically searching for such material. *Id.* This suggests that audience agency was key to the outcome of the case. *Id.*

⁸³ Section 2(1) of the 1959 Act provides:

Laurent Perrin,⁸⁴ where Perrin appealed against his conviction for publishing an obscene article on the preview page of his website.⁸⁵ As a ground of appeal, his lawyer argued that since there was no evidence as to who, other than the police officer, had visited the website, it would be wrong to test obscenity (defined as having a tendency to deprave and corrupt persons who come across it) by reference to others who might have access to it.⁸⁶ He emphasized audience agency by submitting that “in reality the preview page would not be visited by accident. To reach it a viewer would have to type in the name of the site, or conduct a search for material of the kind displayed.”⁸⁷ The Court of Appeal rejected this argument, reasoning that the preview page of the website is viewable by not just the officer but anyone, including young people, who may choose to access it and their mind may be susceptible to corruption.⁸⁸ In other words, the Court of Appeal was not concerned with audience obscurity so long as the potential audience may be vulnerable; it also considered audience agency irrelevant because the mind of the willing audience can be corrupted.⁸⁹

Subject as hereinafter provided, any person who, whether for gain or not, publishes an obscene article or who has an obscene article for publication for gain (whether gain to himself or gain to another) shall be liable . . . (b) on conviction on indictment to a fine or to imprisonment for a term not exceeding five years or both.

Obscene Publications Act 1959, 7 & 8 Eliz. 2 c. 66, (UK.). Further, Section 1(3) of the 1959 act provides that a person publishes an article who—

(a) distributes, circulates, sells, lets on hire, gives, or lends it, or who offers it for sale or for letting on hire; or (b) in the case of an article containing or embodying matter to be looked at or a record, shows, plays or projects it, or, where the matter is data stored electronically, transmits that data.

Id. There is no requirement of the minimum number of persons who has come across the article. *Id.*

⁸⁴ Perrin [2002] EWCA (Crim) 747 [1] (Eng.).

⁸⁵ *Id.*

⁸⁶ *Id.* at [17].

⁸⁷ *Id.*

⁸⁸ *Id.* at [22]–[24].

⁸⁹ *Id.* at [22].

Although the appeal failed, it is notable the likely audience and their agency were clearly a crucial factor for the jury in the trial court; the defendant was only convicted for publishing the obscene content on the preview page of his website, which was viewable by anyone, but was acquitted for charges based on the content that was only available after users pay to subscribe to the site.⁹⁰ Another notable case is *R v Smith (Gavin)*,⁹¹ where the defendant described his sexually explicit fantasies about children with another adult in a private internet relay chat.⁹² The identity of the other participant of the chat was not known.⁹³ The trial court held that there was no case to answer, likening the case to that of two people sharing these fantasies in a private conversation in a physical room, not overheard by others.⁹⁴ The content may be revolting but it is not a crime.⁹⁵ The appellate court disagreed and ordered a fresh trial,⁹⁶ arguing that transmission of data to one person is still publication.⁹⁷ This case demonstrates that the same conversation two persons have which would not be considered illegal if they held it on the street can now be illegal if the conversation is held online, even if the exchange takes place through one to one messaging.⁹⁸ It is difficult to justify the differential treatment based on the harm principle; it appears that the two scenarios differ mostly because electronic communication leaves a record that allows for later scrutiny if discovered. Even though the Obscene Publications Act has been amended to include electronically transmitted data, it would still be baffling to a lay person that their private messaging on electronic platforms could be considered a publication. In fact, prosecutions under the Obscene Publications Act have decreased over the years;⁹⁹

⁹⁰ *Id.* at [17].

⁹¹ *Smith* [2012] EWCA (Crim) 398 [2], (Eng.).

⁹² The chat logs were only discovered after the defendant's computer was seized by the police. *Id.*

⁹³ *Id.* at [3].

⁹⁴ *Id.* at [4].

⁹⁵ *Id.*

⁹⁶ In the fresh trial, Smith accepted a plea bargain and admitted all nine offenses.

See Danny Boyle, *Pervert Gavin Smith Guilty in Landmark Internet Case*, KENT ONLINE (July 11, 2012, 12:01 AM),

<https://www.kentonline.co.uk/kent/news/pervert-gavin-smith-guilty-in-la-a62724/>.

⁹⁷ *Smith*, [2012] EWCA at [21]–[22].

⁹⁸ *Id.* at [20].

⁹⁹ See *Criminal Justice and Immigration Bill Regulatory Impact Assessments*, JUSTICE ON GOV.UK, at 101–02,

as far as online speech is concerned, the most frequently invoked statute these days is Section 127 of the Communications Act, which targets obscene, indecent or threatening messages sent over a public electronic communications network.¹⁰⁰ However, this law does not consider who the audience is, leading to statutory formulations that are overly broad in application. Since there is no consent element in the offense, a naked photograph sent between two consensual adults could be criminal.¹⁰¹ Since there is no requirement that such messages need to have been sent to another person, a person can commit the offense if they only intend to store communications for themselves using online storage facilities.¹⁰²

Comparatively, the U.K. cases provide examples of a speech-restrictive approach that is protective of vulnerable populations but could threaten individual freedoms. Although regard for audience agency has rendered public order offenses inapplicable in some (but not all) online communication contexts, it can prevent excessive criminalization of speech between consenting adults. It can therefore serve to delineate a meaningful boundary for free speech protection.

B. *Online Harassment and Stalking*

The stereotypical stalking or criminal harassment scenario involves private, one-to-one communication (such as letters and telephone calls) that is unwanted by the victim. There is an implicit assumption that the communication is directed to the victim. Under context collapse, audience identification has become a challenge,

<https://webarchive.nationalarchives.gov.uk/20100512161158/http://www.justice.gov.uk/publications/docs/regulatory%2Dimpact%2Dassessments.pdf> (last visited Apr. 23, 2021); *see also* CONSULTATION: ON THE POSSESSION OF EXTREME PORNOGRAPHIC MATERIAL 7 (Home Off. Comm'n Directorate 2005).

¹⁰⁰ Communications Act 2003, c.21, § 127, (UK). This law has arguably created discrepancies between the legal regulation of online versus offline speech. In 2017, Chelsea Russell posted rap lyrics that contained a racial term on Instagram and was convicted for sending a grossly offensive message under Section 127. *Woman Guilty of 'Racist' Snap Dogg Rap Lyric Instagram Post*, BBC NEWS (Apr. 19, 2018), <https://www.bbc.com/news/uk-england-merseyside-43816921>. The song, "I'm Trippin" by Snap Dogg, had been performed on stage in front of thousands of people, but as offline communication it is not criminalized. *Id.*

¹⁰¹ LAW COMMISSION, *supra* note 76, at 129.

¹⁰² *Id.* at 79–80.

leading to the question of how such law could or should be applied to a common type of communication on social media: one-to-many messages that do not have an obvious target audience.

In *People v. Munn*,¹⁰³ the defendant was charged with aggravated harassment in the second degree for posting a message on a newsgroup, which asked the readers to kill a named police officer and his colleagues.¹⁰⁴ The message was accessible by the public but was not sent directly to the named officer.¹⁰⁵ The court noted that for a communication to contravene Penal Law Section 240.30(1), it must have been “directed at the complainant.”¹⁰⁶ The court held that by naming the officer, the message was “transformed” from one that was intended for the general public to one that was directed to the complainant.¹⁰⁷ Despite legitimate government interests in protecting individuals from the fear of violence, the court’s interpretation of direct communication seems to depart from its ordinary meaning: the defendant named the officer not as an addressee but as a target of action (in a message that reads “Please kill [XXX] . . .”).¹⁰⁸ In a later case, *People v. Barber*,¹⁰⁹ where the defendant had posted the complainant’s nude photographs on Twitter, and also sent them to her employer and sister without her consent, the court dismissed the charge based on the same Penal Law¹¹⁰ because the defendant had neither “communicated directly with the complainant” nor “induced others to do so.”¹¹¹ Citing

¹⁰³ 688 N.Y.S.2d 384 (1999).

¹⁰⁴ *Id.* at 385.

¹⁰⁵ *Id.*

¹⁰⁶ *See id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ No. 2013NY059761, 2014 WL 641316 (N.Y. Crim. Ct. Feb. 18, 2014). This is a “revenge porn” case where the defendant posted nude photographs of the complainant on his Twitter account and sent them to her sister and her employer without her consent. *Id.* at *1. The complainant saw his tweet and was also shown the photographs by the third parties who received them. *Id.* at *6. In its reading of the text of the law, the court notes, “[c]learly, it is essential to a charge of Penal Law § 240.30(1)(a) that the defendant undertake some communication with the complainant.” *Id.* at *5.

¹¹⁰ N.Y. PENAL LAW § 240.30(1)(a).

¹¹¹ *Barber*, 2014 WL 641316, at *5. The possibility of using an intermediary in bridging a communication is interesting. For example, in *People v. Kochanowski*, 719 N.Y.S.2d 461 (2000), the defendant caused a website to be created that displayed suggestive photographs of the complainant, his ex-girlfriend, along with

People v. Smith,¹¹² the court agreed that Penal Law Section 240.30(1) “was intended to include communications which are obscene, threats which are unequivocal and specific, [and] communications which are directed to an unwilling recipient under circumstances wherein ‘substantial privacy interests are being invaded in an essentially intolerable manner.’”¹¹³ There was no evidence that the victim was a target recipient.¹¹⁴ Courts are thus caught in a dilemma when applying this law to online messages shared with an obscure audience in the public domain: either they find that a message could not harass a specific individual because it was not sent to him or her, or they have to distort the ordinary meaning of communication in order to suppress the target conduct.

Apart from audience obscurity, another characteristic of one-to-many online communication is audience agency, which logically negatives any presumption of unwilling reception. Consider the cyberstalking case of *Chan v. Ellis*,¹¹⁵ where defendant Matthew Chan published nearly 2000 antagonistic posts against Linda Ellis about her copyright enforcement practices on his own website, at least one of which was written as an open letter and addressing Ellis in the second person.¹¹⁶ Ellis sued Chan for injunctive relief under the Georgia stalking law, which provides that “[a] person commits the offense of stalking when he or she . . . contacts another person at or about a place or places without the consent of the other person for the purpose of harassing and intimidating the other person.”¹¹⁷ The Supreme Court of Georgia reversed Chan’s conviction, holding that he did not “contact” Ellis, even though Chan anticipated that Ellis might see his posts and he might even have intended that she see them.¹¹⁸ All he did was to make his posts available to the general public via his website.¹¹⁹ Ellis could not be an unwilling listener of Chan’s speech because she had to

her address and telephone number and suggested that third parties contact her for sex, which they in fact did. *Kochanowski*, 719 N.Y.S.2d at 462.

¹¹² 392 N.Y.S.2d 968 (1977).

¹¹³ *Barber*, 2014 WL 641316 at *5–6 (citations omitted).

¹¹⁴ *Id.* at *6.

¹¹⁵ 770 S.E.2d 851 (Ga. 2015).

¹¹⁶ *Id.* at 852.

¹¹⁷ GA. CODE ANN. § 16-5-90(a)(1) (2015).

¹¹⁸ *Chan*, 770 S.E.2d at 854–55.

¹¹⁹ *Id.* at 855.

take active steps to access the content on his website.¹²⁰ In rebuttal, counsel representing the appellee argued that it is not so much the content of the posts that constitutes stalking, but the communication becomes stalking when it is put on the internet, which enlarges its potential to reach a wide audience.¹²¹ The court rejected this argument and held that it is essential for the communication to be directed specifically to a person rather than generally to the public for it to satisfy the definition of “contact,” differentiating communication “*about*” a person from what is directed “*to*” a person.¹²² Voluntary access to publicly available content does not constitute “contact”.

The Georgia court’s position differs from their counterpart in Massachusetts, even though the equivalent Massachusetts law also requires the pattern of behavior to be “directed at a specific person.”¹²³ In an alleged stalking case¹²⁴ that took place on social media, the defendant posted a smiling photograph of himself holding a large gun on his lap on his own Facebook page.¹²⁵ On the same page, he wrote, under a box titled “Favorite Quotations,” “[m]ake no mistake of my will to succeed in bringing you two idiots to justice.”¹²⁶ These postings

¹²⁰ *Id.*

¹²¹ Several judges on the bench were clearly uncomfortable with this potentially expansive interpretation of stalking and queried this interpretation with various hypotheticals concerning public speech, including whether someone who climbs a mountain with a megaphone and yells out the exact same thing would be considered stalking, *Chan v. Ellis: Is it “Stalking” to Reach Hundreds of People on the Internet?*, YOUTUBE (Oct. 11, 2014), <https://youtu.be/FV1YTcj2i5I>, or whether a Wikipedia page created to scare, harass and intimidate someone should be considered stalking, *Chan v. Ellis: What if a Wikipedia Page was Created to Scare, Harass, and Intimidate Someone?*, YOUTUBE (Oct. 11, 2014), <https://youtu.be/umsCmidNsZE>.

¹²² Justice Keith Blackwell writes, “[t]he publication of commentary directed only to the public generally does not amount to ‘contact’” *Chan*, 770 S.E.2d at 854.

¹²³ A person is guilty of stalking if he or she: (1) willfully and maliciously engages in a knowing pattern of conduct or series of acts over a period of time directed at a specific person which seriously alarms or annoys that person and would cause a reasonable person to suffer substantial emotional distress, and (2) makes a threat with the intent to place the person in imminent fear of death or bodily injury.

MASS. GEN. LAWS ch. 265, § 43(a) (2014).

¹²⁴ *Commonwealth v. Walters*, 37 N.E.3d 980 (Mass. 2015).

¹²⁵ *Id.* at 989–90.

¹²⁶ *Id.* at 990.

were made three years after he separated from his former partner, who had remarried.¹²⁷ The defendant and his former wife were not Facebook “friends,” and his public post came up only when the former wife’s husband looked up the defendant’s profile page.¹²⁸ His former wife was terrified after seeing the posts and pursued criminal charges that include stalking and harassment.¹²⁹ The Supreme Judicial Court of Massachusetts vacated the conviction of stalking, holding that the content posted was too ambiguous and temporally remote to satisfy the threat component of the charge.¹³⁰ However, unlike the Supreme Court in Georgia, who argues that a communication needs to be “directed specifically” to the victim,¹³¹ Massachusetts held that the perpetrator does not have to directly communicate the threat to the victim to be convicted of stalking, as long as the government can prove beyond a reasonable doubt that “the defendant intended the threat to reach the victim.”¹³²

Both the requirements of “contact” (in Georgia) and conduct “directed at a specific person” (in Massachusetts) are based on a privacy interest, stopping offenders from intruding into others’ private space without their consent. The language of consent is more explicit in Georgia’s law than in Massachusetts’ law. For the Georgia court, the voluntariness of the audience in receiving a message indicates implied consent; it is insufficient that the speaker intends to communicate to the recipient. For the Massachusetts court, it does not matter whether the audience exercised agency in accessing the message as long as the speaker expects the threat to reach the target.¹³³

¹²⁷ *Id.* at 987 n.7, 994.

¹²⁸ *Id.* at 989 n.19.

¹²⁹ *Id.* at 990.

¹³⁰ *Id.* at 991, 1002. A stalking charge requires both a pattern of harassment and proof that the defendant made a threat with the intent to place the victim in imminent fear of death or bodily injury. *See* MASS. GEN. LAWS ch. 265, § 43(a) (2014).

¹³¹ *Chan v. Ellis*, 770 S.E.2d 851, 854 (Ga. 2015).

¹³² *Walters*, 37 N.E.3d at 993. Although communication of a threat to the intended victim is not expressly required under § 43(a)(2), the court held that evidence of the defendant’s intent to communicate the threat either directly or indirectly is necessary. *Id.*

¹³³ Although intent to communicate was not a decisive factor in the present case, the court elaborates about how one may go about assessing such intent in the digital age. *Id.* at 995 n.33. It envisions that “given the relative ease with which material

According to one survey, harassment or stalking laws in at least twelve U.S. states have an explicit requirement that the communication concerned is directed to the victim.¹³⁴ Since not all harassment and stalking law has a direct contact requirement, one may wonder whether removing such a requirement would be an easy way to adapt existing laws to the online environment and ensure consistency. However, even states that do not have a direct communication requirement understand harassment and stalking to be an act of communication.¹³⁵ Therefore, courts still need to decide whether a digital behavior constitutes communication for the purpose of the law, such as whether a message published in a public forum could constitute indirect communication.

Scholars Nancy Leong and Joanne Morando attempt to provide an answer by identifying five means of online communication based on how the target of communication becomes aware of the act of communication, including direct communication (one-to-one messaging), tagging (drawing someone's attention to a public post), mutual forum (no alert is sent to the target but speaker and target are both routine users of the same forum or connected in the same social network), likely discovery (no direct communication but discovery is likely, for example through common acquaintances, or if the speaker knows that the target has set up a Google alert on his/her own name), and discovery in fact (online speech that the target has discovered but the speaker would not have expected him/her to).¹³⁶ They argue that any of the first four categories should qualify as communication for the purposes of cyberstalking and cyberharassment laws.¹³⁷ Accordingly, they understand "communication" on the internet as "any online behavior . . . by an individual who recklessly disregarded a reasonable likelihood that the target would discover it."¹³⁸

on the Internet can be broadcast to a wide audience," factors such as "whether the threat was conveyed in a public or private Internet space, whether the victim or others in his or her social circle was likely to see the threat, and whether the victim and the defendant had communicated online before—will likely be important in future cases involving alleged Internet-based threats." *Id.* Although the court has not considered audience agency, it has included the relationship between the speaker and the audience as an important factor. *Id.* at 994.

¹³⁴ Nancy Leong & Joanne Morando, *Communication in Cyberspace*, 94 N.C. L. REV. 137 (2015).

¹³⁵ *Id.* at 138.

¹³⁶ *Id.* at 117–19.

¹³⁷ *Id.*

¹³⁸ *Id.* at 109.

The approach seems reasonable to the extent that mutual forum and mutual acquaintances could potentially serve as a vehicle through which indirect communication takes place. However, recklessness seems too low a bar for criminal intentionality, especially in an online environment where speaker control over the circulation of a message is limited. Whether or not the communication is made directly, it is wrong to assert moral culpability without establishing that the speaker has intended for the threatening statement to reach the target. An established pattern of previous communication can be used as evidence that the speaker intends to reach the target using a common platform or through a mutual friend even without alerting the target to the message or requesting that the message be conveyed to the target. A deeper problem with an approach based on the likelihood of a message reaching the target recipient is that the more audience agency the target exercises, the less room the speaker has to talk *about* the target without offending the law. If the target has exercised agency in setting up an alert for searching and identifying mentions of her name, the speaker then bears the excessive burden to have to avoid making comments that might alarm, annoy, or frighten her on any platform that may be indexed by a search engine. Also, one cannot write *about* someone without being deemed to have communicated with her as long as they are interconnected, when people whom we want to write and share with others about may precisely be those whose social circles overlap with ours. Moreover, research suggests that online speakers tend to underestimate their audience reach, while hindsight bias might lead judges and jurors to overestimate “reasonable likelihood” with the benefit of retrospection.¹³⁹

Eugene Volokh has warned against extending criminal harassment and stalking law to cover not only speech made *to* a particular person, but also speech made *about* a person on an open platform to an unspecified audience.¹⁴⁰ He argues that this recent trend could interfere with debate and the spread of information by cutting off willing recipients, and is detrimental to free speech goals.¹⁴¹ As Volokh acknowledges, speech made about a person to a public audience may

¹³⁹ See Bernstein et al., *supra* note 38, at 23.

¹⁴⁰ Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and “Cyberstalking,”* 107 NW. L. REV. 731, 731 (2013).

¹⁴¹ *Id.* at 742–43.

be personally disparaging, distressing, and defaming, and can therefore be very harmful.¹⁴² The potential for harm is magnified by the ease of reproduction and permanence of records on the internet. However, there is more public interest to protect such speech than private, one-to-one communication.¹⁴³ To include speech made *about* others as communication to them would unnecessarily restrain public debate.¹⁴⁴

A broad definition of communication is exacerbated by vague definitions of harassment and stalking in statutes, which are usually conceptualized in terms of the effect of speech on the recipient (e.g., causing distress, alarm, or fear). Of course, not all behavior that causes distress, alarm, or fear is illegal, but it may not be clear to laypeople what course of action is. Adding to the confusion is that behavior traditionally associated with stalking, such as “following” someone, which may create fear of physical harm when performed offline, is but common and acceptable behavior on social media. While soliciting the public to kill someone¹⁴⁵ or publishing nude photographs without consent¹⁴⁶ is clearly problematic, more narrowly tailored laws need to be used to tackle such harms.

C. Threat

In a typical offline threat, the target of threat and the addressee are one and the same: the person who makes the threat normally communicates the threat directly to the victim in order to intimidate

¹⁴² *Id.* at 751.

¹⁴³ *See* *United States v. Cassidy*, 814 F.Supp.2d 574 (D. Md. 2011) (applying this logic). *Cassidy* involved the alleged harassment of a Buddhist leader using blogs and Twitter. *Id.* at 576. The District Court declared a federal stalking statute unconstitutional as applied, where the content-based restriction is to shield the sensibilities of listeners. *Id.* at 585. Alluding to the idea of audience agency, the court argued that the victim could protect her sensibilities simply by averting her eyes from the defendant’s blogs and tweets, and the government interest in criminalizing speech is not compelling enough to interrupt the free flow of ideas in a public forum. *Id.* Unlike phone calls or emails, blogs and Twitter are like a public bulletin board that one is free to disregard. *Id.* at 585–86. In particular, criticisms against public figures lie at the core of First Amendment protection, so the public profile of the victim also adds weight to the judgment. *Id.* at 586.

¹⁴⁴ *See id.* at 582.

¹⁴⁵ *People v. Munn*, 688 N.Y.S.2d 384 (1999).

¹⁴⁶ *People v. Barber*, No. 2013NY059761, 2014 WL 641316 (N.Y. Crim. Ct. Feb. 18, 2014).

him or her. In online communication, however, seemingly threatening statements have been made against individuals but not communicated directly to them. This section will illustrate how the phenomena of audience obscurity and audience dislocation have affected the determination of whether a statement is a true threat or not.

In U.S. jurisprudence, a statement that has not reached the target can still constitute a threat.¹⁴⁷ However, since the legal determination of whether a threat has been made requires the analysis of both content and context, the audience of a speech event remains relevant. Similar to Volokh's argument discussed above, current theories of free speech advocate for stronger protection of public speech than private speech, because of the potential expressive value and contribution to public forum that public speech has.¹⁴⁸ Kent Greenawalt has argued that "[t]here is more reason to punish private encouragements [to commit crimes] than public ones and more reason to punish encouragements cast in terms of gain or satisfaction for the listener than those cast in terms of ideological considerations."¹⁴⁹ Communication in public reaches a larger audience and thus also offers more opportunities for the expression of counterarguments and for precautionary measures by law enforcers.¹⁵⁰ In contrast, private speech, more likely to be directed to a "small and selected" audience, is likely to exert a more direct influence from the speaker to the addressee(s).¹⁵¹ Some U.S. courts, such as the Court of Appeals for the Fourth Circuit, have "repeatedly and consistently considered the direct and private communication of an allegedly threatening statement to a specific individual as a

¹⁴⁷ See, e.g., *United States v. Lockhart*, 382 F.3d 447 (4th Cir. 2004) (noting that a threatening letter against the U.S. president delivered to a grocery store manager is a threat); *United States v. Castillo*, 564 F. App'x 500 (11th Cir. 2014) (noting that threatening messages against the U.S. president posted on social media constitute a threat).

¹⁴⁸ See Volokh, *supra* note 140, at 743–44, 751, 774, 776, 790 (analyzing U.S. Supreme Court jurisprudence in stalking and criminal harassment cases that lends support to the observation that exception to First Amendment protection applies primarily to one-to-one speech and may also extend to situations where the speech is intrusive to the listener's private space).

¹⁴⁹ KENT GREENAWALT, *SPEECH, CRIME AND THE USES OF LANGUAGE* 116 (Oxford U. Press 1989).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 117.

significant contextual factor in determining whether such statement constitutes a ‘true threat.’”¹⁵²

Consider the case of William White, who made several blog postings on white supremacist websites that criticized a case he was not a party to, along with identifying contact information of the attorneys involved in the case.¹⁵³ White suggested a number of harassing or violent actions that his readers should *not* take against one of the attorneys,¹⁵⁴ and there was some suggestion that his prior, unrelated postings had inspired action by his followers.¹⁵⁵ In affirming the Magistrate Court’s decision to deny sanctions, the District Court in *In re White* reiterated the lower court’s observation that White’s threatening language contained only, at best, indirect threat of harm, and that “the wide availability of White’s writings on the Internet made them less likely to constitute a true threat than communication delivered directly to the target.”¹⁵⁶ Based on an analysis of both the language and the context of speech, his postings were held to be not true threats, but political hyperbole, which is protected speech under the First Amendment.¹⁵⁷ Although White appeared to have members of his organization and other white supremacists as his addressees,¹⁵⁸ the District Court conceded that it “cannot meaningfully distinguish White’s readers from the public” and so did not have direct evidence that the communication was directed to a specifically dangerous group of individuals.¹⁵⁹ The Court went as far as generalizing that “the

¹⁵² United States v. Henry (*In re White*), No. 07CV342, 2013 U.S. Dist. LEXIS 133148, at *194 (E.D. Va. Sept. 13, 2013).

¹⁵³ *Id.* at *1.

¹⁵⁴ *Id.* at *76–77. It is debatable whether the speaker intends to convey the literal meaning of his statement; he may use an overtly untruthful statement to express the exact opposite meaning through irony. See MARTA DYNEL, IRONY, DECEPTION AND HUMOUR: SEEKING THE TRUTH ABOUT OVERT AND COVERT UNTRUTHFULNESS 20–25 (Istvan Kecskes ed., De Gruyter Mouton 2018).

¹⁵⁵ *In re White*, 2013 U.S. Dist. LEXIS 133148, at *136.

¹⁵⁶ *Id.* at *137.

¹⁵⁷ *Id.* at *164.

¹⁵⁸ White’s writing was posted to the Yahoo groups page of the American National Socialist Workers’ Party (or ANSWP, of which White is the “Commander”), *id.* at *210, and Vanguard News Network Forum (an internet forum dedicated to anti-Semitic and white supremacist views), *id.* at *48 n.30, on overthrow.com (a website set up by White, associated with the ANSWP), *id.* at *63, and in email communications sent to attorneys involved in the case to ‘clarify’ his position, *id.* at *77, *192.

¹⁵⁹ *Id.* at *209.

Internet, as a forum for speech, is more akin to the political rally in *Watts*¹⁶⁰ than to the targeted mailings, emailings, and telephone calls at issue in *Cooper, Lockhart, Bly, and White*.¹⁶¹

Now compare that with *United States v. Turner*,¹⁶² where the Court of Appeals for the Second Circuit affirmed Turner's conviction for threatening to assault or murder three federal judges.¹⁶³ Turner, a popular speaker in white supremacist groups, published a blog post declaring that the judges deserve to die and supplemented the post with their photographs, work addresses, room numbers, a map of the courthouse where they worked and a photograph modified to point out "anti-truck bomb barriers."¹⁶⁴ The post had no explicit addressee. Adopting a similar logic to the judges in *White*, the dissenting judge in *Turner* argued that an ambiguous statement cannot be a true threat if it is publicly made in a blog post, although the same speech "might be subject to a different interpretation if, for example, the statements were sent to the Judges in a letter or email."¹⁶⁵ He also emphasized that a purported threat must be directed to the victim, whereas an incitement is directed towards third parties.¹⁶⁶ However, the majority disagreed and held that Turner made a true threat, arguing that public dissemination is an effective way to instill fear.¹⁶⁷ In fact, they held

¹⁶⁰ *Watts v. United States*, 394 U.S. 705 (1969) (finding threats against the President made by an eighteen-year-old Robert Watts said during a public rally in Washington D.C. to not be a true threat). Protesting against Vietnam war and police brutality, Watts said, "I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is [President Lyndon Baines Johnson]." *Id.* at 706. Considering the "context, and regarding the expressly conditional nature of the statement and the reaction of the listeners," the court ruled that Watts' statement was not a true threat, noting that "[t]he language of the political arena . . . is often vituperative, abusive, and inexact." *Id.* at 708. The court's contextual analysis covered both the immediate speech context (a group of young adults engaging in political discussion, and the audience laughing at Watts' remarks) and the broader political context (anti-war sentiments in the 1960s).

¹⁶¹ *In re White*, 2013 U.S. Dist. LEXIS 133148, at *193.

¹⁶² 720 F.3d 411 (2d Cir. 2013).

¹⁶³ *Id.* at 414.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 434 (Pooler, C.J., dissenting).

¹⁶⁶ *Id.* at 432 (Pooler, C.J., dissenting).

¹⁶⁷ *Id.* at 423.

that a wide audience provided support for the finding that Turner intended for his threats to reach and intimidate the judges.¹⁶⁸

One can see from the two contrasting cases how audience obscurity on the internet has polarized the courts and led to an interpretive divergence in contextual analysis. Does open communication on the internet to an indefinite audience make a statement more likely to constitute political hyperbole, or to be more effective in intimidating the victim? Both are reasonable speculations, but this precise duality suggests that public accessibility, on its own, is a poor parameter for measuring potential of threat.

Compare these cases with the England and Wales case of *Chambers v. Director of Public Prosecutions*,¹⁶⁹ widely known as the Twitter Joke Trial. Chambers had booked a trip to visit his girlfriend in Northern Ireland, but the airport he was going to fly out from had service interruptions due to adverse weather conditions.¹⁷⁰ Chambers posted on Twitter that he would resort to terrorism if the airport were to remain closed.¹⁷¹ Although the airport duty manager decided that the tweet did not pose a credible threat, he alerted the police.¹⁷² Chambers was convicted “for sending by a public electronic communication network a message of a ‘menacing character,’” per the Communications Act of 2003 Section 127(1)(a) and (3), and the conviction was only overturned after two appeals.¹⁷³ For the purpose of determining whether the message was sent by a public electronics communications network, the court deemed it irrelevant whether the message was intended for a limited number of people.¹⁷⁴

Although the court in *Chambers* did not engage in a detailed *mens rea* analysis as the conviction was quashed based on the *actus reus* of the crime, it emphasized that it is the state of mind of the offender¹⁷⁵

¹⁶⁸ *Id.* at 427.

¹⁶⁹ *Chambers v. DPP*, [2012] EWHC (Admin) 2157 (Eng.).

¹⁷⁰ *Id.* at [12].

¹⁷¹ *Id.*

¹⁷² *Id.* at [13].

¹⁷³ *Id.* at [38].

¹⁷⁴ *Id.* at [24].

¹⁷⁵ *Id.* at [38].

By contrast with the offences to be found in s.127(1)(b) of the Act and s.1 of the Malicious Communications Act 1988 which require the defendant to act with a specific purpose in mind, and therefore with a specific intent, no express provision is made in s.127(1)(a) for mens

that the mental element of the offense is directed exclusively to, which clarifies that if the offender intended a message to be a joke, then it is unlikely that the *mens rea* requirement will be met. In order to take a subjective viewpoint, no doubt it is insufficient to consider only the auditors (who are potential audience) and ignore the addressee (who is the target audience). Even though the posts concerned were open to the public, Chambers began them with his girlfriend's Twitter handle and was engaging in a dialogue with her. It would be reasonable to conjecture that Chambers was using hyperbole to express his eagerness to see her. In fact, the couple had met on Twitter, so it was perfectly logical that they continued to converse through this platform, despite its public-facing character. Here the collapse between the target and the potential audience is likely to be the result of context collision rather than collusion, which is to say that the collapse is unintentional, even though as a Twitter user the speaker would be well aware that the platform is open to the public. Distinguishing between the target and the potential audience helps clarify the speaker's communication goals.

Contrast that with the *White* and *Turner* cases, where the speakers are likely to have regular users of their websites as their target audience. Addressees may be users who are known by or in the imagination of the speakers, and ratified auditors are members of the public, who are not restricted from visiting the websites. While it is true that the websites are publicly accessible, they may in reality only be accessed by those who know where to look and remain largely obscure to the public. Moreover, regardless of whether the speech concerned is meant to be political hyperbole or threat, wide

rea. It is therefore an offence of basic intent. That intent was examined by the House of Lords in *DPP v Collins*. While it is true that the examination was directed to grossly offensive messages, it would be quite unrealistic for the *mens rea* required for the different classes of behaviour prohibited by the same statutory provision to be different in principle, the one from the other, or on the basis of some artificial distinction between the method of communication employed on the particular occasion. In consequence we are unable to accept that it must be proved that, before it can be stigmatised as criminal, the sender of the message must intend to threaten the person to whom it was or was likely to be communicated

Id. at [36].

dissemination promotes the speaker's goals. These cases appear to involve context collusion rather than collision. This nuanced distinction could potentially provide more insight into the speakers' intentionality than context collapse or a mere consideration of public accessibility.

The evaluation of context in these interpretive exercises depends on two legal questions: from whose vantage point the speech act is evaluated (i.e., speaker or recipient), and what standard is adopted for criminal intentionality (i.e., subjective or objective). Currently, there is a circuit split on these two questions in threat cases in the United States.¹⁷⁶ Most circuit courts adopt an objective standard,¹⁷⁷ but the U.S. Supreme Court has expressed disapproval of an early case that adopted this standard¹⁷⁸ and there are some circuits which have argued that subjective intent to make a threat should be required for a felony conviction. In *United States v. Patillo*,¹⁷⁹ the Fourth Circuit Court held that where a defendant did not directly communicate a threat to the President, a "present intent" to carry out the threat is needed to justify conviction, for someone who makes threatening remarks without intent to later carry them out and without intent to incite others could not be willfully threatening the victim.¹⁸⁰ Justice Marshall's influential concurring opinion in *Rogers v. United States*¹⁸¹ reviewed legislative history¹⁸² and argued that a subjective intent to make a threat (not necessarily to carry it out) ought to be required.¹⁸³ As for whether the

¹⁷⁶ See generally Mary Margaret Roark, *Elonis v. United States: The Doctrine of True Threats: Protecting Our Ever-Shrinking First Amendment Rights in the New Era of Communication*, 15 PITT. J. TECH. L. & POL'Y 197 (2015).

¹⁷⁷ See, e.g., *United States v. Castillo*, 564 F. App'x 500 (11th Cir. 2014); *United States v. Turner*, 720 F.3d 411 (2d Cir. 2013); *United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997); *Ragansky v. United States*, 253 F. 643 (7th Cir. 1918); *United States v. Henry (In re White)*, No. 07CV342, 2013 U.S. Dist. LEXIS 133148 (E.D. Va. 2013).

¹⁷⁸ See *Watts v. United States*, 394 U.S. 705 (1969).

¹⁷⁹ 431 F.2d 293 (4th Cir. 1970).

¹⁸⁰ *Id.* at 297–98.

¹⁸¹ 422 U.S. 35 (1975). Justice Marshall's approach was subsequently followed. See, e.g., *United States v. Cvijanovich*, 556 F.3d 857, 863 (8th Cir. 2009); *United States v. Frederickson*, 601 F.2d 1358, 1363 (8th Cir. 1979).

¹⁸² See 53 CONG. REC. 9378 (1916).

¹⁸³ Reviewing House debates records, Justice Marshall cites Representative Webb, who commented on the specific intent requirement of the statute:

speech event is viewed from the perspective of the speaker or the recipient, the Supreme Court gave an ambiguous answer in *Virginia v. Black*¹⁸⁴ and failed to clarify the ambiguity in *Elonis v. United States*.¹⁸⁵ Charging a defendant with responsibility for the effect of his speech on a reader seems too low a standard for criminal statutes. In *White*, the court argues that the difference between the reasonable speaker test and the reasonable recipient test is not significant because all courts consider context.¹⁸⁶ Contrary to this view, I will argue below that audience dislocation heightens the need for adopting a subjective standard from the speaker's perspective in online speech crimes.¹⁸⁷

Consider the Tenth Circuit case *United States v. Wheeler*,¹⁸⁸ where the defendant posted allegedly threatening status updates on Facebook, calling upon his "religious followers" to carry out violent acts against law enforcement officers and their children.¹⁸⁹ His status messages were viewable by his "friends and networks," though there was no evidence that he was a member of any network when he posted the messages.¹⁹⁰ He also posted the messages only after he thought that he had deleted all his Facebook friends.¹⁹¹ The trial judge did not doubt that Wheeler was "operating under the 'mistaken belief' that nobody would see his Facebook posts," even though one of the individuals

If you make it a mere technical offense, you do not give him much of a chance when he comes to answer before a court and jury. I do not think we ought to be too anxious to convict a man who does a thing thoughtlessly. I think it ought to be a willful expression of an intent to carry out a threat against the Executive.

Rogers, 422 U.S. at 44–46.

¹⁸⁴ 538 U.S. 343 (2003).

¹⁸⁵ 135 S. Ct. 2001 (2015).

¹⁸⁶ *United States v. Henry (In re White)*, No. 07CV342, 2013 U.S. Dist. LEXIS 133148, at *151–52 (E.D. Va. Sept. 13, 2013).

¹⁸⁷ Both *United States v. Patillo*, 431 F.2d 293, 296 (4th Cir. 1970), and *Rogers v. United States*, 422 U.S. 35, 36 (1975), involve 18 U.S.C. § 871, which contains a willfulness requirement, unlike 18 U.S.C. § 875, which concerns threats made on interstate communication. Nevertheless, this article argues that online communication has heightened the need to attend to subjective intent in any threat charges that lead to criminal liability.

¹⁸⁸ 776 F.3d 736 (10th Cir. 2015).

¹⁸⁹ *Id.* at 738.

¹⁹⁰ *Id.* at 739.

¹⁹¹ *Id.*

mentioned in Wheeler's posts came across the posts on Facebook.¹⁹² Wheeler also claimed that he has no religious followers, and the court has heard no evidence that such individuals ever existed.¹⁹³ In sum, Wheeler might have operated with the subjective belief that he was talking to himself in a private space,¹⁹⁴ when his self-talk was accessible by bystanders who felt threatened by him. The appellate court left open the possibility that Wheeler did not subjectively intend for his remarks to be threatening.¹⁹⁵ Adopting an objective standard and a reader's vantage point, it held that a reasonable reader would consider that a true threat was made, and that is sufficient to justify a conviction.¹⁹⁶

Based on the defendant's account, the target audience of his message is himself; his addressees (i.e., his "religious followers") are imaginary.¹⁹⁷ He did not mean for there to be any ratified auditor of his message.¹⁹⁸ The difference between the target, the imaginary, and the actual audience would all remain obscure to the reasonable reader. The fact that a reasonable reader might assume that Wheeler does have religious followers, even though there is no evidence that they exist, shows the dislocation between the speaker and the reader. Whilst the emphasis on the reasonable reader serves the rationale of protecting individuals from the fear of violence, it does not matter how reasonable the fictional reader is, if the defendant did not intend to communicate with anyone at all.

Consider another case of audience dislocation which shows why the application of an objective standard and recipient vantage point may create an unfair burden on the speaker. Two months after a school shooting in Connecticut, Texas teen Justin Carter posted the following words on his Facebook page: "I think I'ma SHOOT UP A KINDERGARTEN/ AND WATCH THE BLOOD OF THE

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ See generally David Russell Brake, *Who Do They Think They're Talking To? Framings of the Audience by Social Media Users*, 6 INT'L J. COMMUNICATION 1056 (2012) (observing that people seem to use open communication on the internet as an intrapersonal space to talk to themselves).

¹⁹⁵ *Wheeler*, 776 F.3d at 741.

¹⁹⁶ *Id.* at 745–46.

¹⁹⁷ *Id.* at 739. In Bell's model, if the speaker styles his or her speech based on an ideal or absent reference group, he or she is engaging in referee design rather than audience design. See Bell, *supra* note 23, at 172.

¹⁹⁸ *Id.*

INNOCENT RAIN DOWN/ AND EAT THE BEATING HEART OF ONE OF THEM.”¹⁹⁹ Even though no weapons were found in his home, Carter was arrested and charged with making a terrorist threat.²⁰⁰ Lidsky and Norbut argue that the justice system overreacted in this case, especially if one considers the context in which Carter’s words were made²⁰¹: his alleged threat was immediately followed with a post saying “LOL” and “J/K”²⁰² (standing for “laughing out loud” and “just kidding” in internet speech); his use of selective capitalization is internet code for shouting and ranting;²⁰³ and his comment was made in a war of words with a fellow player of League of Legends, a multiplayer online battle game.²⁰⁴ Players of the game “commonly engage in trash talk and hyperbolic exaggerations.”²⁰⁵ Carter’s interlocuter, a fellow gamer, was not alarmed by his post.²⁰⁶ But the average reader of Facebook – a middle-aged woman – might be.²⁰⁷ Although a reasonable reader is not the average but a sophisticated reader who can decode contextual clues, given that the reasonable reader is, after all, a legal construct, it is difficult to rely on courts to recognize and decode internet subcultures.²⁰⁸

Online communication exacerbates existing interpretation problems by amplifying the dislocation between the speaker and the recipient, and relatedly, the divergence between a subjective and objective approach to criminal intention. Requiring subjective intent as assessed from the speaker’s vantage point could address the problem of dislocation by providing “some insurance against a speaker being punished for speech taken out of context.”²⁰⁹

¹⁹⁹ See Lidsky & Norbut, *supra* note 53, at 1886.

²⁰⁰ Carter spent four months in jail while pending bail and five years awaiting trial before he was offered a plea deal. *Id.* at 1886–87.

²⁰¹ *Id.* at 1887.

²⁰² According to Carter’s father in an interview, Carter’s full record of relevant posts were not produced by the police or the prosecutor. *Id.* at 1887 & n.10.

²⁰³ *Id.* at 1887.

²⁰⁴ *Id.* at 1887–88.

²⁰⁵ *Id.* at 1888.

²⁰⁶ *Id.* at 1891.

²⁰⁷ *Id.* at 1888.

²⁰⁸ *Id.* at 1922 (“Put simply, law enforcement, prosecutors, judges, and juries do not know what they do not know about the interpretation of social media speech . . .”).

²⁰⁹ *Id.* In addition to requiring specific intent, Lidsky and Norbut advocate for the introduction of expert witnesses in social media cases and the establishment of

IV. CONCLUSION

This article identifies three characteristics of the digital audience: audience agency, audience obscurity, and audience dislocation, which I argue are important considerations in the legal analyses of online speech crimes. These concepts are neither taxonomical nor exhaustive; they are generalized properties that provide insights into online language practices and their interpretation. I offer examples of existing approaches to speech crimes from different jurisdictions that are not well-equipped to deal with an agentive, obscure, and dislocated digital audience, illustrating how digitalization and the corresponding changes in our communicative environment challenge legal regulation of speech. I also provide recommendations for how laws could sharpen their context sensitivity by showing stronger appreciation of these audience characteristics.

The three broad types of crimes that could be committed through language have been covered. Written with face-to-face communication in mind, public order offenses aim to protect the pedestrian on the street who is shocked and disgusted by offensive acts they do not expect to come across in public spaces. One of the challenges of transposing these laws to online speech is an active audience who cannot be considered accidental overhearers. Considering the role of intermediaries in disseminating user-generated content, public order offenses without an audience or specific intent requirement is dangerously encompassing in the digital era. The broad scope of harassment and stalking is similarly alarming when coupled with a relaxed understanding of communication, which encompasses recklessness about audience reach. In particular, audience agency seems to be incompatible with traditional conceptions of stalking, where the person being stalked does not consent to receiving the stalker's communication. While there is a substantial amount of abusive online speech that should be discouraged, more narrowly tailored law needs to be used to tackle the problem in order to avoid chilling free speech in the largest medium for public discourse today. Finally, analyses of threat cases show that increased audience obscurity necessitates more careful delineation between target and

context defense which a defendant could invoke during a pre-trial hearing. *Id.* at 1926.

potential audience. It is not productive to simply accept that context has collapsed; instead, more nuanced contextual analyses is needed to assess the nature of the collapse and what that may inform us about communicative intentions. Moreover, audience dislocation has deepened the contextual gap between subjective versus objective standards and speaker versus recipient vantage point in the determination of criminal intentionality, and it is submitted that a subjective standard from the speaker's vantage point should be adopted as the basis for criminal liability.

It would be unfair to say that courts have been unaware of the contextual shifts highlighted in this article. In fact, the case law shows that courts are not blind to technological advances; many judges in our examples have identified clashes between audience assumptions in existing laws and audience characteristics in the case in front of them. Unfortunately for the judges, applying laws made during the mass communication era to online communication is sometimes akin to nailing a square peg in a round hole. In some cases, they simply declare quite rightly that the law does not fit. Moreover, awareness does not equate to sufficient understanding that is required in the search for conceptual tools that allow interpretive consistency and for ways of adapting interpretive approaches so that they are context-sensitive enough to not be overly narrow or broad. Such understanding may be enhanced by interdisciplinary work that examines assumptions in legal principles and assesses their empirical grounding in our changing social world, such as social scientific analyses of online communication illustrated in this article. Admittedly, sharpening the context sensitivity of legal interpretation would not solve all the problems; tackling some of the harms that now fall outside the law may also require legislative measures or, increasingly frequently, extrajudicial solutions in collaboration with intermediaries.²¹⁰ That said, these measures require context-sensitive tailoring just as much.

As Greenawalt and Volokh have both emphasized, public speech requires stronger legal protection than private speech. Web 2.0 has dramatically expanded what is considered public by encouraging what would traditionally be considered private speech into the public

²¹⁰ Although it would not be feasible for speech platforms to pre-screen and filter all user-generated content, intermediaries may for example be obliged to take down obscene materials on their site upon notification.

domain, accompanied by seemingly impoverished context. Even though we may not subjectively feel that way, speech we make online is often considered public. To ensure that digitalization does not lead to the exploitation or jeopardy of our speech freedoms, the legal regulation of online speech requires deep pragmatic analyses. In all the cases discussed in this article, uncertainties in meaning did not arise from semantic indeterminacy such as lexical ambiguity or vagueness. Instead, disputes in meaning occurred at the pragmatic level, which depends on contextual analyses. A wide range of audience types exist in online communication, who may draw inferences about speaker meaning and intention based on different contextual information they have. Regulation of online speech needs to be narrowly tailored and show sensitivity to audience characteristics, and the ones identified in this article are a starting point. As audience is only one of many contextual shifts that occurred as human communication becomes increasingly digitalized, further work is needed to identify and analyze other contextually salient features.

This leads me to a note about methodology. It is perhaps not surprising that there is no singular theory about communication in law, even within one jurisdiction. This is perhaps necessitated by the divergent objectives in different areas of law. One analytical consequence is that it is almost impossible for an interdisciplinary scholar to critique legal assumptions about communication in broad strokes. Even with the analytical concepts proposed in this article, it is difficult to know how useful they are for each type of crime without a careful review of assumptions in jurisdiction-specific and crime-specific legal analysis. In the work reported here, it is only after incompatibilities are identified that cross-jurisdictional comparisons become meaningful. The recommendations made in this article are accordingly quite specific to each type of crime analyzed, even though there is no reason why this type of context analysis could not be conducted in a similar fashion for other language crimes.

Distilling from the analytical work done in this article, I conjecture that the following insights may be generally applicable to the legal analyses of language crimes in any jurisdiction. Given the proliferation of publicly accessible content and the accompanied phenomenon of audience obscurity, it is more important than ever to differentiate between audience types, including target audience, actual audience, and potential audience, in assessing criminal intentionality.

Admittedly, such differentiation is not always easy. However, speaker identity, language use, group or organizational style, epistemic presumptions, expressions of intimacy or solidarity, and markers of power dynamics do offer some cues; previous communications on the same platform also provide a reference point.²¹¹ It is also important to assess the extent to which audience characteristics (e.g., agency) on digital media are compatible with the harm that the legislation tries to prevent. In addition, audience dislocation in online communication favors interpreting a language crime using the speaker's perspective and a subjective standard of intention. The more obscure and dislocated the audience is, as is the often case with online

²¹¹ For example, although the defendants in *Holcomb v. Commonwealth*, 709 S.E.2d 711 (Va. Ct. App. 2011), *United States v. Jeffries*, 692 F.3d 473 (6th Cir. 2012), and *United States v. Stock*, 728 F.3d 287 (3rd Cir. 2013), have all been convicted of threat by posting messages on publicly accessible online platforms, variation in how they disseminated their messages could arguably inform their criminal intentionality. In *Holcomb*, 709 S.E.2d at 712–13, the defendant posted rap lyrics on MySpace which contained references to his past relationship with the victim, allowing the victim to identify herself as the subject of the defendant's violent fantasies. Importantly, even though he did not direct her to the page, the defendant knew that the victim had viewed his MySpace page in the past, contributing to the finding that he intended to threaten her. *Id.* at 715. In *Jeffries*, 692 F.3d at 475–77, the defendant posted a song entitled “Daughter’s Love” on YouTube which contained statements about killing and bombing judges but did not name the targeted judge who was overseeing his custody dispute with his estranged wife. He argued that his video was “akin to writing a threat on a piece of paper that is then placed in a bottle and thrown into the ocean or posted on the bulletin board of a public library in another city”; it was very unlikely that the judge would come across it among “the 100 million videos” on the site. Report and Recommendation at 12, *United States v. Jeffries*, No. 10-CR-100, 2011 U.S. Dist. LEXIS 162529 (E.D. Tenn. 2010). His argument might have worked had he not also actively shared the video on Facebook, where the video eventually became known to the targeted judge through his family network. *Jeffries*, 692 F.3d at 477. Given the ongoing involvement of the judge in his custody dispute, it is foreseeable that video could be passed on by mutual acquaintances. Finally, in *Stock*, 728 F.3d at 301, where the defendant posted a message on Craigslist about his violent fantasies against someone called “J.K.P.,” the context did not seem to provide strong support that he intended to threaten this individual. For one thing, the court provided no information about who this targeted individual was, and whether the speaker could at all expect that the target would come across the post on Craigslist; it held simply that a reasonable person could believe that the defendant intended to intimidate the target, even though there was limited evidence that the subject of the fantasy was his target audience. *Id.* at 301.

communication, the more nuanced the corresponding contextual analysis should be.

This article does not advocate for tighter or looser regulation of online speech. The Law Commission (U.K.) has conducted a six-month study to see whether abusive and offensive behavior that is illegal offline has also been held illegal online and vice versa. They conclude that in most cases, “abusive online communications are, at least theoretically, criminalised to the same or even a greater degree than equivalent offline behaviour.”²¹² Gaps and inconsistencies that they have identified arise not because there are not enough laws but because the laws are not sufficiently targeted to address the nature of the offending behavior in the online environment. In other words, the context sensitivity of the laws needs to be sharpened. This article provides an illustration of the kind of interdisciplinary analysis that might help reveal mismatches between a new communication context and existing approaches to language crimes, which is a critical step in achieving outcome-based equivalence between online and offline communication.

²¹² LAW COMMISSION, *supra* note 76, at 328.

FIXING FOIA: HOW THIRD-PARTY INTERVENTION THWARTS TRANSPARENCY

Amy Kristin Sanders* & William D. Kosinski**

The Supreme Court’s recent *Food Marketing Institute v. Argus Leader Media* decision—as well as other decisions permitting third-party intervention—has opened the door for increasing opposition to public records requests. This fundamental shift has global implications for transparency as other governments may follow our lead. But possible judicial and legislative reforms, including some modeled by other countries, to constrain third-party intervention and limit the definition of confidential information offer a glimmer of hope for transparency advocates.

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I. INTRODUCTION

When journalists—like those at South Dakota’s *Argus Leader*¹—file public records requests in the United States, they are prepared to take on government agencies that want to prevent the disclosure of those records. Until recently, though, news organizations had not anticipated squaring off against well-funded corporations and powerful industry groups seeking to limit access to government information.² But the Supreme Court’s 2019 ruling in *Food Marketing Institute v. Argus Leader Media*³—as well as other lower court decisions⁴ permitting broad third-party intervention in freedom of information cases—has opened the door for a new wave of corporate opposition to public records requests.⁵ This fundamental shift in how

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¹ The *Argus Leader* is the daily newspaper in Sioux Falls, South Dakota. Owned by Gannett and part of the USA Today Network, it is South Dakota’s largest newspaper group with a Sunday circulation just over 33,000 as of March 2021. Argus Leader News Media Statement, All. for Audited Media (Mar. 31, 2021) (on file with author).

² In fact, in a 1979 case, the U.S. Supreme Court ruled that the federal Freedom of Information Act is a statute that presumes disclosure, and it does not create a private right of action to prevent agencies from disclosing information. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 285 (1979). As a result, those seeking to prevent the government from disclosing information often rely on § 10(a) of the Administrative Procedure Act as the basis for their “reverse FOIA” actions. *Id.* at 285, 317.

³ 139 S. Ct. 2356 (2019).

⁴ *See, e.g., Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015) (permitting a third-party to claim competitive harm as a reason to exempt records from disclosure under Texas’ Public Information Act).

⁵ Reverse FOIA cases, as they are called, are not new. The first reported case occurred in 1973. *See generally* Charles River Park “A,” Inc. v. Dep’t of Hous. & Urb. Dev., 360 F. Supp. 212 (1973), *rev’d*, 519 F.2d 935 (1975).

our nation's freedom of information law is being construed, along with the country's recent declines in a number of freedom-measuring indices,⁶ has dramatic implications for government transparency on a global scale. As a wave of nationalist and populist sentiment spreads, other governments may be inclined to follow our lead with regard to freedom of information—a move that could usher in a new era of government secrecy worldwide. But approaches taken by other countries, including Canada and South Africa, as well as possible judicial and legislative reforms may offer a glimmer of hope for increased government transparency.

Initially, the *Argus Leader* case started out like any typical Freedom of Information Act (FOIA) request. The newspaper, based in Sioux Falls, requested the names and addresses of all stores participating in the federal food-stamp program, referred to as SNAP.⁷ In addition, it asked the U.S. Department of Agriculture (USDA) for SNAP redemption data for each store.⁸ After releasing the stores' names and addresses, the USDA invoked FOIA Exemption 4,⁹ claiming the redemption data was protected from disclosure as “trade secrets or commercial or financial information” that are “privileged or confidential.”¹⁰ As news organizations often do when the government denies access to information, the *Argus Leader* filed suit against the USDA in federal court.¹¹ The U.S. District Court for the District of South Dakota ordered disclosure, and the USDA declined to appeal that decision. However, the USDA alerted the retailers that had

⁶ As one example, the United States ranked 48th in Reporters Without Borders' 2019 World Press Freedom Index, down from 32nd in 2013. It noted, “[j]ournalists covering the Trump administration were denied access to information and events of public interest. The White House repeatedly broke records for the longest spans of time without a press briefing.” *RSF Index 2019: Institutional Attacks on the Press in the U.S. and Canada*, RSF REPS. WITHOUT BORDERS: WORLD PRESS FREEDOM INDEX, <https://rsf.org/en/rsf-index-2019-institutional-attacks-press-us-and-canada> (last visited Apr. 14, 2021); *United States*, RSF REPS. WITHOUT BORDERS: WORLD PRESS FREEDOM INDEX, <https://rsf.org/en/united-states> (last visited Apr. 14, 2021).

⁷ *Argus Leader Media v. U.S. Dep't of Agric.*, 900 F. Supp. 2d 997, 1000 (2012).

⁸ *Id.*

⁹ The relevant part of the Freedom of Information Act reads, “[t]his section does not apply to matters that are . . . trade secrets and commercial or financial information obtained from a person and privileged or confidential . . .” 5 U.S.C. § 552(b)(4).

¹⁰ 5 U.S.C. § 552(b)(4).

¹¹ *Argus Leader*, 900 F. Supp. 2d at 999.

provided redemption data. The Food Marketing Institute—a grocery store industry group—intervened¹² under Federal Rule of Civil Procedure 24(a).¹³

Subsequently, the *Argus Leader* again prevailed in the Eighth Circuit,¹⁴ which applied the rigorous “substantial [competitive] harm test” traditionally used in Exemption 4 cases. However, the U.S. Supreme Court overruled that decision, instead relying on the plain meaning of “confidential” to permit a significantly lower threshold for a third-party intervenor to overcome, essentially eliminating any requirement to prove harm.¹⁵ As a result, the *Argus Leader* decision dramatically undercut FOIA’s presumption of openness by reducing the standard for when third-party information will be considered confidential and cast a shadow on government transparency worldwide.

¹² As Stephen F. Hehl points out, “the reverse FOIA suit has become an extremely confused and complicated area of law. Perhaps the main reason for this confusion is Congress’ failure to explicitly provide for any such suit in the FOIA.” Stephen F. Hehl, *Reverse FOIA Suits After Chrysler: A New Direction*, 49 *FORDHAM L. REV.* 185, 187 (1979). As a result, corporations tried many different approaches before succeeding in reverse FOIA actions. *See id.* at 188.

¹³ (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive Intervention.

(1) *In General*. On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

See FED. R. CIV. P. 24(a) (providing for intervention by right and permissive intervention).

¹⁴ *Argus Leader Media v. U.S. Dep’t of Agric.*, 889 F.3d 914, 915–17 (8th Cir. 2018).

¹⁵ *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2362–64, 2366 (2019).

Media law scholars Daxton “Chip” Stewart and Amy Kristin Sanders point out that the *Argus Leader* decision opens the door to increased secrecy through the use of public-private partnerships, allowing private organizations doing government work to take advantage of Exemption 4’s protections for confidential information: “The U.S. Supreme Court rarely hears Freedom of Information Act cases. But when it does, the decisions have the potential to carry significant weight as a statement on democratic principles by the highest court in the country despite only addressing the application and interpretation of federal open records law.”¹⁶

The decision in *Argus Leader* and some of the Court’s other recent FOIA decisions have chipped away at the public’s ability to access information about the government—a critical aspect of democratic governance. Not all jurisdictions allow the kind of third-party intervention that occurred in *Argus Leader*, and we believe that judicial action or legislative reform is necessary to preserve the press and public’s ability to engage in meaningful government oversight. We start by reviewing the central purpose of the Freedom of Information Act, outlining both Congress and the courts’ iterations of the statute’s importance. Next, we detail how the Court has construed FOIA’s exemptions in the past and the ways in which the *Argus Leader* decision contravenes the law’s central purposes. We then review alternative approaches—from both the United States and abroad—to address third-party interventions aimed at limiting access to public records. Finally, the article concludes with a call to action to restore access to these records, which fulfills FOIA’s central purpose and ensures government transparency.

II. THE CENTRAL PURPOSE OF THE FREEDOM OF INFORMATION ACT

“A government by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty.”¹⁷

The purpose of the Freedom of Information Act is rooted in its origin. The law, which has since been internationally renowned as a

¹⁶ Daxton “Chip” Stewart & Amy Kristin Sanders, *Secrecy, Inc.: How Governments Use Trade Secrets, Purported Competitive Harm and Third-Party Interventions to Privatize Public Records*, 1 J. CIVIC INFO. 1, 23–24 (2019).

¹⁷ S. REP. NO. 89-813, at 45 (1965).

pertinent tenet of government transparency,¹⁸ was drafted in response to increasing Cold War Era secrecy under the Eisenhower Administration in the mid-1950s and an inadequate public information statute.¹⁹ John Moss, then a House Representative from California's Third Congressional District, started campaigning for an improved public records law after being denied access to information related to the firings of thousands of federal employees accused of being communist sympathizers.²⁰ Fearful of a government operating without any mechanism for its citizens to inform themselves about its actions, Moss said, "The present trend toward government secrecy could end in a dictatorship. The more information that is made available, the greater will be the nation's security."²¹

Journalists, lawmakers, scientists, and members of the public joined Moss' movement to hold the federal government accountable by giving Congress, the press, and the general public the ability to access records documenting the federal government's actions.²² Moss eventually found a Republican co-sponsor, Donald Rumsfeld, to help push a law opposed by many in the federal government—including every federal agency and department²³—through Congress. After nearly a decade of work, Moss brought Senate Bill 1160 to the floors

¹⁸ The concept of granting access to government information has existed for hundreds of years. Sweden enacted its FOI law in 1766, and both Colombia and Finland developed forms of FOI legislation in the 19th and early 20th centuries, respectively. At the time of its passage in 1966, the United States' FOIA was considered unprecedented in its comprehensive scope and served as a catalyst for countries all over the world to pass their own FOI laws. Denmark and Norway passed their FOI laws in 1970, followed by France and the Netherlands in 1978, and later followed by Australia, Canada, and New Zealand in the early 1980s. In all, two countries had FOI laws before the United States; now, over 100 countries have some codified way for the public to access government information. See John M. Ackerman & Irma E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, 58 ADMIN. L. REV. 85 (2006); and TONY MENDEL, UNESCO, FREEDOM OF INFORMATION: A COMPARATIVE LEGAL SURVEY 20–23 (2d ed. 2008).

¹⁹ See *Freedom of Information Act*, HISTORY, <https://www.history.com/topics/1960s/freedom-of-information-act> (last updated Aug. 21, 2018).

²⁰ MICHAEL R. LEMOV, *PEOPLE'S WARRIOR: JOHN MOSS AND THE FIGHT FOR FREEDOM OF INFORMATION AND CONSUMER RIGHTS* (2011).

²¹ HISTORY, *supra* note 19.

²² *Id.*

²³ *History of FOIA*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/transparency/history-of-foia> (last visited Apr. 14, 2021).

of the Senate and House, both of which recognized the importance of broad government disclosure with narrow exemptions in their final reports on what would eventually become the Freedom of Information Act.²⁴ Notably, in recognizing Section 3 of the Administrative Procedure Act's failure to give the public adequate access to information,²⁵ the Senate wrote in its report:

It is the very purpose of the [FOIA] to . . . establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld

At the same time that a broad philosophy of "freedom of information" is enacted into law, it is necessary to protect certain equally important rights . . .

It is not an easy task to balance the opposing interests, but it is not an impossible one either Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.²⁶

Similarly, the House wrote in its report that the Freedom of Information Act would serve a vital role in America's democracy by allowing agencies to withhold information only under the law's nine narrow exemptions.²⁷ By improving upon Section 3 of the

²⁴ S. REP. NO. 89-813, at 40-41 (1965).

²⁵ Section 3 of the Administrative Procedure Act, 5 U.S.C. § 1002 (1964 ed.), which was titled "Public Information" was intended to disclose government information, contained broadly worded exemptions that effectively allowed the federal government to unilaterally prevent any types of disclosure. *See id.* at 38 (stating that Section 3 was "full of loopholes which allow[ed] agencies to deny legitimate information to the public. Innumerable times it appear[ed] that information [was] withheld only to cover up embarrassing mistakes or irregularities").

²⁶ *Id.*

²⁷ *See* H.R. REP. NO. 89-1497, at 22, 28-33 (1966) (clarifying generally the exemptions to be construed narrowly).

Administrative Procedure Act,²⁸ FOIA's greater access to government documents would provide "the necessary machinery to assure the availability of Government information necessary to an informed electorate."²⁹

Moss eventually garnered enough votes to get his bill passed.³⁰ On July 4, 1966, President Lyndon B. Johnson signed the bill into law.³¹ He issued a signing statement praising the law's structure of balancing government transparency with interests of privacy, national security, and the facilitation of government operations.³² President Johnson made clear he and his administration would fully embrace the law,³³ and he stated, "I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded."³⁴

Even though Congress anticipated FOIA's exemptions to be unequivocal and narrow,³⁵ federal agencies quickly initiated litigation to prevent the public from viewing and evaluating their documents. But the plan did not succeed. In the Supreme Court's first FOIA-related decision,³⁶ the Court endorsed the statute's central purpose of broad disclosure and narrow exemptions even though it largely ruled in favor of non-disclosure. After thirty-three members of the House of Representatives filed a request to the Nixon Administration for documents and recommendations relating to an upcoming underground nuclear test, the administration claimed it could withhold

²⁸ Similar to the Senate, the House recognized that Section 3 of the Administrative Procedure Act "though titled 'Public Information' and clearly intended for that purpose, has been used as an authority for withholding, rather than disclosing, information." *Id.* at 25.

²⁹ *Id.* at 33.

³⁰ See William M. Blair, *INFORMATION BILL SENT TO JOHNSON; House Votes, 307-0, to Open Federal Records to Public*, N.Y. TIMES, June 21, 1966, at 21.

³¹ HISTORY, *supra* note 19.

³² Presidential Statement on Signing the Freedom of Information Act, 1966, 2 PUB. PAPERS 699 (July 4, 1966).

³³ *Id.* (stating, "I am instructing every official in this administration to cooperate with this end and to make information available to the full extent consistent with individual privacy and with the national interest").

³⁴ *Id.*

³⁵ For an explanation of the purposes and scope of the exemptions, see H.R. REP. NO. 89-1497, at 28-33 (1966) and S. REP. NO. 89-813, at 37-38, 44-45 (1965).

³⁶ *EPA v. Mink*, 410 U.S. 73 (1973).

the information under Exemptions 1 and 5.³⁷ The D.C. Circuit remanded the case back to the U.S. District Court for an *in camera* review of whether some of the documents were exempt.³⁸ On appeal, the U.S. Supreme Court granted *certiorari*, analyzing FOIA's legislative history and both the Senate and House reports to guide its decision.³⁹ Justice White wrote for the majority: "Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands."⁴⁰ The *Mink* Court's reliance on FOIA's legislative history, in addition to its enumeration of the law's central purpose, established a clear path for lower courts as they navigated the law's nine stated exemptions.

Just three years later, in *Department of the Air Force v. Rose*,⁴¹ the Court reinforced *Mink* and further elaborated FOIA's importance. In *Rose*, the Air Force argued FOIA permitted it to withhold summaries of honor and ethics hearings at the U.S. Air Force Academy.⁴² The Academy claimed that Exemptions 2 and 6, both of which are intended to protect personal privacy, applied because the summaries contained information that would constitute invasions of privacy, if disclosed.⁴³ Citing *Mink* and the Senate and House reports,⁴⁴ Justice William Brennan wrote for the majority that the summaries must be disclosed after being properly redacted to protect privacy interests to meet the law's goal of the broadest responsible disclosure:

To make crystal clear the congressional objective—in the words of the Court of Appeals, “to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny”—Congress provided in 552 (c)

³⁷ *See id.* at 74–75 (noting that the Freedom of Information Act exempts documents that are “specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy” or “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”) (citations omitted).

³⁸ *Id.* at 78.

³⁹ *Id.* at 79–91.

⁴⁰ *Id.* at 80.

⁴¹ 425 U.S. 352 (1976).

⁴² *Id.* at 357.

⁴³ *Id.*

⁴⁴ *Id.* at 360–62.

that nothing in the Act should be read to “authorize withholding of information or limit the availability of records to the public, except as specifically stated” But these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act. “These exemptions are explicitly made exclusive” and must be narrowly construed.⁴⁵

Despite early articulations in favor of a narrow construction of FOIA’s exemptions, the Court has not always followed that path. Fifteen years after *Rose*, the Court again returned FOIA’s central purpose—this time to justify withholding information in the name of privacy. In *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*,⁴⁶ the Court unanimously ruled that Exemption 7(C) prevents the disclosure of documents compiled for law enforcement purposes when disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”⁴⁷ Although the individual documents were otherwise available from other sources, “when the information is in the Government's control as a compilation, rather than as a record of ‘what the Government is up to,’ the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir.”⁴⁸ In other words, the Court emphasized that disclosing information about a person’s criminal records would violate personal privacy if it did not provide meaningful insight into the government’s conduct.⁴⁹ More explicitly, Justice Stevens wrote: “[T]he FOIA’s central purpose is to ensure that the *Government’s* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens

⁴⁵ *Id.* at 361 (citations omitted).

⁴⁶ 489 U.S. 749 (1989).

⁴⁷ *Id.* at 751, 780 (citation omitted).

⁴⁸ *Id.* at 780.

⁴⁹ [A]s a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that, when the request seeks no ‘official information’ about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is ‘unwarranted.’

to be in the warehouse of the Government be so disclosed.”⁵⁰ In so ruling, the Court made clear that the balance must tip in favor of illuminating government conduct before it could justify the kind of disclosure permitted in *Rose*.⁵¹ *Reporters Committee* effectively expanded the scope of Exemption 7(C). Legal scholars have long criticized the ruling, which has been used to justify the government’s decision to withhold information in many subsequent decisions.⁵²

But the courts have also cited *Reporters Committee*, along with *Mink* and *Rose*, in many decisions that ultimately mandated disclosure of documents where doing so supported FOIA’s central purpose—providing the public with knowledge of the government actions, subject to narrow exemptions.⁵³ The Supreme Court has long recognized and relied on this central purpose when considering various important questions relating to disclosure of government information. Regardless of the specific exemption at issue—be it privacy, national security or confidential information—the Court has routinely been

⁵⁰ *Id.* at 774.

⁵¹ See Martin E. Halstuk & Charles N. Davis, *The Public Interest Be Damned: Lower Court Treatment of the Reporters Committee “Central Purpose” Reformulation*, 54 ADMIN. L. REV. 983, 989–92 (2002).

The Court’s definition of the FOIA’s “central purpose” [in *Reporters Committee*] raises serious questions about the future of public access to vast stores of government-held information that does not necessarily reveal government operations but that still holds great public interest. . . .

. . . .
The 1989 *Reporters Committee* opinion seemingly contravenes the legislative intent of the FOIA by narrowly defining a disclosable record as only official information that reflects an agency’s performance and conduct. In effect, the ruling creates a *court*-crafted FOIA exemption, which operates as a performance or conduct test.

Id. at 989–92 (footnote omitted).

⁵² See, e.g., *Reed v. NLRB*, 927 F.2d 1249 (D.C. Cir. 1991); *Fed. Lab. Rels. Auth. v. U.S. Dep’t of Def.*, 977 F.2d 545 (11th Cir. 1992); *Fed. Lab. Rels. Auth. v. U.S. Dep’t of Navy*, 975 F.2d 348 (7th Cir. 1992); *U.S. Dep’t of Def. v. Fed. Lab. Rels. Auth.*, 510 U.S. 487 (1994); and *Nat’l Archives & Recs. Admin. v. Favish*, 541 U.S. 157 (2004).

⁵³ See, e.g., *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978); *FBI v. Abramson*, 456 U.S. 615 (1982); *U.S. Dep’t of Just. v. Tax Analysts*, 492 U.S. 136, 142 (1989); *Fed. Lab. Rels. Auth. v. U.S. Dep’t of Com.*, 954 F.2d 994 (4th Cir. 1992); and *Fed. Lab. Rels. Auth. v. U.S. Dep’t of Navy*, 966 F.2d 747 (3d Cir. 1992).

required to strike a balance between the exemptions' interests and FOIA's interest in the "fullest responsible disclosure."⁵⁴

More than a half-century later, FOIA no longer holds the same promise it did when President Johnson signed the law into effect. As a result of a handful of Supreme Court decisions, including *Reporters Committee*, the exemptions have grown in ways that prevent the fullest responsible disclosure. Further, even though FOIA has been amended seven times since first enacted in 1966,⁵⁵ it has not kept pace with other freedom of information laws around the world.⁵⁶ As courts have broadened FOIA's exemptions and digital technology has evolved, disclosure has waned. Once considered a key statute necessary to a democracy, the Freedom of Information Act no longer lives up to its legacy.

III. THE UNRAVELING OF ACCESS RIGHTS

Although *Argus Leader* may appear to strike a fatal blow to FOIA, in reality, the Court has slowly unraveled access rights over time. On its face, the *Reporters Committee* decision paid homage to the importance of broad government disclosure,⁵⁷ but the Court's interpretation of Exemption 7(C)⁵⁸ has allowed subsequent courts wide

⁵⁴ S. REP. NO. 89-813, at 38 (1965).

⁵⁵ For a complete list and descriptions of FOIA's amendments, see *Legislative History*, FOIA WIKI, https://foia.wiki/wiki/Legislative_History (last modified Sept. 20, 2018, 1:04 PM).

⁵⁶ See David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1098–99 (2017).

⁵⁷ See *supra* text accompanying note 50.

⁵⁸ For a discussion of *Reporters Committee*'s, 489 U.S. at 773–74, restrictive definition of the FOIA's central purpose, see Halstuk & Davis, *supra* note 51; Michael Hoefges et al., *Privacy Rights Versus FOIA Disclosure Policy: The "Uses and Effects" Double Standard in Access to Personally-Identifiable Information in Government Records*, 12 WM. & MARY BILL RTS. J. 1, 20–24 (2003); Martin E. Halstuk & Bill F. Chamberlin, *The Freedom of Information Act 1966–2006: A Retrospective on the Rise of Privacy Protection over the Public Interest in Knowing What the Government's Up To*, 11 COMM. L. & POL'Y 511, 543–46 (2006); Jane E. Kirtley, "Misguided in Principle and Unworkable in Practice": *It is Time to Discard the Reporters Committee Doctrine of Practical Obscurity (and Its Evil Twin, the Right to Be Forgotten)*, 20 COMM. L. & POL'Y 91 (2015); and Clay Calvert et al., *Reining in Internet-Age Expansion of Exemption 7(C): Towards a Tort Law Approach for Ferreting Out Legitimate Privacy Concerns and Unwarranted Intrusions Under FOIA*, 70 SMU L. REV. 255, 264–68 (2017).

latitude to prevent the disclosure of information, undermining FOIA's central purpose. At the time, Exemption 7(C) stated that information cannot be disclosed when the release "could reasonably be expected to constitute an unwarranted invasion of personal privacy."⁵⁹ A 1974 FOIA amendment had omitted the word "clearly" in front of "unwarranted."⁶⁰ As a result, the Court reasoned that this amendment made the exemption "somewhat broader" in its application than other privacy exemptions.⁶¹

Rejecting Reporters Committee's argument that personal privacy interests are nonexistent when a government agency compiled publicly available personal information,⁶² the Court looked at both the common law and literal understandings of the word "privacy" but relied much more heavily on the dictionary definition⁶³—a trend that recurs in *Argus Leader* and other FOIA decisions. Interpreting "privacy" to mean "not otherwise 'freely available,'"⁶⁴ the Court relied on this broader definition to decide that disclosing a government compilation of otherwise publicly available records containing personal information constituted an unwarranted invasion of privacy.⁶⁵

The Court's expansive interpretation of Exemption 7(C), along with its reliance on privacy's denotative meaning, broadened the

⁵⁹ 5 U.S.C. § 552(b)(7)(C).

⁶⁰ See H.R. 12471, 93rd Cong. (1974).

⁶¹ *Reporters Committee*, 489 U.S. at 756.

⁶² *Id.* at 762–63.

⁶³ According to Webster's initial definition, information may be classified as "private" if it is "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public." Recognition of *this* attribute of a privacy interest supports the distinction, in terms of personal privacy, between scattered disclosure of the bits of information contained in a rap-sheet and revelation of the rap-sheet as a whole.

See *id.* at 763–64 (emphasis added) (footnote omitted).

⁶⁴ *Id.* at 764.

⁶⁵ [W]e hold as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no "official information" about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is "unwarranted."

Id. at 780.

exemption's applicability.⁶⁶ As a result, *Reporters Committee* laid the foundation for the continued enlargement of Exemption 7(C). In the years following the decision, for example, journalists filed hundreds of complaints with the Reporters Committee for Freedom of the Press, claiming that federal agencies were overusing privacy exemptions and impeding their access to government information.⁶⁷ Moreover, *Reporters Committee's* more restrictive articulation of FOIA's central purpose⁶⁸ has not only been used in subsequent Exemption 7 cases⁶⁹ but also in cases defining covered agencies and records.⁷⁰ Legal scholars widely consider *Reporters Committee* to be one of the

⁶⁶ See Halstuk & Davis, *supra* note 51. See also *supra* note 50 and accompanying text.

⁶⁷ REPORTERS COMM. FOR FREEDOM OF THE PRESS, 105TH CONG., REPORT ON RESPONSES AND NON-RESPONSE OF THE EXECUTIVE AND JUDICIAL BRANCHES TO CONGRESS' FINDING THAT THE FOI ACT SERVES 'ANY PURPOSE' 2 (Comm. Print 1998) [hereinafter RCFP REPORT].

⁶⁸ See *supra* text accompanying note 50. See also RCFP REPORT, *supra* note 67, at 10–11 (explaining how this articulation of FOIA's central purpose restricted what information could be disclosed).

⁶⁹ Halstuk & Davis, *supra* note 51, at 1000–02. Halstuk & Davis compiled the following list of cases that used *Reporters Committee* when evaluating privacy exemptions in FOIA disputes: Sheet Metal Workers Int'l Ass'n, Local Union No. 19 v. U.S. Dep't of Veteran Affs., 135 F.3d 891 (3d Cir. 1998); Kimberlin v. U.S. Dep't of Just., 139 F.3d 944 (D.C. Cir. 1998); McQueen v. United States, 179 F.R.D. 522 (S.D. Tex. 1998); Ligorner v. Reno, 2 F. Supp. 2d 400 (S.D.N.Y. 1998); Lurie v. U.S. Dep't of Army, 970 F. Supp. 19 (D.D.C. 1997); Ctr. to Prevent Handgun Violence v. U.S. Dep't of Treasury, 981 F. Supp. 20 (D.D.C. 1997); Sheet Metal Workers Int'l Ass'n, Local No. 9 v. U.S. Air Force, 63 F.3d 994 (10th Cir. 1995); Manna v. U.S. Dep't of Just., 51 F.3d 1158 (3d Cir. 1995), *cert. denied*, 516 U.S. 975 (1995); Exner v. U.S. Dep't of Just., 902 F. Supp. 240 (D.D.C. 1995); Jones v. FBI, 41 F.3d 238 (6th Cir. 1994); Fed. Lab. Relations Auth. v. U.S. Dep't of Navy, 975 F.2d 348 (7th Cir. 1992); Hunt v. FBI, 972 F.2d 286 (9th Cir. 1992); Hale v. U.S. Dep't of Just., 973 F.2d 894 (10th Cir. 1992). Halstuk & Davis, *supra* note 51, at 996 n.76.

⁷⁰ See Christopher P. Beall, Note, *The Exaltation of Privacy Doctrines over Public Information Law*, 45 DUKE L.J. 1249, 1273–80 (1996). Beall identified and analyzed three cases where courts applied *Reporters Committee's*, 489 U.S. 749, "central purpose" definition in disputes not relating to Exemptions 6 and 7 (the privacy exemptions): Sweetland v. Walters, 60 F.3d 852 (D.C. Cir. 1995) (relying on *Reporters Committee* to help define what qualifies as an agency subject to FOIA); Baizer v. U.S. Dep't of Air Force, 887 F. Supp. 225 (N.D. Cal. 1995) (relying on *Reporters Committee* to help define agency records); and Vazquez-Gonzalez v. Shalala, 1995 U.S. Dist. LEXIS 5671 (D.P.R. 1995). Beall, *supra*.

Supreme Court's greatest missteps in its FOIA jurisprudence.⁷¹ Notably, *Reporters Committee* greatly increased the burden requestors must overcome to obtain government records that may implicate any privacy exemption by requiring requestors to prove the documents will shed light on government actions,⁷² which can be nearly impossible if they do not already have access to the documents.

In 2004, the Court further limited FOIA's effectiveness when it decided *National Archives & Records Administration v. Favish*.⁷³ In *Favish*, the Court relied on *Reporters Committee* to further extend Exemption 7(C)⁷⁴ to include the personal privacy interests of a person's family.⁷⁵ Writing for the majority, Justice Anthony Kennedy declined to accept the argument that "the individual who is the subject of the information is the only one with a privacy interest."⁷⁶ Expanding the exemption, he wrote:

The right to personal privacy is not confined, as *Favish* argues, to the "right to control information about oneself" To say that the concept of personal privacy must "encompass" the individual's control of information about himself does not mean it cannot encompass other personal privacy interests as well.⁷⁷

Embracing the Court's broad concept of privacy established in *Reporters Committee*, Justice Kennedy wrote that a person's family also possesses the same privacy right outlined in Exemption 7(C) and can rightfully object to disclosure of their loved one's personal information.⁷⁸ Such an interpretation of FOIA undermines congressional intent that exemptions be narrowly construed. The Court's opinion did not mention any *explicit* recognition from

⁷¹ See, e.g., sources cited *supra* note 58.

⁷² See Hehl, *supra* note 12, at 190.

⁷³ 541 U.S. 157 (2004).

⁷⁴ 5 U.S.C. § 552(b)(7)(C).

⁷⁵ *Favish*, 541 U.S. at 165–67.

⁷⁶ *Id.* at 165.

⁷⁷ *Id.* (quoting Brief on the Merits of Respondent Allan J. Favish at 4, Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 157 (2003) (No. 02-954)).

⁷⁸ See *id.* (stating that "the concept of personal privacy under Exemption 7(C) is not some limited or 'cramped notion' of that idea" (quoting U.S. Dep't of Just. v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989))).

Congress that the definition of “personal privacy” in Exemption 7(C) was intended to include the privacy interests of a person’s family.⁷⁹ Such a reading by the Court is particularly ironic given more recent decisions—including *Argus Leader*—that purport to rely on “plain language” when interpreting FOIA’s exemptions.

Under *Favish*, requestors face a higher burden when seeking information potentially implicating an “unwarranted invasion of privacy.”⁸⁰ Contrary to the statute itself and previous case law,⁸¹ requestors must now show why they are requesting the information when Exemption 7(C) objections are made.⁸² Requestors must demonstrate a “significant”⁸³ public interest in seeking the information and that releasing the information is “likely to advance that interest.”⁸⁴ Information can be withheld if the requestor fails to fulfill either prong.⁸⁵

Many legal scholars argue that *Favish*’s two-pronged test fundamentally altered FOIA and further constrained the public’s ability to access information.⁸⁶ In many ways, *Favish* shifted the burden to the requesting party. By its terms, FOIA does not require the

⁷⁹ Justice Kennedy’s discussion on the definition of privacy did not include any reference to S. REP. NO. 89-813 (1965), which the Court used in *EPA v. Mink*, 410 U.S. 73 (1973), *U.S. Dep’t of Air Force v. Rose*, 425 U.S. 352 (1976), *Reporters Committee*, 489 U.S. 749, and other FOIA-related cases as the leading indicator of Congress’ intent when passing the FOIA. *See generally Favish*, 541 U.S. 157.

⁸⁰ *See generally Favish*, 541 U.S. 157.

⁸¹ [A]s a general rule, when documents are within FOIA's disclosure provisions, citizens should not be required to explain why they seek the information. A person requesting the information needs no preconceived idea of the uses the data might serve. The information belongs to citizens to do with as they choose. Furthermore, as we have noted, the disclosure does not depend on the identity of the requester. As a general rule, if the information is subject to disclosure, it belongs to all.

See id. at 172.

⁸² *Id.*

⁸³ *See id.* (defining “specific” as “more specific than having the information for its own sake”).

⁸⁴ *Id.*

⁸⁵ *See id.*

⁸⁶ Halstuk & Chamberlin, *supra* note 58, at 552–53, 560–64. *See also* Lauren Bemis, Note, *Balancing a Citizen’s Right to Know with the Privacy of an Innocent Family: The Expansion of the Scope of Exemption 7(C) of the Freedom of Information Act Under National Archives & Records Administration v. Favish*, 25 J. NAT’L ASS’N ADMIN. L. JUDGES 507, 540–43 (2005).

requestor to prove that a significant public interest lies in the information or that releasing the information will further that interest; it states instead that the government agency must demonstrate why the information can be withheld.⁸⁷ Lauren Bemis clearly articulated the resulting quandary: “How can an individual show that the government is acting improperly when they cannot have access to the documents to prove impropriety? The courts have created a catch-22 for requestors.”⁸⁸ When assessing the combined impact of *Reporters Committee* and *Favish*, Martin E. Halstuk and Bill F. Chamberlin noted:

[T]he Supreme Court has created [a] FOIA-related privacy framework that has reset the balance significantly in favor [of] privacy over disclosure. Taken as a whole, the Court-crafted privacy principles create [an] irrebuttable presumption of nondisclosure that stands in stark contrast to FOIA’s voluminous legislative record. . . .

Congress has repeatedly reiterated the statute’s strong presumption of government openness, and the Supreme Court had consistently recognized this principle for more than two decades after the FOIA’s enactment. The Court’s current FOIA privacy framework is the product of judicial overreaching grounded in historical revisionism that is clearly at odds with the bedrock democratic principles of accountability and transparent governance in an open society, as envisioned by FOIA’s framers forty years ago.⁸⁹

IV. CAN THE COURT CORRECT ITS COURSE?

Perhaps now-Chief Justice John Roberts was paying attention when legal scholars excoriated the Rehnquist Court’s decisions in *Reporters Committee* and *Favish*. His 2011 majority opinion in *FCC v. AT&T Inc.*⁹⁰ prevented Exemption 7(C) from being further

⁸⁷ See 5 U.S.C. § 552(a)(8).

⁸⁸ Bemis, *supra* note 86, at 540.

⁸⁹ Halstuk & Chamberlin, *supra* note 58, at 563–64.

⁹⁰ 562 U.S. 397, 407–09 (2011).

expanded. Just like *Reporters Committee* and *Favish*, AT&T again turned on the meaning of one word: “personal” in the phrase “personal privacy.”⁹¹ In this case, AT&T argued that Exemption 7(C) prevented disclosure of “[a]ll pleadings and correspondence”⁹² relating to an FCC investigation into the company⁹³ because “personal” is the adjective form of the term “person,” which Congress defined in the Administrative Procedure Act to include corporations.⁹⁴ The Court unanimously rejected this argument.⁹⁵

Justice Roberts, writing for the majority, opined that adjectives do not always reflect the meaning of their corresponding nouns.⁹⁶ Furthermore, he wrote that “person” was defined in FOIA, but “personal” was not and thus looked at the word’s “ordinary meaning.”⁹⁷ Without making reference to a dictionary, Justice Roberts explained that “[p]ersonal’ ordinarily refers to individuals”⁹⁸ and is not generally used to describe corporate entities’ actions, feelings, communications, characteristics, or thoughts. “In fact, we often use the word ‘personal’ to mean precisely the *opposite* of business related.”⁹⁹ This interpretation of the word “personal” made even greater sense, Justice Roberts asserted, when looking at the terms surrounding it.¹⁰⁰ “‘Personal’ in the phrase ‘personal privacy’ conveys more than just ‘of a person.’ It suggests a type of privacy evocative of human concerns—not the sort usually associated with an entity like, say, AT&T.”¹⁰¹ Lastly, Justice Roberts inferred the purpose of Exemption 7(C) by examining the entire statute, reviewing the exemption’s legislative and judicial history, and comparing Exemption 7(C) to FOIA’s other exemptions relating to privacy and financial interests.¹⁰² He concluded

⁹¹ *See id.* at 405–09.

⁹² *AT&T Inc. v. FCC*, 582 F.3d. 490, 493 (2009), *rev’d sub nom.* *FCC v. AT&T*, 562 U.S. 397 (2011).

⁹³ *See* Brief for Respondent AT&T Inc. at 4, *FCC v. AT&T Inc.*, 562 U.S. 397 (2010) (No. 09-1279).

⁹⁴ *See also AT&T*, 562 U.S. at 497.

⁹⁵ *See id.*

⁹⁶ *See id.* at 402–03 (giving numerous examples of such words).

⁹⁷ *Id.* at 403 (quoting *Johnson v. United States*, 559 U.S. 133, 138 (2010)).

⁹⁸ *Id.*

⁹⁹ *Id.* at 403–04.

¹⁰⁰ *Id.* at 405–07.

¹⁰¹ *Id.* at 406.

¹⁰² *See id.* at 406–08 (discussing how the creation of Exemption 7(C), the Court’s precedents, and Exemptions 4 and 6 all support an understanding of “personal

that Exemption 7(C) applied solely to individual people, not corporations.¹⁰³

Although Justice Roberts' rigorous analysis of Exemption 7(C) emphasized FOIA's legislative intent, it did not place adequate weight on the statute's central purpose. Nonetheless, *AT&T* stands out when compared with *Reporters Committee* and *Favish*. Journalists, watchdog organizations, and other civil society groups filed amicus briefs arguing that corporate wrongdoing would be shielded from public scrutiny were the Court to construe "personal" to include private corporations: "Recognizing corporate personal privacy would 'result in the withholding of agency records to which the public should have access, including records documenting corporate malfeasance.'"¹⁰⁴ Ultimately, Justice Roberts' decision prevented a further watering down of Exemption 7(C), yet it could not undue the harm *Reporters Committee* had inflicted.¹⁰⁵

Less than a week after deciding *AT&T*, the Court issued its decision in *Milner v. Department of the Navy*.¹⁰⁶ There, the Court narrowed the reach of Exemption 2, which prevents the disclosure of information "related solely to the internal personnel rules and practices of an agency."¹⁰⁷ After *Rose*, lower courts had established two differing interpretations of the exemption, often dubbed as "Low 2" and "High 2."¹⁰⁸ The narrower "Low 2" exemption adopted a strict construction

privacy" that does not include corporations); see also Maeve E. Huggins, *Don't Take It Personally: Supreme Court Finds Corporations Lack Personal Privacy under FOIA Exemptions*, 19 COMM.LAW CONSPECTUS 481, 506–07 (2011).

¹⁰³ See *AT&T*, 562 U.S. at 409–10.

We reject the argument that because 'person' is defined for purposes of FOIA to include a corporation, the phrase 'personal privacy' in Exemption 7(C) reaches corporations as well. The protection in FOIA against disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations. We trust that AT&T will not take it personally.

Id.

¹⁰⁴ Huggins, *supra* note 102, at 500–01 (citing Petition for Writ of Certiorari at 29, *FCC v. AT&T Inc.*, 562 U.S. 397 (2010) (No. 09-1279)).

¹⁰⁵ See RCFP REPORT, *supra* note 67.

¹⁰⁶ *Milner v. Dep't of Navy*, 562 U.S. 562 (2011).

¹⁰⁷ 5 U.S.C. § 552(b)(2).

¹⁰⁸ See Ashley E. Short, *The Taming of the "2": Milner v. Department of the Navy Signals the Curtain Call on Debates Surrounding the Scope of FOIA's Exemption*

approach to Exemption 2, protecting only documents related to personnel matters such as pay, pensions, benefits, vacation, etc.¹⁰⁹ The “High 2” interpretation relied on a broader construction of the exemption that applied to any internal documents that would “risk circumvention of the law” if disclosed.¹¹⁰

Justice Kagan, writing for the Court in an 8–1 decision, struck down the “High 2” interpretation as improper. She reasoned, “the only way to arrive at High 2 is by taking a red pen to the statute—‘cutting out’ some words and ‘pasting in others’ until little of the actual provision remains.”¹¹¹ Looking back at FOIA’s “‘goal of broad disclosure’ and insist[ing] that the exemptions be ‘given a narrow compass,’”¹¹² Justice Kagan acknowledged the plain meaning of the word “personnel” taken with congressional understanding results in a narrower interpretation consistent with FOIA’s legislative intent.¹¹³ As a result, the Court held Exemption 2’s phrase “personnel rules and practices” to mean “rules and practices dealing with employee relations or human resources.”¹¹⁴

Multiple times in FOIA cases, the Court has relied on its dictionary to determine the plain-language meaning of words. In *Milner*, Justice Kagan turned to a 1966 version of the Webster’s Third New International Dictionary for a definition of the word “personnel.”¹¹⁵ In *Reporters Committee*, Justice Stevens used a 1976 version of the Webster’s Third New International Dictionary when evaluating the language Exemption 7(C).¹¹⁶ In *AT&T*, Chief Justice Roberts cited a

2, 63 MERCER L. REV. 1419, 1425 (2012) (explaining how *Rose* did not make clear “whether Exemption 2 applies to situations where disclosure may risk circumvention of agency regulation”). Five years later in *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981), the D.C. Circuit Court of Appeals “determined that if an agency record is ‘predominately internal []’ and its disclosure ‘significantly risks circumvention of agency regulations or statutes,’ then Exemption 2 protects the material from mandatory disclosure.” *Crooker*, 670 F.2d at 1074.

¹⁰⁹ See *Milner*, 562 U.S. at 567.

¹¹⁰ See *id.*; Short, *supra* note 108, at 1420, 1426.

¹¹¹ *Milner*, 562 U.S. at 573 (quoting *Elliott v. Dep’t of Agric.*, 596 F.3d 842, 845 (D.C. Cir. 2010)).

¹¹² *Id.* at 571 (citing *Dep’t of Just. v. Tax Analysts*, 492 U.S. 136, 151 (1989)).

¹¹³ See *id.* at 569–72.

¹¹⁴ *Id.* at 570.

¹¹⁵ See *id.* at 569.

¹¹⁶ See *Dep’t of Just. v. Reps. Comm. for Freedom of the Press*, 489 U.S. 749, 763–64 (1989); see also *supra* notes 63–65 and accompanying text.

2002 version of the Webster’s Third New International Dictionary¹¹⁷ to argue that adjectives and nouns can take on different meanings and pointed to many examples, including the difference between the noun “crab” and the adjective “crabbed.”¹¹⁸ Nearly one decade later in *Argus Leader*, Justice Gorsuch pulled out the 1963 version of Webster’s Seventh New Collegiate Dictionary, among others, to determine “confidential” meant “private or secret” when Congress passed the law.¹¹⁹

But, we argue that the Court must consider the plain meaning of words against FOIA’s legislative history, as Justice Kagan did in *Milner*.¹²⁰ Doing so, rather than simply relying on the dictionary alone, “instead gives the exemption the ‘narrower reach’ Congress intended through the simple device of confining [Exemption 2]’s meaning to its words.”¹²¹ Justice Kagan’s approach rightly mirrors Justice Roberts’ in *AT&T*, where he examined the exemption against the backdrop of the entire law and its other exemptions.¹²² Justice Gorsuch’s approach in *Argus Leader* instead dismissed the statute’s legislative intent and FOIA’s central purpose, calling the D.C. Circuit’s reliance on “substantial competitive harm” a “selective tour through the legislative history.”¹²³

The Court’s lack of consistency in interpreting FOIA’s exemptions is troubling, even though some of the Court’s recent decisions had signaled a return toward the law’s central purpose. By rejecting the notion of a “High 2” in *Milner* and by narrowly construing “personal privacy” in Exemption 7(c), the Court limited the government’s ability

¹¹⁷ *FCC v. AT&T Inc.*, 562 U.S. 397, 402 (2011).

¹¹⁸ “The noun ‘crab’ refers variously to a crustacean and a type of apple, while the related adjective ‘crabbed’ can refer to handwriting that is ‘difficult to read,’” he wrote. *Id.*

¹¹⁹ *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2363 (2019).

¹²⁰ Conflicting congressional reports about the exemption led Justice Kagan to use a strict constructionist approach. She recognized that such an approach would adhere to the FOIA’s central purpose of broad disclosure with narrow exemptions, which she wrote was reinforced throughout the law’s congressional history. *See Milner*, 562 U.S. at 574 (explaining that “[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it . . . When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, we must choose the language.”) (citations omitted).

¹²¹ *Id.* at 573.

¹²² *See supra* pp. 251-53; Huggins, *supra* note 102.

¹²³ *See Argus Leader*, 139 S. Ct. at 2364.

to withhold information. These 2011 decisions have undoubtedly helped journalists, watchdogs, and the public access more information by narrowly interpreting aspects of two key exemptions, but those victories pale in comparison to the Court's most recent blow to the public's right to access information.

V. ARGUS LEADER UPENDS THE TREND TOWARD TRANSPARENCY

Although access advocates lauded *AT&T* and *Milner*, those celebrations were short-lived. The Court's streak of narrowly interpreting exemptions came to an abrupt halt in 2019 with Justice Gorsuch's wide-reaching interpretation of Exemption 4.¹²⁴ The exemption, which prevents the disclosure of "trade secrets and commercial or financial information [that is] obtained from a person and privileged or confidential,"¹²⁵ is routinely invoked in reverse FOIA cases, where plaintiffs attempt to prevent the government from releasing information.¹²⁶ It is important to note that *Argus Leader* did not begin as a reverse FOIA case.¹²⁷ Instead, the South Dakota newspaper requested access to USDA records regarding the federal food stamp program, known as SNAP.¹²⁸ Only after the government lost its case and agreed to disclose the requested information did the Food Marketing Institute intervene as a third party in an attempt to prevent the information from becoming public.¹²⁹

Hinging solely on the interpretation of the word "confidential," the Court's *Argus Leader* decision overturns nearly five decades of lower court precedent established by the D.C. Circuit in *National Parks and Conservation Association v. Morton*.¹³⁰ After the National Parks and Conservation Association filed a FOIA request with the National Parks Service to obtain financial data about park concession operations,¹³¹ the National Parks Service argued that the information was exempt

¹²⁴ See *id.* at 2366 (focusing on the definition of "confidential" under Exemption 4); 5 U.S.C. § 552(b)(4).

¹²⁵ 5 U.S.C. § 552(b)(4).

¹²⁶ See *e.g.*, *Argus Leader*, 139 S. Ct. at 2360–62.

¹²⁷ *Id.* at 2361.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ See *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

¹³¹ *Id.* at 766.

from disclosure under Exemption 4.¹³² The District Court for the District of Columbia granted summary judgment in favor of the National Parks Service and explained that—because both parties agreed the information was obtained from a person and was commercial and financial—its decision rested on the meaning of “confidential.”¹³³ Relying directly on FOIA’s Senate Report and on appellate court precedent, the district court held that information is “confidential” for the purposes of Exemption 4 when it is information that “would customarily not be released to the public by the person from whom it was obtained.”¹³⁴

The D.C. Circuit upheld the district court’s definition of “confidential” but reversed its judgment.¹³⁵ The appellate court reasoned:

[T]he test for confidentiality is an objective one. Whether particular information would customarily be disclosed to the public by the person from whom it was obtained *is not the only relevant inquiry* in determining whether that information is ‘confidential’ for purposes of [Exemption 4]. *A court must also be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption.*¹³⁶

The D.C. Circuit turned to the Senate Report—the court’s primary source for the statute’s legislative history—to ensure that its definition of “confidential” adhered closely to the FOIA’s central purpose.¹³⁷

¹³² See *Nat’l Parks & Conservation Ass’n v. Morton*, 351 F. Supp. 404, 406 (D.D.C. 1972).

¹³³ *Id.* at 406–07.

¹³⁴ See *id.* at 406 (citing S. REP. NO. 89-813, at 9 (1965)).

¹³⁵ *Nat’l Parks & Conservation Ass’n*, 498 F.2d at 770–71.

¹³⁶ *Id.* at 766–67 (emphasis added) (citations omitted).

¹³⁷ The reversal can be seen as part of the District of Columbia Circuit’s past effort to steer itself, its lower courts, and other appellate courts back toward a judicial administration of the FOIA that releases as much information as possible. See Theodore P. Seto, Recent Case, *Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), 88 HARV. L. REV. 470, 471–77 (1974) (citing other District of Columbia Circuit cases consistent with a philosophy of broad disclosure and explaining that “[t]he *National Parks* reversal reflected the [district courts]’s apparent belief that the circuit’s prior construction of subsection (b)(4) . . . exempted more than was necessary to protect against those harms which Congress . . . had attempted to avoid.”).

Using the House and Senate reports to determine Exemption 4's purpose, the D.C. Circuit provided the district court with detailed guidance to reevaluate the case on remand.¹³⁸ According to the D.C. Circuit, Exemption 4 was intended to ensure that the government can continue to obtain financial information *and* to protect the financial interests of the persons providing it.¹³⁹ More specifically, the court wrote:

[Exemption 4] recognizes the need of government policymakers to have access to commercial and financial data. Unless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials and the ability of the Government to make intelligent, well informed decisions will be impaired.

....

Apart from encouraging cooperation with the Government by persons having information useful to officials . . . [Exemption 4] protects persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication.¹⁴⁰

Because the district court had decided that the information “would customarily not be released to the public by the person from whom it was obtained,”¹⁴¹ it only needed to decide whether disclosure would “impair the Government's ability to obtain necessary information in the future” *or* “cause substantial harm to the competitive position of the person from whom the information was obtained.”¹⁴² If neither condition was met, disclosure would be warranted under FOIA's central purpose.

The decision established what came to be known as the *National Parks* test, which was quickly recognized as strongly upholding the FOIA's central purpose by placing a high burden on government

¹³⁸ See *Nat'l Parks & Conservation Ass'n*, 498 F.2d at 767–69 (first citing S. REP. NO. 89-813; then citing H.R. REP. NO. 89-1497).

¹³⁹ *Id.* at 767.

¹⁴⁰ *Id.* at 768.

¹⁴¹ *Id.* at 766.

¹⁴² *Id.* at 770.

agencies to justify the withholding of information.¹⁴³ More than half of the federal appellate circuits subsequently adopted the *National Parks* test to evaluate Exemption 4 cases.¹⁴⁴

Writing for a 6–3 majority in *Argus Leader*, Justice Gorsuch rejected the D.C. Circuit’s definition of “confidential” and abandoned the *National Parks* test.¹⁴⁵ Justice Gorsuch largely set aside the legislative history, looking at the word’s “‘ordinary, contemporary, common meaning’ when Congress enacted FOIA in 1966”¹⁴⁶—even though Congress made clear through its Senate and House reports that it understood “confidential” information to mean that which “‘would customarily not be released to the public by the person from whom it was obtained.’”¹⁴⁷

Justice Gorsuch cited multiple dictionaries when he concluded:

The term “confidential” meant then, as it does now, “private” or “secret.” Contemporary dictionaries suggest two conditions that might be required for information communicated to another to be considered confidential. In one sense, information communicated to another remains confidential whenever it is customarily kept private, or at least closely held, by the

¹⁴³ See Seto, *supra* note 137, at 477 (stating “[t]he test may therefore provide . . . that which the Congress hoped the Act would generally provide — ‘a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.’” (quoting S. REP. NO. 89-813, at 37)).

¹⁴⁴ For the Eighth Circuit Court of Appeals list of cases in its decision to use the *National Parks* test, see *Cont. Freighters, Inc. v. Sec’y of U. S. Dep’t of Transp.*, 260 F.3d 858, 861 (8th Cir. 2001) (first citing *OSHA Data/CIH, Inc. v. U.S. Dep’t of Lab.*, 220 F.3d 153, 162 n. 24, (3rd Cir. 2000); then citing *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1112–13 (9th Cir. 1994); then citing *Anderson v. Dep’t of Health Hum. Servs.*, 907 F.2d 936, 944–46 (10th Cir. 1990); then citing *Hercules, Inc. v. Marsh*, 839 F.2d 1027, 1029 (4th Cir. 1988); then citing *Gen. Elec. Co. v. U.S. Nuclear Regul. Comm’n*, 750 F.2d 1394, 1398 (7th Cir. 1984); then citing 9 to 5 *Org. for Women Off. Workers v. Bd. of Governors of Fed. Rsrv. Sys.*, 721 F.2d 1 *passim* (1st Cir. 1983); then citing *Cont’l Stock Transfer Tr. Co. v. S.E.C.*, 566 F.2d 373, 375 (2d Cir. 1977); and then citing *Cont’l Oil Co. v. Fed. Power Comm’n*, 519 F.2d 31, 35 (5th Cir. 1975)).

¹⁴⁵ See *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366.

¹⁴⁶ *Id.* at 2362 (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

¹⁴⁷ See *Nat’l Parks & Conservation Ass’n*, 498 F.2d at 766 (citing S. REP. NO. 89-813 at 9).

person imparting it. In another sense, information might be considered confidential only if the party receiving it provides some assurance that it will remain secret.¹⁴⁸

Put in simpler terms, Justice Gorsuch decided that something is “confidential” when it is “customarily kept private . . . by the person imparting it” and when “the party receiving it provides some assurance that it will remain secret.”¹⁴⁹ As a result, “[a]t least where commercial or financial information is both *customarily and actually treated as private by its owner* and *provided to the government under an assurance of privacy*, the information [at issue in the case] is ‘confidential’ within Exemption 4’s meaning.”¹⁵⁰

The Court’s decision to abandon the *National Parks* substantial harm requirement is particularly striking. Citing a case unrelated to FOIA, Justice Gorsuch reasoned that the Court cannot give Exemption 4 “anything but a fair reading.”¹⁵¹ He continued: “just as [the Court] cannot properly *expand* Exemption 4 beyond what its terms permit, [the Court] cannot arbitrarily *constrict* [Exemption 4] either by adding limitations found nowhere in its terms.”¹⁵² But Justice Gorsuch ignores the congressional intent that exemptions are to be construed as narrowly as possible while still protecting the relevant opposing interests. Removing *National Parks*’ substantial harm requirement increased the likelihood that information will be withheld under Exemption 4, which is inconsistent with FOIA’s central purpose. As a result, *Argus Leader* falls far short of protecting the “*fullest* responsible disclosure.”¹⁵³

Unraveling *National Parks*’ requirement of “substantial competitive harm” all but ensures an increase in reverse FOIA suits by parties seeking to prevent disclosure. *Argus Leader* dramatically reduced the government’s burden for withholding information,

¹⁴⁸ See *Argus Leader*, 139 S. Ct at 2363 (citing WEBSTER’S SEVENTH NEW COLLEGIATE DICTIONARY 174 (1962); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 476 (1961); *Confidential*, BLACK’S LAW DICTIONARY (rev. 4th ed. 1968); 1 OXFORD UNIVERSAL DICTIONARY ILLUSTRATED 367 (3d ed. 1961); WEBSTER’S NEW WORLD DICTIONARY 158 (1960)).

¹⁴⁹ *Id.* at 2363.

¹⁵⁰ *Id.* at 2366 (emphasis added).

¹⁵¹ *Id.* (quoting *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1138, 1143 (2018)).

¹⁵² *Id.* (citing *Milner v. Dep’t. of Navy*, 562 U.S. 562, 570–71).

¹⁵³ S. REP. NO. 89-813, at 38 (1965) (emphasis added).

encouraging any party who submits commercial or financial information to the government to claim it is exempt from disclosure as confidential information.¹⁵⁴ Such a low threshold shields a multitude of corporate and financial records from public scrutiny—the exact concern that amici alluded to in *AT&T*.¹⁵⁵ Absent any reform, the Court’s decision in *Argus Leader* upends any meaningful attempt at government transparency when corporations are involved in the government’s work.

Additionally, *Argus Leader* further affirms the right of third parties to intervene in FOIA cases.¹⁵⁶ After a FOIA request is filed, it is the government agencies that should decide whether information is protected by one of the statute’s exemptions.¹⁵⁷ Indeed, the Court recognized in *Chrysler Corp. v. Brown* that “the FOIA by itself protects [private organizations’] interest[s] . . . *only to the extent that th[e] interest[s] [are] endorsed by the agency collecting the information.*”¹⁵⁸ Government agencies, after considering the private organization’s concerns, have the ultimate authority to decide whether to disclose information—not the organizations themselves.¹⁵⁹ Even more, all of the exemptions, save Exemption 3, are permissive rather than mandatory; they grant the government the authority to release information covered by an exemption should it believe doing so will further FOIA’s central purpose.¹⁶⁰ As a result, had Congress wanted to provide the wide-reaching protection to confidential information inferred by the Court in *Argus Leader*, it could have specifically exempted that information by statute, thereby removing the agency’s discretion related to disclosure. *Argus Leader* ignores this important aspect of FOIA, with the Court instead substituting its judgment where Congress could have, but did not, act.¹⁶¹

It is important to also note that the Food Marketing Institute was not an original party in the case, which began with the *Argus Leader*’s

¹⁵⁴ *Argus Leader*, 139 S. Ct. at 2366.

¹⁵⁵ Petition for Writ of Certiorari at 48, *FCC v. AT&T Inc.*, 562 U.S. 397 (2011) (No. 09-1279).

¹⁵⁶ *Argus Leader*, 139 S. Ct. at 2362.

¹⁵⁷ See generally Freedom of Information Act, 5 U.S.C. § 552.

¹⁵⁸ See *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979) (emphasis added).

¹⁵⁹ *Id.* at 292–93; 5 U.S.C. § 552(a)(8).

¹⁶⁰ See *Chrysler Corp.*, 441 U.S. at 293–94, 284; 5 U.S.C. § 552(a)(8).

¹⁶¹ See *Argus Leader*, 139 S. Ct. at 2366.

request to obtain the store-level SNAP data.¹⁶² The organization only entered the dispute after the U.S. Department of Agriculture declined to appeal the district court's order to disclose and sent notice of its decision to release the requested information.¹⁶³ Because of this, the newspaper rightly questioned the Food Marketing Institute's standing, noting the nature of FOIA's exemptions would permit the government to release the information even if it were deemed to cause substantial competitive harm.¹⁶⁴ But Justice Gorsuch concluded that Article III of the Constitution gave the organization this standing because the government assured the court it wouldn't release the information even if it were allowed.¹⁶⁵ Such an approach to third-party intervention contravenes FOIA's central purpose and encourages the government and private entities to conspire in the name of limiting disclosure.

As a result of the Court's gradual expansion of FOIA's exemptions, its recent decision broadening the definition of "confidential," and its increasing assent to third-party intervention, the statute's effectiveness has been seriously constrained. If we are to preserve the statute's congressional intent and our nation's commitment to government transparency, serious reforms are needed to prevent corporations and other entities from abusing the statute's exemptions to preclude the public from accessing government information.

VI. FIXING FOIA: OPTIONS FOR RESTORING THE PUBLIC'S ACCESS TO INFORMATION

The Supreme Court's decision in *Argus Leader* has the potential to severely limit the public's access to information by allowing third-party intervenors to claim information is "confidential" under the gaping hole created in Exemption 4. However, this need not be the case. After examining public records statutes here in the United States and abroad, it is clear that a number of actions could be taken—either

¹⁶² *Id.* at 2361.

¹⁶³ *Id.* at 2362.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (first citing Brief for U.S. as Amicus Curiae Supporting Petitioner at 35, 139 S. Ct. 2356 (No. 18-481); then citing Transcript of Oral Argument at 18-22, 139 S. Ct. 2356 (No. 18-481); and then citing *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 152-53).

judicially or legislatively—to reaffirm FOIA’s central purpose and restore the presumption that government records are open to the public. The most wide-reaching of those options would be to prevent third-party intervention in FOIA cases through judicial or legislative action, effectively forbidding reverse FOIA lawsuits. More narrowly, Congress could amend FOIA to clarify the rights of third-party intervenors—placing strict parameters on their ability to intervene as have countries like Canada, South Africa and Uganda.¹⁶⁶ In the alternative, Congress could amend FOIA to clarify the meaning of “confidential” by legislatively overriding the Supreme Court’s decision in *Argus Leader*. As will be discussed, a review of more than 100 freedom of information laws from around the world suggests few, if any, laws rely on a definition of “confidential” as broad as the one adopted by the Court in *Argus Leader*.

A. *Forbidding Third-Party Intervention to Oppose Disclosure*

Because FOIA did not explicitly create a right of intervention to oppose disclosure, a strong argument could be made that either Congress or the Supreme Court could forbid third-party intervention. Although this is a dramatic departure from the current jurisprudence, it would clearly further FOIA’s central purpose of promoting the fullest possible disclosure of information.¹⁶⁷ Further, because all but Exemption 3 are permissive exemptions, allowing the government to choose to disclose information even when it falls within an exemption, a third party’s right to intervene provides no guaranteed remedy against disclosure.¹⁶⁸

Facebook recently attempted to prevent the FTC from releasing annual privacy assessments mandated by Facebook’s consent decree with the FTC.¹⁶⁹ Facebook relied on Federal Rule of Civil Procedure

¹⁶⁶ Access to Information Act, R.S.C. 1985 c A-1, § 27 (Can.) [Hereinafter “Access to Infor. Act (Can.)”]; Promotion of Access to Information Act 2 of 2000 §§ 47-49 (S. Afr.) [Hereinafter “Access to Infor. Act (S. Afr.)”]; Access to Information Act 2005, Act No. 6, §§ 35-36, (Uganda), <https://www.parliament.go.ug/documents/1254/acts-2005> (select “Access-To-Information-Act-2005.Pdf” to view) [Hereinafter “Access to Infor. Act (Uganda)”].

¹⁶⁷ S. REP. NO. 89-813, at 38.

¹⁶⁸ 5 U.S.C. §522(a)(8)-(b).

¹⁶⁹ Elec. Priv. Info. Ctr. v. FTC, No. 18-00942, 2020 BL 225877 (D.D.C. June 16, 2020).

24 (FRCP) (the same provision FMI relied on in *Argus Leader*) to request intervention.¹⁷⁰ FRCP 24 creates several conditions for intervention by right, including “an unconditional right to intervene by a federal statute.”¹⁷¹ FOIA does not create such a right.¹⁷² Intervenor like Facebook must instead rely on the second clause, which permits permissive intervention when a party “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.”¹⁷³ In FOIA litigation, however, where the government’s position is one opposing disclosure, it is hard to imagine how it would not adequately represent a third party’s interest against disclosure. Particularly under Exemption 4, as EPIC argues in its Motion to Oppose Intervention, the intervening party’s interests nearly always directly overlap the government’s interests in asserting non-disclosure.¹⁷⁴ Recall that because Exemption 4 is a permissive exemption, the government could choose to release the information even if it were covered by the exemption.¹⁷⁵ As a result, a strong argument can be made that third-party intervention should not be permitted in cases involving Exemption 4 because the government’s interest in opposing disclosure protects and represents the third party’s interest.

One state appellate court in the United States has clearly ruled that its state freedom of information law does not permit third-party intervention. In *Hunter Health Clinic v. Wichita State University*, the Kansas Court of Appeals held that a non-profit had no standing to file suit to prevent a public agency from disclosing public records it claimed contained private information.¹⁷⁶ In so ruling, the court ruled the Kansas Open Records Act was a disclosure statute¹⁷⁷—akin to the Supreme Court’s ruling in *Chrysler*.¹⁷⁸ The court noted:

¹⁷⁰ *Id.*

¹⁷¹ FED. R. CIV. P. 24(a)(1).

¹⁷² *See generally* 5 U.S.C. § 552.

¹⁷³ FED. R. CIV. P. 24(a)(2).

¹⁷⁴ Plaintiff’s Opposition to Motion by Facebook, Inc. to Intervene at 4, Elec. Priv. Info. Ctr. v. FTC (D.D.C. filed June 14, 2019) (No. 18-0094), 2020 BL 225877.

¹⁷⁵ 5 U.S.C. § 552(a)(8)-(b).

¹⁷⁶ 362 P.3d 10, 11 (2015).

¹⁷⁷ *Id.* at 12.

¹⁷⁸ *Chrysler Corp. v. Brown*, 441 U.S. 281, 285 (1979).

[A] violation under KORA may occur when a public agency denies access to the public record. . . . Hunter was not an entity or person whose request for records under the act, i.e., the public record, has been denied or impeded. Hunter’s request to the district court was to prevent WSU from disclosing purportedly private records. On this basis, Hunter lacked statutory standing to make a KORA claim.¹⁷⁹

In many ways, the Kansas Court of Appeals’ approach in *Hunter* is quite similar to the Supreme Court’s approach in *Chrysler*. The Kansas Court goes further, however, noting the legislative declaration of KORA’s purpose controls:

[T]he legislature has declared it to be “the public policy of the state that public records shall be open for inspection by any person unless otherwise provided by this act.” The legislature also directed that KORA “shall be liberally construed and applied to promote such policy. . . .” The legislature’s intent was “to ensure public confidence in government by increasing the access of the public to government and its decision-making processes.” Hunter’s construction of KORA does not promote the public policy determined by the legislature.¹⁸⁰

Given the similarity between KORA’s public policy and FOIA’s central purpose, it is hardly a stretch to suggest that such a prohibition against third-party intervention at the federal level would not be equally beneficial in promoting a strong culture of disclosure.

B. Limiting the Rights of Third-Party Intervenors

Assuming the Supreme Court or Congress is unwilling to prohibit third-party intervention in FOIA cases, steps to limit the rights of third-party intervenors could prove effective in promoting access to public records. A review of 128 countries’ freedom of information laws

¹⁷⁹ *Hunter Health Clinic*, 362 P.3d at 16.

¹⁸⁰ *Id.* at 17 (citations omitted) (first citing KAN. STAT. ANN. § 45-216 (West, Westlaw through 2021 Reg. Legis. Sess.); then quoting *Data Tree, LLC. v. Meek* 109 P.3d 1226, 1233 (2005)).

catalogued in the Centre for Law and Democracy's Right to Information Ratings database revealed that although some countries specifically permit third-party intervention in cases involving public records requests, they do so in much narrower ways than the United States.¹⁸¹ Often this takes the form of either limiting when and how parties can intervene or narrowly outlining when information would be exempt from release. In most instances, these limits are outlined in the country's FOI law.

Clear statutory guidance can help the courts determine when third-party intervention is likely to unduly inhibit the public's right to information. In its Access to Information Act, Canada outlines the standard for third-party intervention in Section 27.¹⁸² It permits limited intervention through a mandatory system of notice in cases involving trade secrets, commercially sensitive, and confidential information—information like that which was it issue in *Argus Leader*.¹⁸³ In addition,

¹⁸¹ See generally CTR. FOR L. & DEMOCRACY, *The RTI Rating*, <https://www.rti-rating.org/> (last visited Apr. 21, 2021).

¹⁸² Canada is not the only country whose FOI law permits third-party intervention. However, it does so in a way that does not create disproportionately broad exemptions for confidential information. See Access to Infor. Act (Can.), *supra* note 166. Uganda's law appears to permit third-party intervention once the government has ruled in favor of disclosure, but it is unclear what would be needed to overcome the disclosure. See Access to Infor. Act (Uganda), *supra* note 166. South Africa's law, which also permits third-party intervention, is written in a way that creates a broad exemption with mandatory protections for information classified as trade secrets, confidential or financial in nature. See Access to Infor. Act (S. Afr.), *supra* note 166, § 9. India's law is similar to South Africa's. See Right to Information Act, 2005, § 11 (India).

¹⁸³ The law reads, in part:

- 20 (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Part that contains
- (a) trade secrets of a third party;
 - (b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;
 - (b.1) information that is supplied in confidence to a government institution by a third party for the preparation, maintenance, testing or implementation by the government institution of emergency management plans within the meaning of section 2 of the Emergency Management Act and that concerns the vulnerability of the third party's buildings or other structures, its

the Canadian statute provides stringent time limits to prevent delays in access—one of the key issues Stewart and Sanders identified with third-party intervention.¹⁸⁴

Canada is not alone in permitting third-party intervention while still establishing statutory guidance on how that intervention can take place. A number of other countries, many of whom have enacted their freedom of information laws long after the United States enacted

networks or systems, including its computer or communications networks or systems, or the methods used to protect any of those buildings, structures, networks or systems;

(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or

(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

Product or environmental testing

(2) The head of a government institution shall not, pursuant to subsection (1), refuse to disclose a part of a record if that part contains the results of product or environmental testing carried out by or on behalf of a government institution unless the testing was done as a service to a person, a group of persons or an organization other than a government institution and for a fee.

Access to Infor. Act (Can.), *supra* note 166, § 20. Communicated information was considered confidential if (1) the information is customarily kept private, and (2) the party receiving it provided some assurance that it will remain private. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2363 (2019).

(1) [T]he communications must originate in a confidence that they will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury that would result to the relationship by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

R v. Gruenke, [1991] 3 S.C.R. 263, 265 (Can.).

¹⁸⁴ “The ability of private companies to intervene in discretionary matters bestows upon them an enormous procedural advantage to run out the clock on requesters, employing attorneys at costs that private citizens or freedom of information advocates simply cannot match.” Stewart & Sanders, *supra* note 16, at 28.

FOIA, include such provisions.¹⁸⁵ The list includes a number of common law countries, including Canada, South Africa, and India, as well as civil law countries. Section 11 of India's Right to Information Act (2005) provides specific guidance to government officials tasked with responding to information requests:

Where a[n] . . . Information Officer . . . intends to disclose any information . . . which relates to or has been supplied by a third party and has been treated as confidential by that third party, the . . . Information Officer . . . shall, within five days from the receipt of the request, give written notice to such third party of the request and of the fact that the . . . Information Officer . . . intends to disclose the information [T]he third party shall, within ten days from the date of receipt of such notice, be given the opportunity to make representation against the proposed disclosure.¹⁸⁶

¹⁸⁵ Dozens of countries have provisions within their FOI statutes that outline the processes for how and to what extent third parties can intervene in information requests. *E.g.*, Access to Infor. Act (S. Afr.), *supra* note 166, §§ 34–37, 43, 47–49, 63–65, 69, 71–78; Access to Infor. Act (Can.), *supra* note 166, art. 20, 27–29, 43–44 (1985); Access to Infor. Act (Uganda), *supra* note 166, §§ 27, 28(1), 28(2)(b), 35–36, 38; Freedom of Information Act 2000 c. 36, §§ 43, 44(1)(a), 57–61, 79 (Eng.); Gyôsei kikan no hoyû suru jôhō no kōkai ni kansuru hōritsu [Act on Access to Information Held by Administrative Organs], Act No. 42 of 1999, art. 5–7, 13, 19, 20 (Japan), *translated in* (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp/law/detail_main?re=02&vm=02&id=99; [Access to Public Administration Files Act], Lov om offentlighed i forvaltningen (Offentlighedsloven), Lov nr. 572 af 19 Dec. 1985 (Den.), <https://www.retsinformation.dk/eli/ta/1985/572> (§§ 1(2), 1(3), 12(1), 13(1)(5), 13(1)(6), 15(2)); Gesetz zur Regelung des Zugangs zu Informationen des Bundes [Informationsfreiheitsgesetz] [IFG] [Freedom of Information Act] Sep. 5, 2005, BGBl I at 2722, last amended by Verordnung (V), BGBl I at 1328, art. 44 (Ger.), <http://www.gesetze-im-internet.de/ifg/> (§§ 2(2), 3(4), 3(7), 4(1), 5, 6, 7(1), 7(2), 8 of English translation); Right to Information Act, 2005, §§ 7(7), (8)(1)(d), 11, 19(4) (India); Freedom of Information Act 2014 (Act No. 30/2014) § 24, 35–37 (Ir.), <http://www.irishstatutebook.ie/eli/2014/act/30/enacted/en/html>; Access to Information Act, No. 31 (2016) KENYA GAZETTE SUPPLEMENT No. 152 § 6(1)(e), 15, 25(2)(g); Ley General de Transparencia y Acceso a la Información Pública [LGTAIP] art. 120, 144, 162, 169, 170, 178, Diario Oficial de la Federación [DOF] 04-05-2015, últimas reformas DOF 13-08-2020 (Mex.).

¹⁸⁶ Right to Information Act, 2005, § 11(1)-(2) (India).

South Africa's law contains an entire chapter (Part 2, Chapter 5) that outlines the procedure when third-party interests are implicated in a request for public information, including that a decision on access must be made within 30 days of notifying third parties, unless an appeal is lodged.¹⁸⁷ These kinds of procedural protections would have prevented the eleventh-hour intervention of Food Marketing Institute, which would ultimately lower litigations costs for plaintiffs like the *Argus Leader*—an important step toward ensuring the public's access to government information.

C. Amending FOIA to Narrow the Definition of Confidential

Many countries' laws contain exemptions for trade secrets and other forms of business or financial information. But, unlike the American law, these FOI laws clearly articulate standards defining what constitutes "confidential" information. South Africa's exemption only covers information where the disclosure could "reasonably be expected" to disadvantage the third party.¹⁸⁸ At a minimum, this requires some showing of potential harm—unlike the current American standard.

Canada's test for whether information should be protected as confidential—outlined in Section 20 and subsequent case law—is much more stringent than the standard the U.S. Supreme Court articulated in *Argus Leader*. Rather than adopting a plain-language meaning of confidential, which the U.S. Supreme Court took to mean "private" or "secret," the Canadian courts went further, requiring the evaluation of the content, purpose, and circumstances in which the information was compiled and communicated.¹⁸⁹ The Canadian Supreme Court also established standards for judges to use when evaluating appeals from third parties.¹⁹⁰ These standards include requiring judges to narrowly construe exemptions, requiring third parties to demonstrate they meet an exemption, and requiring third parties claiming an exemption due to harm to demonstrate a link between the disclosure and a real harm.¹⁹¹ Authored by Justice Thomas

¹⁸⁷ See Access to Infor. Act (S. Afr.), *supra* note 166, §§ 47–49.

¹⁸⁸ See Access to Infor. Act (S. Afr.), *supra* note 166, § 36(1)(c)(i).

¹⁸⁹ See *R v. Gruenke*, [1991] 3 S.C.R. 263, 265 (Can.); see also *supra* note 183 (quotation from *Gruenke*).

¹⁹⁰ *Gruenke*, 3 S.C.R. at 265.

¹⁹¹ See *Merck Frosst Ltd. v. Canada*, [2012] 1 S.C.R. 23 (Can.).

Cromwell, the *Merck Frosst* decision makes it much harder for third-party intervenors to prevail, and for good reason: “Refusing to disclose information for fear of public misunderstanding undermines the fundamental purpose of access to information legislation; the public should have access to information so that they can evaluate it for themselves.”¹⁹² In many ways, the *Merck* standard parallels the standard the Eighth Circuit applied in *Argus Leader* when it ruled in favor of disclosure.

In March 2021, Senators Charles Grassley (R-Iowa), Patrick Leahy (D-Vt.), and Dianne Feinstein (D-Cal.) introduced a bipartisan bill to restore the meaning of ‘confidential’ in light the Court’s *Argus Leader* decision.¹⁹³ The bill, while also addressing other FOIA issues, includes a provision that would reinstate the D.C. Circuit’s definition of ‘confidential’ as outlined in its *National Parks* decision. If passed, the bill would codify the substantial harm standard¹⁹⁴ and realign Exemption 4 more closely with FOIA’s central purpose. It does not, however, address the ability of third parties to intervene in FOIA litigation.

VII. CONCLUSION

Globally, the right to information dates back to the 18th century,¹⁹⁵ but the majority of its history is remarkably recent. In 1990, the United States was among only twelve countries with a freedom of information

¹⁹² *Id.* para. 224.

¹⁹³ See Open and Responsive Government Act of 2021, S. 742, 117th Cong. (2021); see also Grassley, Leahy, Feinstein Introduce Bill to Reinforce Transparency in Wake of Supreme Court FOIA Decision & Recent Regulations, CHUCK GRASSLEY (Mar. 15, 2021), <https://www.grassley.senate.gov/news/news-releases/grassley-leahy-feinstein-introduce-bill-to-reinforce-transparency-in-wake-of-supreme-court-foia-decision-and-recent-regulations>.

¹⁹⁴ The bill would revise Exemption 4 to exempt trade secrets and commercial or financial information obtained from a person and privileged or confidential, provided that the term “confidential” means information that, if disclosed, would likely cause substantial harm to the competitive position of the person from whom the information was obtained. See S.B. 742, § 2.

¹⁹⁵ Enacted in 1766, Sweden’s Press Act gets credit for being the oldest freedom of information law in the country. *Sweden: International Focus*, UNIV. COLLEGE LONDON: THE CONSTITUTION UNIT, <https://www.ucl.ac.uk/constitution-unit/research/research-archive/foi-archive/international-focus/sweden> (last visited Apr. 23, 2021).

law. A majority of laws were adopted in the 1990s and 2000s in the new post-Soviet democracies of Eastern Europe and burgeoning democracies in South America, Africa and Southeast Asia. Often, they were drafted in the spirit—if not letter—of FOIA,¹⁹⁶ which has been called “one of the United States’ leading legal exports abroad.”¹⁹⁷ Modern FOI laws have substantively outpaced their American counterpart at ensuring access to government information,¹⁹⁸ even though its presumption of openness is often credited with establishing a minimum expectation of access and transparency: “the decisions and policies—as well as the mistakes—of public officials are always subjected to the scrutiny and judgments of the people.”¹⁹⁹ Critics have convincingly argued FOIA has failed to keep up with the rest of the world.²⁰⁰ Because developing democracies have historically looked to the United States as a role model,²⁰¹ aspiring to emulate its constitutional protections for a free press and statutory commitment to open government, recent trends in opposition to disclosure—sure to be

¹⁹⁶ Ackerman & Sandoval-Ballesteros, *supra* note 18, at 111.

¹⁹⁷ Pozen, *supra* note 56, at 1106.

¹⁹⁸ In the Centre for Law and Democracy’s most recent ranking of these laws, the United States scored 83, tying it with Romania and ranking it 72nd in the world.

[T]here are significant problems with the USA’s access regime which negatively impact the right to information in that country. For instance, exceptions within the law are in many instances not harm tested and there is only a very limited public interest override. The United States also lacks a specialised [sic] appeals body and, while American courts have been somewhat good in defending the right to information, they cannot do the job as effectively or expeditiously as an independent appeals body.

United States, GLOB. RIGHT TO INFO. RATING, <https://www.rti-rating.org/country-data/United%20States/> (June 2016).

¹⁹⁹ When President Johnson—hardly an advocate for transparency—initially signed the FOIA, this quote was written at the bottom of the signing statement, but it had been crossed out. See Nate Jones, *How to Ensure We Have a More Open, Accountable Government*, WASH. POST (Mar. 13, 2019), <https://www.washingtonpost.com/outlook/2019/03/13/how-ensure-we-have-more-open-accountable-government/>.

²⁰⁰ Clark Merrefield, *How Business Interests Shaped US Public Records Law: Q&A with Jeannine Relly*, JOURNALIST’S RES. (June 28, 2019), <https://journalistsresource.org/studies/society/news-media/foia-public-records-business-interests/>.

²⁰¹ John McCain, Opinion, *America Must Be a Good Role Model*, FIN. TIMES (Mar. 18, 2008), <https://www.ft.com/content/c7e219e2-f4ea-11dc-a21b-000077b07658>.

further fueled by the Supreme Court's *Argus Leader* decision—are particularly troublesome.

Given the United States' historical role in setting an aspirational standard for other democratic nations, the expansion of Exemption 4, combined with an increase in third-party intervention, suggest the tide has turned away from FOIA's central purpose. The Court's plain reading of the word "confidential" threatens several of access advocate Toby Mendel's guiding principles for FOI laws, including maximum disclosure and limited scope of exceptions as well as disclosure taking precedence.²⁰² In fact, the current setup almost guarantees that secrecy will reign once a third party asserts information is confidential. Similarly, it flies in the face of long-standing tradition to construe exemptions narrowly in favor of broad disclosure. Without a proper legislative²⁰³ or judicial fix, the Court's broad interpretation of the FOIA Exemption 4 serves as a prime example for other countries—countries looking to increase secrecy and decrease accountability. Whether it means limiting the scope of third-party intervention, narrowing the definition of confidential information—as other countries have done—or enacting a statutory prohibition on third-party intervention in access to information cases as has been done in some U.S. states, judges and legislators must push back against corporate efforts to close off access to government records. In the meantime, transparency advocates will have to rely on other democracies to lead the way in terms of open government.

²⁰² MENDEL, *supra* note 18, at 33, 34, 39.

²⁰³ Shortly after the decision, U.S. Senator Charles Grassley (R-Iowa) said he was "working on legislation to address these developments and to promote access to government records. Americans deserve an accountable government, and transparency leads to accountability." 165 CONG. REC. S4587 (daily ed. June 27, 2019) (statement of Sen. Charles Grassley), <https://www.congress.gov/116/crec/2019/06/27/CREC-2019-06-27-pt1-PgS4587-5.pdf>. To date, no such legislation has been enacted.

FAKE NEWS AND THE COVID-19 PANDEMIC

Russell L. Weaver*

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I. INTRODUCTION

“Fake News,” or disinformation, has existed since the beginning of time.¹ Octavian spread false allegations against Mark Anthony, leading to Anthony being denounced as a traitor in ancient Rome;² George

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¹ See, e.g., Anthony L. Fargo, *A Federal Shield Law that Works: Protecting Sources, Fighting Fake News, and Confronting Modern Challenges to Effective Journalism*, 8 J. INT’L MEDIA & ENT. L. 35, 59 (2018) (referencing “anti-Semetic tales in the twelfth century to Nazi propaganda before and during World War II”) (footnote omitted); Thomas Rid, *Can Russia Use the Coronavirus to Sow Discord Among Americans?*, N.Y. TIMES (Mar. 16, 2020),

<https://www.nytimes.com/2020/03/16/opinion/russian-interference-coronavirus.html>; and RUSSELL L. WEAVER, FROM GUTENBERG TO THE INTERNET: FREE SPEECH, ADVANCING TECHNOLOGY AND THE IMPLICATIONS FOR DEMOCRACY 141–42 (Carolina Acad. Press, 2nd ed., 2019).

² See Karl Manheim & Lyric Kaplan, *Artificial Intelligence: Risks to Privacy and Democracy*, 21 YALE J.L. & TECH. 106, 144 (2019) (“Fake news in ancient Rome may have sealed the fate of Mark Antony and Cleopatra.”); Carol A. Watson, *Information Literacy in a Fake/False News World: An Overview of the Characteristics of Fake News and its Historical Development*, 46 INT’L J. LEGAL

Washington was alleged to have been a British loyalist and traitor during the American Revolution;³ the Nazis and the Japanese disseminated propaganda and disinformation to U.S. troops during World War II;⁴ and the U.S. government fed disinformation to anti-war protestors during the Vietnam War.⁵

INFO. 93, 94 (2018).

[I]n ancient Rome the rivalry between Mark Antony and Octavian (Julius Caesar's adopted son) escalated due to false news. In order to damage Antony's reputation, Octavian deployed devious propaganda tactics to spread fake news about him. Octavian distributed coins with slogans describing Antony as a drunk and a puppet of Cleopatra's. Octavian even purported to have a copy of Antony's official will, although historians still debate its veracity. He inflamed the emotions of politicians with anti-Cleopatra prejudices by reading the will aloud in the Senate and claiming Antony wanted to be buried with the Egyptian pharaohs. The Senate was outraged, proclaiming Antony a traitor and declaring war on Cleopatra. The public shaming was so humiliating, Antony killed himself after his defeat in the battle of Actium.

Watson, *supra*.

³ See Watson, *supra* note 2, at 95.

In the 1700s even America's founding father, George Washington was the victim of fake news. Someone published pamphlets that included letters supposedly written by Washington to his family and describing that he was miserable during the revolutionary war and lamenting that the revolutionary war was a mistake. The fake news was very convincing, purportedly an excellent forgery of his writing style. Even George Washington admitted he was impressed with how well the letters mimicked his writing. Unfortunately, the letters were influential in persuading some members of the public that Washington was a British loyalist. The letters haunted him throughout his presidency and tarnished his reputation. Side note, the letters were probably written by John Randolph of Virginia.

Id.

⁴ See Henry Mark Holzer, *Why Not Call It Treason?: From Korea to Afghanistan*, 29 S.U. L. REV. 181, 210–12 (2002).

⁵ See Stephen Dycus, *The Role of Military Intelligence in Homeland Security*, 64 LA. L. REV. 779, 784 (2004) (“In the late 1960s, the Pentagon compiled personal information on more than 100,000 politically active Americans in an effort to quell civil rights and anti-Vietnam War demonstrations and to discredit protestors. The Army used 1,500 plainclothes agents to watch demonstrations, infiltrate organizations, and spread disinformation.”) (footnotes omitted).

Fake news has become a serious problem today because of the rapid evolution of speech technologies.⁶ For centuries, ordinary people had limited capacity to communicate their ideas.⁷ While the printing press has existed since the fifteenth century, and was later followed by even more powerful speech technologies, all of those technologies have historically been controlled by “gatekeepers” – essentially, rich or powerful individuals (e.g., the owners of the technologies or editors or producers of media outlets).⁸ Ordinary people could try to convince the owners or gatekeepers of technology to air their ideas; but, if the gatekeepers refused, people had few communication options at their disposal.⁹ They could give speeches, but could thereby reach only a limited number of people.¹⁰ They could also produce written documents, but they faced substantial distribution problems.¹¹ Today, the internet has transformed communication by giving everyone the ability to mass communicate.¹² Of course, this increased capacity is a double-edged sword.¹³ Just as the internet has made it easier for people to engage in politics, and political debate, and to disseminate their ideas widely, it has also made it easier for them to disseminate disinformation,¹⁴ and to easily transmit disinformation across international borders and indeed around the world.¹⁵

The COVID-19 pandemic has set off a massive wave of disinformation.¹⁶ As one commentator noted, we have never “faced a pandemic at a time when humans are as connected and have as much access to information as they do now.”¹⁷ Indeed, the World Health Organization has warned of an “infodemic” as the purveyors of

⁶ See WEAVER, *supra* note 1, at 142–43.

⁷ See *id.* at 39–65, 142.

⁸ See *id.* at 32–38, 39–65.

⁹ See *id.* at 47–65.

¹⁰ See *id.* at 3–5.

¹¹ *Id.* at 35–36 (“Even individuals who could afford to pay for printing were confronted by substantial distribution costs that were beyond the means of average individuals.”) (footnote omitted).

¹² See *id.* at 67–114.

¹³ See *id.* at 67–114, 139–170.

¹⁴ See *id.* at 67–114.

¹⁵ *Id.* at 158.

¹⁶ See Sebastian Herrera, *Misinformation About Epidemic Flourishes Online*, WALL ST. J., Mar. 4, 2020, at A6.

¹⁷ See Max Fisher, *The Infectious Danger of Conspiracy Theories*, N.Y. TIMES, Apr. 9, 2020, at A10.

disinformation take advantage of the fact that people are scared.¹⁸ Individuals have circulated claims that the virus is a “hoax,”¹⁹ that exaggerate the fatality rate of the coronavirus,²⁰ that downplay the danger of the virus,²¹ that suggest blacks are immune to the virus,²² and that suggest cell phone towers facilitate the spread of the virus,²³ as do 5G cellular networks.²⁴ Disinformation has been circulated regarding remedies for the virus,²⁵ with some alleging that diluted bleach can cure the virus,²⁶ as can bananas.²⁷ There have also been claims that the virus is treatable, but that governments are hiding the truth regarding effective treatments.²⁸ The internet has also led to conspiracy theories regarding the origins of the virus,²⁹ including

¹⁸ *Id.*

¹⁹ See Jason Breslow, *Why Misinformation and Distrust are Making COVID-19 More Dangerous for Black America*, NPR (Apr. 10, 2020, 5:24 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/10/832039813/why-misinformation-and-distrust-is-making-covid-19-more-dangerous-for-black-amer>; Fisher, *supra* note 17.

²⁰ See Fisher, *supra* note 17; Herrera, *supra* note 16.

²¹ See Fisher, *supra* note 17.

²² See Breslow, *supra* note 19.

²³ See Adam Satariano & Davey Alba, *Burning Cell Towers, Out of Baseless Fear They Spread the Virus*, N.Y. TIMES, Apr. 11, 2020, at 1.

The attacks were fueled by the same cause, government officials said: an internet conspiracy theory that links the spread of the coronavirus to an ultrafast wireless technology known as 5G. Under the false idea, which has gained momentum in Facebook groups, . . . radio waves sent by 5G technology are causing small changes to people's bodies that make them succumb to the virus.

Id.

²⁴ See Fisher, *supra* note 17.

²⁵ See Emma Bowman, *Facebook Steps Up Efforts to Combat the Spread of Coronavirus Information*, NPR (Mar. 26, 2020, 9:55 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/03/26/822245048/facebook-steps-up-efforts-to-combat-the-spread-of-coronavirus-misinformation>; Kazim Rizvi & Ayush Tripathi, *Fighting Misinformation During the Ongoing Pandemic*, CIOL (Apr. 8, 2020), <https://www.ciol.com/fighting-misinformation-ongoing-pandemic/>; Fisher, *supra* note 17.

²⁶ See Fisher, *supra* note 17.

²⁷ See *id.*

²⁸ See *id.*

²⁹ See Bowman, *supra* note 25; Herrera, *supra* note 16 (stating sources have claimed

claims that the coronavirus is a “foreign bioweapon,”³⁰ that it was engineered and released by the United States,³¹ particularly the Central Intelligence Agency³² or by the U.S. Army,³³ perhaps as a plot to reengineer the population³⁴ or as a bioweapon directed at China.³⁵ There have also been claims that the virus was released by a pharmaceutical company hoping to profit from the pandemic,³⁶ by China,³⁷ by Jews,³⁸ by Turkey³⁹ or by Iran.⁴⁰

This article examines societal responses and remedies for fake news related to the coronavirus pandemic.

II. FAKE NEWS: THE IMPLICATIONS FOR DEMOCRATIC SOCIETIES

Disinformation is problematic. In democratic systems, freedom of expression is accorded a preferred position because it constitutes an essential building block of the governmental system. In the Middle Ages, European governments were monarchical, often premised upon the Divine Right of Kings.⁴¹ Under the theory of Divine Right, the king was viewed as God’s representative on earth, and his actions were

that the coronavirus is a “bioengineered weapon system”).

³⁰ See Fisher, *supra* note 17.

³¹ See *id.*; Melissa Healy, *How Misinformation Overpowers Truth*, L.A. TIMES, Feb. 9, 2020, at B3.

³² See Herrera, *supra* note 16.

³³ See Fisher, *supra* note 17.

³⁴ See *id.*

³⁵ See *id.*

³⁶ See Healy, *supra* note 31.

³⁷ See Fisher, *supra* note 17; Souad Mekhennet, *Far-Right and Radical Islamist Groups are Exploiting Coronavirus Turmoil*, WASH. POST (Apr. 10, 2020, 2:08 PM), https://www.washingtonpost.com/national-security/far-right-wing-and-radical-islamist-groups-are-exploiting-coronavirus-turmoil/2020/04/10/0ae0494e-79c7-11ea-9bee-c5bf9d2e3288_story.html.

³⁸ See Mekhennet, *supra* note 37.

³⁹ See Nabih Bulos, *Coronavirus Becomes a Weapon of Disinformation in Middle East Battle for Influence*, L.A. TIMES (Apr. 8, 2020, 3:11 PM), <https://www.latimes.com/world-nation/story/2020-04-08/coronavirus-becomes-new-front-in-middle-east-battle-for-influence>.

⁴⁰ *Id.*

⁴¹ See *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 602 (1837) (“The policy of the common law, which gave the crown so many exclusive privileges, and extraordinary claims, different from those of the subject, was founded in a good measure, if not altogether, upon the divine right of kings . . .”).

portrayed as carrying out God's will, and therefore criticism of government was regarded as inappropriate.⁴² After all, why would society allow ordinary people to criticize what God (through the king) has done? England even went so far as to prohibit criticism of the king through the Star Chamber's 1606 decision in *de Libellis Famosis*.⁴³ That decision created the crime of seditious libel,⁴⁴ making it an offense to criticize the government or governmental officials (and, at one point, the clergy as well).⁴⁵ The crime was justified by the notion that criticism of the government "inculcated a disrespect for public authority."⁴⁶ Truth was not a defense, and indeed, truthful criticisms were punished more severely than false criticisms.⁴⁷

A dramatic shift in societal attitudes came about in the eighteenth century as societies began to move from monarchy to democracy. An early indication of this shift was reflected in the U.S. Declaration of Independence's implicit rejection of Divine Right and its explicit adoption of democratic principles: the power to govern derives from the "consent of the governed."⁴⁸ As societies shifted from monarchy to democracy, societies began to regard free speech as an essential right. As the Court reiterated in *Connick v. Myers*,⁴⁹ "[speech] concerning public affairs is more than self-expression; it is the essence of self-government."⁵⁰ Indeed, former U.S. Supreme Court nominee Robert

⁴² *Divine Right*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2003).

⁴³ *De Libellis Famosis* (1606) 77 Eng. Rep. 250, 251; 5 Co. Rep. 125 a, 125 b.

⁴⁴ See Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 909 (1963).

⁴⁵ Indeed, in *De Libellis Famosis*, 77 Eng. Rep. at 251, the defendants had ridiculed high clergy.

⁴⁶ William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 103 (1984). See also Matt J. O'Laughlin, *Exigent Circumstances: Circumscribing the Exclusionary Rule in Response to 9/11*, UMKC L. REV. 707, 720–21 (2002) (referring to the seditious libel prosecution of John Wilkes during the reign of George III (1760–64)).

⁴⁷ See Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111, 184 n.290 (1998); see also William R. Glendon, *The Trial of John Peter Zenger*, 68 N.Y. STATE BAR J. 48, 48 (1996).

⁴⁸ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); see also *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 820 (2015); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875).

⁴⁹ 461 U.S. 138 (1983).

⁵⁰ *Id.* at 145 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (White, J., concurring) ("Core

Bork once argued that the “entire structure of the Constitution creates a representative democracy, a form of government that would be meaningless without freedom to discuss government and its policies.”⁵¹ Bork believed that protections for political speech were so essential to the democratic process that they “could and should be inferred even if there were no first amendment.”⁵² Other commentators agree that free expression is a critical component of a democratic system of government.⁵³

“Fake news” or disinformation is problematic in democratic systems because it has the potential to mislead the public and undermine the quality of public debate. Disinformation is particularly problematic during a pandemic. As noted, during the current pandemic, individuals have used various social media networks (e.g., Facebook, Google and Twitter) to distribute “half-truths and outright falsehoods about the deadly outbreak,”⁵⁴ which has resulted in a

political speech occupies the highest, most protected position.”); *Roth v. United States*, 354 U.S. 476, 484 (1957) (“The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”); *see also* RUSSELL L. WEAVER & CATHERINE HANCOCK, *THE FIRST AMENDMENT: CASES, PROBLEMS & MATERIALS* (6th ed. 2020).

⁵¹ Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 23 (1971).

⁵² *Id.* However, Bork would have limited free speech protections to speech that is “explicitly political”: “Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic.” *Id.* at 20.

⁵³ *See* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 *UCLA L. REV.* 964, 1028 (1978) (“Either all people have a right to participate in the individual and social processes of self-determination or a ‘better’ individual and collective expression of humanity results from this social process because of the increased opportunity of each to freely participate.”); Emerson, *supra* note 44, at 883. (“The crucial point . . . is not that freedom of expression is politically useful, but that it is indispensable to the operation of a democratic form of government.”); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 *SUP. CT. REV.* 245, 255 (“The First Amendment does not protect a ‘freedom to speak.’ It protects the freedom of these activities of thought and communication by which we ‘govern.’”).

⁵⁴ Tony Romm, *Facebook, Google and Twitter Scramble to Stop Misinformation About Coronavirus*, *WASH. POST* (Jan. 27, 2020, 5:52 PM), <https://www.washingtonpost.com/technology/2020/01/27/facebook-google-twitter-scramble-stop-misinformation-about-coronavirus/>.

pandemic of misinformation.⁵⁵ Disinformation is being spread by foreigners, as well as by U.S. citizens themselves.⁵⁶ Facebook, which has nearly two billion users worldwide,⁵⁷ is a major source of disinformation.⁵⁸ Indeed, “[e]very time major political events dominated the news cycle, Facebook was overrun by hoaxers and conspiracy theorists, who used the platform to sow discord, spin falsehoods and stir up tribal anger.”⁵⁹

India’s government has flatly declared that, even though it is “taking proactive steps to deal with this pandemic, fake news ‘is the single most unimaginable hindrance’ in addressing the situation.”⁶⁰ India’s situation is hardly unique. A British study concluded that nearly fifty percent of the British population has been confronted with disinformation regarding the pandemic, and that forty percent are unsure regarding the truth or falsity of the information that they are receiving.⁶¹ As with political information, social media is playing a prominent role. In the British study, forty-nine percent of the British public indicated that they were receiving information about the pandemic from social media, and only forty-three percent indicated that they were receiving their information from newspapers.⁶²

As with other attempts to spread disinformation, many claims related to the pandemic have “elements of truth,” which make them

⁵⁵ See Farhad Manjoo, *How Twitter is Being Gamed to Feed Misinformation*, N.Y. TIMES (May 31, 2017), <https://www.nytimes.com/2017/05/31/technology/how-twitter-is-being-gamed-to-feed-misinformation.html> (“But the biggest problem with Twitter’s place in the news is its role in the production and dissemination of propaganda and misinformation.”). This article offers the example of a conspiracy theory suggesting that the murder of a staffer at the Democratic National Committee was linked to the leak of Clinton campaign emails. *Id.*

⁵⁶ *Id.*

⁵⁷ See Joel Timmer, *Fighting Falsity: Fake News, Facebook and the First Amendment*, 35 CARDOZO ARTS & ENT. L.J. 669, 672 (2017).

⁵⁸ See Kevin Roose, *Facebook Thwarted Chaos on Election Day. It’s Hardly Clear That Will Last*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/business/facebook-midterms-misinformation.html>.

⁵⁹ *Id.* “Misinformation is a worrisome consequence of any emerging epidemic” Healy, *supra* note 31 (quoting Dartmouth College political scientist Brendan Nyhan).

⁶⁰ Rizvi & Tripathi, *supra* note 25.

⁶¹ See *Half of Us Hit by Fake News on Pandemic*, DAILY MIRROR, Apr. 9, 2020, at 10.

⁶² See *id.* at 11.

“just plausible enough to be credible.”⁶³ For example, some rumors link the virus to “unfounded yet well-established beliefs,” such as claims “linking vaccines to autism and genetically modified foods to health risks.”⁶⁴ Those claims have been linked almost daily to claims about the coronavirus.⁶⁵

Disinformation regarding the pandemic has created various societal problems. For example, disinformation has decreased public trust in official and governmental sources of information,⁶⁶ including official medical sources,⁶⁷ and has encouraged the public to believe that they must find the truth on their own.⁶⁸ Some believe that the “wave of coronavirus conspiracies” has the “potential to be just as dangerous for societies as the outbreak itself.”⁶⁹

III. POSSIBLE SOLUTIONS

Lots of suggestions have been offered for dealing with disinformation related to the pandemic. However, it is not clear that any of the suggested remedies are adequate to deal with the problem, especially in the United States.

A. Criminal Prosecutions

In some countries, individuals can be arrested and prosecuted for disseminating fake news related to the pandemic.⁷⁰ In South Africa, for example, two teenagers were criminally prosecuted for a video that

⁶³ See Healy, *supra* note 31.

⁶⁴ *See id.*

⁶⁵ *See id.*

⁶⁶ See Fisher, *supra* note 17.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Daniel Jolley & Pia Lamberty, *Coronavirus is a Breeding Ground for Conspiracy Theories—Here’s Why That’s a Serious Problem*, THE CONVERSATION (Feb. 28, 2020, 5:55 AM), <https://theconversation.com/coronavirus-is-a-breeding-ground-for-conspiracy-theories-heres-why-thats-a-serious-problem-132489>.

⁷⁰ See Sakhiseni Nxumalo, *Nine Arrested for Spreading ‘Fake News,’ IOL: THE MERCURY* (Apr. 8, 2020), <https://www.iol.co.za/mercury/news/nine-arrested-for-spreading-fake-news-46432117> (“In a bid to clamp down on ‘fake news’, the police have arrested nine people throughout the country for spreading false information about the Covid-19 pandemic.”).

went viral on social media.⁷¹ The teenagers were dressed in police uniforms in order to make their statements seem more authentic and more official.⁷² In addition, the City of Newark, New Jersey, has threatened to prosecute individuals who disseminate disinformation during the pandemic, especially through social media networks, because of the potential to cause “unnecessary public alarm.”⁷³ Newark expressed concern that those who circulate disinformation “can set off a domino effect that can result in injury to residents and visitors and affect schools, houses of worship, businesses and entire neighborhoods.”⁷⁴

In the United States, there are limited situations in which criminal prosecutions for dissemination of false information will be permissible. For example, because fraudulent commercial speech is not constitutionally protected,⁷⁵ individuals who try to sell fake cures for the COVID-19 virus could potentially be prosecuted for fraud. However, it would be extremely difficult to prosecute individuals who disseminate conspiracy theories regarding the origin of the virus. The U.S. position might be regarded as counterintuitive. In the panoply of free speech values, one might assume that false speech would not be accorded much value. After all, if speech receives special protection because of its role in the democratic process,⁷⁶ false speech should arguably receive less protection because of its potential to distort and mislead the democratic process.

The real place of false speech in the free speech hierarchy is much murkier. There are certain categories of false speech that are not constitutionally protected (e.g., perjury in judicial proceedings and making false statements to the government). In addition, those who

⁷¹ *Id.*

⁷² *Id.*

⁷³ Justine Coleman, *Newark Warns of Criminal Prosecution for ‘False Reporting of Coronavirus,’* THE HILL (Mar. 11, 2020, 11:41 AM), <https://thehill.com/policy/healthcare/public-global-health/487006-newark-nj-warns-of-criminal-prosecution-for-false>.

⁷⁴ Newark Department of Public Safety, *Public Safety Director Ambrose Warns Against False Reporting of Coronavirus in Newark via Social Media*, NEXTDOOR (Mar. 10, 2020), <https://nextdoor.com/agency-post/nj/newark/newark-police-department/public-safety-director-ambrose-warns-against-false-reporting-of-coronavirus-in-newark-via-social-media-139923492/>.

⁷⁵ See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553 (2001) (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976)).

⁷⁶ See *WEAVER & HANCOK*, *supra* note 50, at 3–16.

engage in fraud (e.g., offering to sell bogus remedies for the coronavirus or offering fake testing to determine whether someone has contracted the virus) can be criminally prosecuted.⁷⁷

However, there are many instances in which false speech is constitutionally protected. For example, in *United States v. Alvarez*,⁷⁸ federal prosecutors charged Alvarez under the Stolen Valor Act for falsely claiming that he had won the Congressional Medal of Honor. In *Alvarez*, the Court flatly rejected the contention that false speech is not entitled to constitutional protection, overturning Alvarez's conviction.⁷⁹ The Court held that the government does not have the power to "compile a list of subjects about which false statements are punishable,"⁸⁰ a power that the Court referred to as a "broad censorial power" that is "unprecedented in this Court's cases or in our constitutional tradition."⁸¹ The Court expressed concern that governmental power to punish false speech might impose "a chill the First Amendment cannot permit if free speech, thought and discourse are to remain a foundation of our freedom."⁸²

The U.S. Supreme Court's landmark decision in *New York Times Co. v. Sullivan*⁸³ further illustrates the idea that false speech may be constitutionally protected. *Sullivan* involved a defamation action by a public official (Sullivan) against the *New York Times* for an advertisement relating to the civil rights movement of the 1960s.⁸⁴ In overturning the judgment, the Court emphasized that free speech requires "breathing space,"⁸⁵ and therefore mere factual error does not

⁷⁷ See Matt Zapposky, *Justice Department Brings First Fraud Case Stemming from Coronavirus Crisis*, WASH. POST (Mar. 22, 2020, 2:27 PM), https://www.washingtonpost.com/national-security/coronavirus-vaccine-fraud-case-justice-department/2020/03/22/3ac4014e-6c72-11ea-b148-e4ce3fbd85b5_story.html.

⁷⁸ 567 U.S. 709, 713 (2012).

⁷⁹ *Id.* at 718. The Court agreed that certain types of false speech could be criminally prosecuted such as perjury or filing a false claim with the U.S. government. *Id.* at 720–22.

⁸⁰ *Id.* at 723.

⁸¹ *Id.*

⁸² *Id.* "[E]ven where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood." *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964).

⁸³ 376 U.S. 254 (1964).

⁸⁴ *Id.* at 256.

⁸⁵ *Id.* at 271–72 (citing *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

deprive defamatory speech of constitutional protection.⁸⁶ As a result, in order to recover, a public official is required to not only prove that the defendant's allegation was false, but also must show that the defendant made the statement with "actual malice."⁸⁷ In other words, a plaintiff must prove either that the defendant "knew" that the statement was false, or acted in "reckless disregard" for whether it was true or false.⁸⁸ Mere negligence, or a failure of the newspaper to check the advertisement against its own files, is an insufficient basis for liability.⁸⁹ Moreover, the Court limited the amount of damages that could be recovered and provided for independent appellate review of defamation judgments.⁹⁰ In subsequent decisions, the Court extended the actual malice standard to defamation actions brought by public figures.⁹¹ In other words, the mere fact that a statement is false does not provide an adequate basis for imposing defamation liability.⁹²

Absent the possibility for a criminal prosecution or a successful defamation action, it is difficult to control fake news. For one thing, there is no clear method for determining "truth" in our governmental system. Some courts and commentators rely on the "marketplace of ideas" justification for providing special protection for free expression.⁹³ In its strict sense, this theory suggests that all ideas should be allowed into the marketplace of ideas, and thereby allowed to compete against each other, in the hope that the best ideas will

⁸⁶ *Sullivan*, 567 U.S. at 273.

⁸⁷ *Id.* at 279–80.

⁸⁸ *Id.* at 280.

⁸⁹ *Id.* at 287.

⁹⁰ *Id.* at 284–85.

⁹¹ See *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967); *Associated Press v. Walker*, 393 S.W.2d 671 (Tex. Civ. App. 1965), *rev'd sub nom. Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967).

⁹² Although the Court has imposed lower liability standards on defamation actions brought by private individuals, the Court still imposed significant restrictions on the ability of private individuals to recover. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348–50 (1974). Only when a private individual is involved in a matter of "purely private concern" would the Court permit a defamation plaintiff to recover presumed and/or punitive damages. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985).

⁹³ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market."). See also Emerson, *supra* note 44, at 881–82 (arguing freedom of expression helps lead society to the "attainment of truth" because it is the best process for advancing knowledge and discovering truth).

ultimately prevail.⁹⁴ This theory, which can be traced back to John Stuart Mill⁹⁵ and John Milton,⁹⁶ was incorporated into U.S. jurisprudence by Justice Oliver Wendell Holmes.⁹⁷ The difficulty is that, in the U.S. system, there are few mechanisms for declaring truth, or knowing whether the “best ideas” have prevailed (absent success in a defamation action). Unlike some other countries (e.g., France) which have declared that certain facts cannot be denied on pain of criminal sanctions (e.g., the French Gayssot law permits the imposition of criminal sanctions on those who deny the Holocaust⁹⁸), the United States does not allow the government to declare certain ideas to be “true” and to prohibit the expression of contrary opinions. Moreover, there is no “Truth Commission” that is empowered to decide and declare which ideas or facts are true, and which are false, and to impose criminal penalties on those who disagree. Even if the United States did have such a commission, it is not clear that the American people would be willing to accept governmental declarations of truth as accurate. In the United States, many are skeptical of government and governmental pronouncements.

Further, many would be troubled by the idea of giving the government the power to declare “truth.” If it were given that power, there is a significant risk that its declarations might be skewed by political considerations. Since the Obama Administration believed in the concept of climate change,⁹⁹ one might guess that an Obama Truth Commission would have declared the validity of climate change theory, and perhaps prosecuted those who denied the existence of

⁹⁴ See Baker, *supra* note 53, at 964–65, 974–78, 1028.

⁹⁵ See generally JOHN STUART MILL, *ON LIBERTY* (Cambridge Univ. Press 2011) (1859).

⁹⁶ See generally 2 JOHN MILTON, *Areopagitica*, in *COMPLETE PROSE WORKS OF JOHN MILTON* 166 (E. Sirluck ed. 1959).

⁹⁷ *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market.”).

⁹⁸ See Russell L. Weaver et al., *Holocaust Denial and Governmentally Declared “Truth”*: *French and American Perspectives*, 41 *TEX. TECH. L. REV.* 495, 497 (2009).

⁹⁹ See *President Obama on Climate & Energy: A Historic Commitment to Protecting the Environment and Addressing the Impacts of Climate Change*, WHITE HOUSE: PRESIDENT BARACK OBAMA, https://obamawhitehouse.archives.gov/sites/obamawhitehouse.archives.gov/files/achievements/theRecord_climate_0.pdf (last visited Apr. 15, 2021).

climate change. By contrast, since the Trump Administration rejected the idea of climate change,¹⁰⁰ there was a very real risk that it would have prosecuted those who affirmed the existence of climate change.

The same problems arise with regard to statements about the pandemic. Should government be able to prohibit individuals from asserting that the U.S. government was the cause of the pandemic? Can government make it criminal for individuals to state that the pandemic is worse than the government is admitting? I was in Japan when the pandemic first broke out, and Japanese citizens repeatedly told me that the Japanese government was concealing information regarding the scope and severity of the pandemic. At the time, Japan was scheduled to host the 2020 Olympics, and many believed that the government was covering up the scope of the crisis to prevent a postponement of the Olympics. If Japan had a criminal law prohibiting the circulation of disinformation, could Japanese citizens have been prosecuted for alleging that Japan was circulating disinformation? In fact, there is considerable evidence suggesting that governments have been systematically understating the number of COVID-19 infections. After all, most governments have limited capacity to test their citizens for the infection, and therefore many believe that official statistics significantly understate the number of infections.¹⁰¹

The ability to criminally prosecute individuals for false statements is further undercut by the Court's holding in *Garrison v. Louisiana*,¹⁰² which abolished criminal libel in the United States. *Garrison* involved

¹⁰⁰ See Juliet Eilperin et al., *Trump Rolled Back More Than 125 Environmental Safeguards. Here's How.*, WASH. POST (Oct. 30, 2020), <https://www.washingtonpost.com/graphics/2020/climate-environment/trump-climate-environment-protections/>.

¹⁰¹ See Sara Chodosh, *Why So Many of the COVID-19 Graphs You See Are Misleading*, POPULAR SCIENCE: HEALTH (Mar. 24, 2020), <https://www.popsoci.com/story/health/misleading-covid-coronavirus-graphs-charts/>.

And that brings up another major issue with looking at pure case counts: You're only ever looking at confirmed cases. Most places aren't testing a huge number of people right now, which means there are certainly many more folks infected than the stats suggest. And because of the massive variation in testing rates, it's close to impossible to compare case counts between countries (or sometimes even within one) because our ability to detect mild cases is so low in some areas.

Id.

¹⁰² 379 U.S. 64 (1964).

a Louisiana district attorney who made disparaging comments regarding judicial conduct at a press conference, and who was convicted of criminal defamation.¹⁰³ In reversing the conviction, the Court emphasized that, even if an allegedly defamatory statement is false, the Court expressed reluctance to impose criminal liability.¹⁰⁴ At the very least, the prosecution must show that defendant knew that the statement was false or acted in reckless disregard for truth or falsity.¹⁰⁵

B. Injunctions Against False Pandemic Speech

It will also be difficult to obtain injunctive relief against the dissemination of false information related to the pandemic. In general, injunctions against speech are regarded as prior restraints, and therefore are presumptively unconstitutional.¹⁰⁶ For example, in *Near v. Minnesota*,¹⁰⁷ a newspaper alleged that gangsters and racketeers were engaged in illegal activities in Minneapolis, and that public officials were not “energetically” attempting to control the situation.¹⁰⁸ Relying on a Minnesota statute that allowed the government to enjoin a “malicious, scandalous and defamatory newspaper,” city officials sought to enjoin the newspaper from publishing further information about the topic.¹⁰⁹ The trial court concluded that the allegations in question were “chiefly devoted to malicious, scandalous and defamatory articles,” held that the newspaper was a public nuisance, and enjoined the newspaper “from producing, editing, publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law.”¹¹⁰ The trial court further enjoined the newspaper “from further conducting said nuisance under the name and title of said The Saturday Press or any other name or

¹⁰³ *Id.* at 64–65.

¹⁰⁴ *Id.* at 70–72.

¹⁰⁵ *Id.* at 73 (“Moreover, even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood.”).

¹⁰⁶ *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963).

¹⁰⁷ 283 U.S. 697 (1931).

¹⁰⁸ *Id.* at 704.

¹⁰⁹ *Id.* at 701–03.

¹¹⁰ *Id.* at 706

title.”¹¹¹ The U.S. Supreme Court vacated the injunction, concluding that prior restraints on speech are generally prohibited,¹¹² and as a result, viewed the Minnesota injunction as a prior restraint.¹¹³ Moreover, the Court struck down the statute even though it gave newspapers the chance to defend themselves by establishing the truth of their allegations.¹¹⁴ Publishers cannot be forced to defend themselves prior to publication.¹¹⁵ In any event, the Court made clear that its decision to overturn the injunction was undertaken without regard to whether the newspaper’s allegations were true or false.¹¹⁶

¹¹¹ *Id.*

¹¹² *Id.* at 716 (“The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship.”).

¹¹³ *Id.* at 718–19 (“Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals.”).

¹¹⁴ *Id.* at 721–23 (“The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends.”).

¹¹⁵ If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the Legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details), and required to produce proof of the truth of his publication, or of what he intended to publish and of his motives, or stand enjoined. If this can be done, the Legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be but a step to a complete system of censorship. The recognition of authority to impose previous restraint upon publication in order to protect the community against the circulation of charges of misconduct, and especially of official misconduct, necessarily would carry with it the admission of the authority of the censor against which the constitutional barrier was erected. The preliminary freedom, by virtue of the very reason for its existence, does not depend, as this court has said, on proof of truth.

Id. (citing *Patterson v. Colorado*, 205 U.S. 454, 462 (1907)).

¹¹⁶ For these reasons we hold the statute, so far as it authorized the proceedings in this action under clause (b) of section 1, to be an infringement of the liberty of the press guaranteed by the Fourteenth Amendment. We should add that this decision rests upon the operation and effect of the statute, without regard to the question of the truth of the

The Court has even been reluctant to enjoin the publication of information that implicates national security interests. In *New York Times Co. v. United States*,¹¹⁷ a case that is also referred to as the “Pentagon Papers” case, classified documents were stolen from the U.S. Department of Defense and turned over to newspapers for publication. The government intervened, seeking to prevent the publication. In overturning an injunction issued by a lower court, the Court emphasized that “any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity,”¹¹⁸ and suggested that the government must carry a “heavy burden of justification” to sustain such a restraint.¹¹⁹ Although the case produced a plethora of concurrences and dissents,¹²⁰ a per curiam decision lifted the injunction.¹²¹

The one situation in which it might be possible to obtain injunctive relief is against fraudulent commercial speech related to the pandemic. While commercial speech is protected under the First Amendment,¹²² receiving an intermediate level of scrutiny,¹²³ fraudulent or illegal speech is unprotected.¹²⁴ As a result, if an individual sought to sell a

charges contained in the particular periodical. The fact that the public officers named in this case, and those associated with the charges of official dereliction, may be deemed to be impeccable, cannot affect the conclusion that the statute imposes an unconstitutional restraint upon publication.

Id. at 722–23

¹¹⁷ *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

¹¹⁸ *Id.* at 714 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

¹¹⁹ *Id.* (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

¹²⁰ *Id.* at 714–21 (Black, J., concurring); *id.* at 721–24 (Douglas, J., concurring); *id.* at 724–27 (Brennan, J., concurring); *id.* at 727–30 (Stewart, J., concurring); *id.* at 730–40 (White, J., concurring); *id.* at 740–48 (Marshall, J., concurring); *id.* at 748–52 (Burger, C.J., dissenting); *id.* at 752–60 (Harlan, J., dissenting); *id.* at 760–63 (Blackmun, J., dissenting).

¹²¹ *Id.* at 714.

¹²² *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976).

¹²³ *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

¹²⁴ *See id.* at 574 (Blackmun, J., concurring); *Pittsburgh Press Co. v. Pittsburgh Comm’n on Hum. Rels.*, 413 U.S. 376, 388 (1973) (“Discrimination in employment is not only commercial activity, it is *illegal* commercial activity . . . We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes.”).

completely bogus remedy for the coronavirus, not only might the government prosecute the individual, but it might be able to prohibit advertisements for the bogus product as well.

Thus, it seems unlikely that the government can easily obtain an injunction against false speech related to the pandemic except in limited circumstances.

C. Responsive Speech

One possible remedy for disinformation is for the government to provide the people with accurate information. India, for example, is fighting disinformation by trying to circulate accurate information.¹²⁵ In the United States, not only the federal government, but also many governors, are holding daily press conferences to update the public regarding the course of the pandemic. The federal briefing includes two of the nation's leading experts, Dr. Anthony Fauci and Dr. Deborah Birk.¹²⁶

But it is not clear whether these attempts to provide truthful and accurate information regarding the pandemic have been successful. For one thing, it is difficult to know how many people are listening to these updates. For example, in Louisville, most media outlets do not live stream updates from the national coronavirus task force.¹²⁷ Instead, they filter the task force and report only what they wish.¹²⁸ Even when responsive speech occurs, there is no assurance that it will be effective. Those who are skeptical of government may choose not to believe what they hear.¹²⁹

¹²⁵ See Rizvi & Tripathi, *supra* note 25 (“The Central government in its status report to the Supreme Court has said that they would create a portal for answering every query of the citizens by creating a separate unit headed by a joint secretary-level officer along with eminent doctors from reputed institutes.”).

¹²⁶ Yelena Dzhanova, *Watch Live: Coronavirus Task Force Holds Briefing as Latest Relief Package Passes House*, CNBC (Apr. 23, 2020, 6:41 AM), <https://www.cnn.com/2020/04/23/watch-live-coronavirus-task-force-holds-briefing.html>.

¹²⁷ See generally David Bauder, *To Air or Not Air Trump Briefings? Pressure on at Networks*, ABC NEWS (Apr. 17, 2020, 1:02 PM), <https://abcnews.go.com/Entertainment/wireStory/air-air-trump-briefings-pressure-networks-70210701>.

¹²⁸ See *id.*

¹²⁹ See Healy, *supra* note 31.

D. *Actions by Social Media Companies*

Social media platforms have undertaken their own efforts to combat disinformation, including deactivating the accounts of those who spread disinformation, directing users from fake news to sites with more reliable information, and trying to provide accurate information.¹³⁰ In additions, nations are working with social media companies to counteract disinformation.¹³¹

The problem for social media companies is that there is so much disinformation that companies like Facebook are simply overwhelmed by the total volume of information.¹³² Facebook receives more than 6.5 million reports a week alleging fake or improper accounts,¹³³ and Facebook's moderators are sometimes forced to make decisions

¹³⁰ Herrera, *supra* note 16.

Social media platforms are also taking initiatives in order to prevent the spread of misinformation. Facebook has deployed artificial intelligence to deactivate the accounts spreading fake news along with the introduction of pop-ups which direct[] the users to the resources of WHO from where reliable information could be obtained. Other such initiatives have been taken by WhatsApp wherein they have started a coronavirus information hub to provide reliable information with regard to the pandemic.

Rizvi & Tripathi, *supra* note 25.

¹³¹ Apart from this, the central government in collaboration with What's App has started a service of chatbots named "MyGov Corona News Desk" which aims to prevent the spread of misinformation by providing reliable information about the pandemic. A similar initiative has also been started by the government on Telegram as well. The MyGov website of the government of India specifically provides a section on myth busters that presents facts while simultaneously destroying the misinformation attached to it.

Rizvi & Tripathi, *supra* note 25.

¹³² See generally Alex Hern & Olivia Solon, *Facebook Closed 583m Fake Accounts in First Three Months of 2018*, THE GUARDIAN (May 15, 2018, 10:00 AM), <https://www.theguardian.com/technology/2018/may/15/facebook-closed-583m-fake-accounts-in-first-three-months-of-2018>.

¹³³ Nick Hopkins, *Revealed: Facebook's Internal Rulebook on Sex, Terrorism and Violence*, THE GUARDIAN (May 21, 2017, 1:00 PM), <https://www.theguardian.com/news/2017/may/21/revealed-facebook-internal-rulebook-sex-terrorism-violence>.

regarding the permissibility of content in as little as ten seconds.¹³⁴ There is so much disinformation on social media networks that it is difficult for the platforms to keep up. At one point, Facebook hired a team of twenty-five news curators who were charged with examining “trending” new stories, and who were given the power to suppress them.¹³⁵ This team was supposed to be skilled in “the art of determining source credibility, ascertaining truth and applying news content.”¹³⁶ However, Facebook summarily dismissed the team when its existence became public knowledge, and allegations were made that it “routinely suppressed news stories of interest to conservative readers.”¹³⁷ Since dissolving the team, Facebook has used algorithms to ferret out fake content.¹³⁸ The nature of those algorithms is not publicly known.¹³⁹

In Germany, Facebook employs hundreds of content moderators who have the power to delete content from Facebook pages.¹⁴⁰ The deletion can be based either on a violation of German law or a violation of Facebook’s “community standards.”¹⁴¹ As a result, the regulators routinely take down “hate speech,” “terrorist propaganda,” Nazi symbols, and pictures of child abuse.¹⁴² Of course, such repression is consistent with Germany’s free speech attitude which allows for the prohibition of *Mein Kampf*, swastikas, speech that involves incitement to hatred, and defamatory speech.¹⁴³ Facebook is reinforced by the Network Enforcement Law, enacted in 2017, which defines twenty-one different types of content that are declared to be illegal and that network platforms are required to remove from their sites.¹⁴⁴

One thing is clear, a large amount of content has been excluded

¹³⁴ *Id.*

¹³⁵ See NATHAN BOMEY, *Prologue* to AFTER THE FACT: THE EROSION OF TRUTH AND THE INEVITABLE RISE OF DONALD TRUMP 9 (2018).

¹³⁶ *Id.*

¹³⁷ Hopkins, *supra* note 133.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Katrin Bennhold, *Germany Acts to Tame Facebook, Learning from Its Own History of Hate*, N.Y. TIMES (May 19, 2019), <https://www.nytimes.com/2018/05/19/technology/facebook-deletion-center-germany.html>.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

from social media platforms; in the first three months of 2018, Facebook closed some 583 million accounts that it characterized as “fake,” and took “moderation action” against some 1.5 billion accounts.¹⁴⁵

Social media platforms have shown some capacity to exclude individuals or groups for reasons unrelated to the pandemic, and commentators, expressing concern that social media companies exercise too much control over speech, suggest these companies adopt transparent governing procedures.¹⁴⁶ For example, Facebook shut down online pages linked to the “Muslim Cyber Army.”¹⁴⁷ GoDaddy banned the allegedly neo-Nazi website, Daily Stormer, after it mocked a young woman (Heather Heyer) who was killed during a white nationalist rally in Charlottesville, Virginia,¹⁴⁸ claiming that the article might incite violence and therefore violated its terms of service.¹⁴⁹ GoDaddy claimed that it was not engaging in “censorship,” and that it supported a “free and open internet.”¹⁵⁰ Daily Stormer then moved its website to Google, which later banned it for violating its terms of service.¹⁵¹

Likewise, three internet companies (Google, Apple, and Facebook)

¹⁴⁵ Hern & Solon, *supra* note 132.

¹⁴⁶ See Bennhold, *supra* note 140.

¹⁴⁷ Max Fisher, *With Alex Jones, Facebook’s Worst Demons Abroad Begin to Come Home*, N.Y. TIMES (Aug. 8, 2018), <https://www.nytimes.com/2018/08/08/world/americas/facebook-misinformation.html?>

¹⁴⁸ Bill Chappell, *Neo-Nazi Site Daily Stormer is Banned by Google After Attempted Move from GoDaddy*, NPR (Aug. 14, 2017, 8:30 AM), <https://www.npr.org/sections/thetwo-way/2017/08/14/543360434/white-supremacist-site-is-banned-by-go-daddy-after-virginia-rally>; Christine Hauser, *GoDaddy Severs Ties with Daily Stormer After Charlottesville Article*, N.Y. TIMES (Aug. 14, 2017), <https://www.nytimes.com/2017/08/14/us/godaddy-daily-stormer-white-supremacists.html>; see also GoDaddy (@godaddy), TWITTER (Aug. 13, 2017, 8:24 PM), <https://twitter.com/GoDaddy/status/896935462622957573> (GoDaddy announced that it had “informed the Daily Stormer that they have 24 hours to move the domain to another provider, as they have violated our terms of service.”).

¹⁴⁹ Chappell, *supra* note 148.

¹⁵⁰ Hauser, *supra* note 148 (Ben Butler, the director of GoDaddy’s digital crime unit, stated, “[w]hile we detest the sentiment of such sites, we support a free and open internet [W]here a site goes beyond the mere exercise of these freedoms, however, and crosses over to promoting, encouraging, or otherwise engaging in violence against any person, we will take action . . .”).

¹⁵¹ Chappell, *supra* note 148.

have moved aggressively to remove content produced by Alex Jones and his Infowars site as “hate speech.”¹⁵² Infowars has been described by one newspaper as a “right-wing conspiracy site,”¹⁵³ and another referred to Jones as someone “who became famous for his spittle-flecked rants and far-fetched conspiracies, including the idea that the Sandy Hook massacre was an elaborate hoax promoted by gun-control supporters.”¹⁵⁴ He referred to the 9/11 attacks as an “inside job,” and he helped spread the “Pizzagate” controversy (a debunked conspiracy theory alleging that Hillary Clinton was involved in running a child sexual abuse ring out of a pizza parlor).¹⁵⁵ In regard to the 9/11 attacks, Jones stated: “Now 9/11 was an inside job, but when I say inside job it means criminal elements in our government working with Saudi Arabia and others, wanting to frame Iraq for it.”¹⁵⁶ Other sites – including YouTube, Pinterest, and MailChimp – also banned Infowars.¹⁵⁷

Leading internet companies have also banned other right-wing individuals.¹⁵⁸ For example, Twitter banned Milo Yiannopoulos,

¹⁵²Li Yuan, *This Week in Tech: Infowars and China's Great Firewall*, N.Y. TIMES (Aug. 10, 2018), <https://www.nytimes.com/2018/08/10/technology/tech-infowars-china-great-firewall.html>.

¹⁵³Brian X. Chen, *The Internet Trolls Have Won. Sorry, There's Not Much You Can Do.*, N.Y. TIMES (Aug. 8, 2018), <https://www.nytimes.com/2018/08/08/technology/personaltech/internet-trolls-comments.html>.

¹⁵⁴Kevin Roose, *Facebook Banned Infowars. Now What?*, N.Y. TIMES (Aug. 10, 2018), <https://www.nytimes.com/2018/08/10/technology/facebook-banned-infowars-now-what.html>.

¹⁵⁵Christine Hauser, *Megyn Kelly Calls Alex Jones's Sandy Hook Denial 'Revolted,' but Still Plans to Air Interview*, N.Y. TIMES (June 12, 2017), <https://www.nytimes.com/2017/06/12/business/media/megyn-kelly-alex-jones-newtown.html>; see Eli Rosenberg, *Alex Jones Apologizes for Promoting 'Pizzagate' Hoax*, N.Y. TIMES (Mar. 25, 2017), <https://www.nytimes.com/2017/03/25/business/alex-jones-pizzagate-apology-comet-ping-pong.html>.

¹⁵⁶Hauser, *supra* note 148.

¹⁵⁷Roose, *supra* note 154.

¹⁵⁸The alt-right isn't necessarily wrong when it claims, as its followers often do, that Silicon Valley is steeped in social liberalism. These are companies that emerged out of Bay Area counterculture, that sponsor annual floats in gay pride parades and hang “Black Lives Matter” signs on the walls of their offices. Silicon Valley's policy preferences aren't always liberal, but tech executives routinely side with progressives on hot-button social issues like immigration, the Paris climate accords, and

allegedly for an online harassment campaign against an actress, and it also banned Chuck Johnson, a Breitbart writer, for alleged threats against a civil rights activist.¹⁵⁹ Twitter has also banned organizations, such as the American Nazi Party and Golden Dawn.¹⁶⁰

Perhaps because of the resilience of the internet, it is not clear that these social media platforms bans have had a dramatically adverse impact on the speech of banned individuals or organizations. Despite the fact that it was banned from certain websites, Daily Stormer has ready access to the internet.¹⁶¹ Indeed, Daily Stormer touts the GoDaddy and Google bans for the proposition that it is the “most censored” publication.¹⁶² The bans do not seem to have hurt either Alex Jones or Infowars either. Like Daily Stormer, Infowars has played up its role as a “martyr” by slapping “censored” labels on a number of its videos and initiating a “forbidden information” marketing campaign.¹⁶³ Jones used a different Twitter account to claim, “[t]hey’re scared of us. They’re scared of the populist movement.”¹⁶⁴ Likewise, Infowars remains readily available on the internet.¹⁶⁵ Indeed, following the bans (but before the Twitter ban) Jones saw an eight percent bump in his Twitter followers (which translated to about 70,000 followers).¹⁶⁶ Even though individuals can still access the Infowars site directly despite the bans, some believe that the social media ban will mean that Jones and Infowars will have

President Trump’s recent decision to bar transgender people from military service. In today’s political climate, these are partisan positions, and it’s no big shock that they have drawn suspicion from the other side.

Kevin Roose, *The Alt-Right Finds a New Enemy in Silicon Valley*, N.Y. TIMES (Aug. 9, 2017), <https://www.nytimes.com/2017/08/09/business/alt-right-silicon-valley-google-memo.html>.

¹⁵⁹ Kate Conger & Jack Nicas, *Twitter Bars Alex Jones and Infowars, Citing Harassing Messages*, N.Y. TIMES (Sept. 6, 2018), <https://www.nytimes.com/2018/09/06/technology/twitter-alex-jones-infowars.html>.

¹⁶⁰ *Id.*

¹⁶¹ DAILY STORMER, <https://dailystormer.name/> (last visited Mar. 13, 2021).

¹⁶² *Id.*

¹⁶³ Roose, *supra* note 154.

¹⁶⁴ Conger & Nicas, *supra* note 159.

¹⁶⁵ After reading a series of articles about how Infowars had been banned, the author ran an internet search for the site on August 28, 2018 and the site readily popped up. *See generally* INFOWARS, <https://infowars.com/> (last visited Mar. 14, 2021).

¹⁶⁶ *See* Conger & Nicas, *supra* note 159.

trouble attracting new followers.¹⁶⁷

In addition, organizations like Infowars have sometimes found ways to circumvent social media bans.¹⁶⁸ For example, when Facebook decided to ban Infowars, Infowars' private groups and messaging apps continued to proliferate on Facebook.¹⁶⁹ Using both "closed" and "secret" groups, Infowars functioned without much oversight.¹⁷⁰ There is evidence suggesting that, although Infowars' video and podcasts have been removed from various platforms, its app has become one of the most popular, sometimes on those very platforms.¹⁷¹ Twitter responded that it would take action to prevent Jones and Infowars from circumventing its ban.¹⁷²

Individuals have also been able to circumvent social media bans by starting their own apps and platforms.¹⁷³ In response to the threat of censorship from "liberal" social media platforms, a conservative digital universe has been developing.¹⁷⁴ For example, there are conservative apps that support the National Rifle Association (NRA) or that support particular candidates such as Donald Trump or Ted Cruz.¹⁷⁵ The Great America app contrasts enthusiastic posts about Trump with pictures of puppies against descriptions of illegal immigrants and "Fake News Friday," which encourages media bashing.¹⁷⁶ These apps provide a way for conservative candidates to interact with their bases.¹⁷⁷ Many of these platforms are not curated or

¹⁶⁷ See *id.*

¹⁶⁸ See Kevin Roose, *To the Fringe, Being Barred by Facebook Isn't the End*, N.Y. TIMES, Sept. 4, 2018, at B1.

¹⁶⁹ See *id.* at B2.

¹⁷⁰ *Id.*

¹⁷¹ See Yuan, *supra* note 152 ("[D]ays after Google, Facebook and Apple removed video and podcasts from Infowars from their sites, its app became one of the hottest in the United States. Among news apps on Wednesday, Infowars was No. 3 on Apple and No. 5 on Google, above all mainstream news organizations.").

¹⁷² Conger & Nicas, *supra* note 159; Twitter Safety (@TwitterSafety), TWITTER (Sep. 6, 2018, 1:47 PM), <https://twitter.com/TwitterSafety/status/1037804430006005760>.

¹⁷³ See Natasha Singer & Nicholas Confessore, *Let's Talk Politics. No Liberals Allowed. Conservative Apps Build Networks Unhindered by Social Media Giants*, N.Y. TIMES, Oct. 22, 2018, at B1.

¹⁷⁴ See *id.* at B1, B3.

¹⁷⁵ *Id.* at B1.

¹⁷⁶ *Id.* at B3.

¹⁷⁷ *Id.*

controlled in the same way as traditional social media platforms,¹⁷⁸ and provide users with seemingly-authentic, pre-scripted conservative messages that they can post on Facebook or Twitter.¹⁷⁹ Although the Democrats also have their own apps, many of these apps are focused on encouraging individuals to volunteer in political campaigns.¹⁸⁰ Although anyone can gain access to the conservative apps, app controllers have the ability to ban individuals who post messages challenging conservative viewpoints.¹⁸¹

IV. CONCLUSION

A pandemic provides a particularly fertile environment for disinformation to flourish.¹⁸² In the current pandemic, allegations have been made that the virus is a “hoax,”¹⁸³ that exaggerate the fatality rate of the virus,¹⁸⁴ downplay its danger,¹⁸⁵ and suggest that blacks are immune to the virus.¹⁸⁶ Disinformation has also circulated regarding remedies for the virus,¹⁸⁷ whether governments are hiding information regarding effective treatments for the virus,¹⁸⁸ and the source of the virus.¹⁸⁹

There are few remedies for this flood of disinformation. Although some countries have the ability to prosecute individuals for disseminating disinformation, or to seek injunctive relief against such dissemination, those options are generally not available in the United

¹⁷⁸ *Id.* at B1.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at B3.

¹⁸¹ *Id.*

¹⁸² *See id.*; Fisher, *supra* note 17, at A10.

¹⁸³ Morning Edition, *Misinformation, Distrust May Contribute to Black Americans' COVID-19 Deaths*, NPR, at 01:02 (Apr. 10, 2020), https://www.npr.org/2020/04/10/831480462/misinformation-distrust-may-contribute-to-black-americans-covid-19-deaths?utm_medium=RSS&station=KXJZ_FM.

¹⁸⁴ *See* Fisher, *supra* note 17, at A10; Herrera, *supra* note 16.

¹⁸⁵ *See* Fisher, *supra* note 17.

¹⁸⁶ *Misinformation, Distrust May Contribute to Black Americans' COVID-19 Deaths*, *supra* note 183, at 01:09.

¹⁸⁷ *See* Bowman, *supra* note 25; Fisher, *supra* note 17.

¹⁸⁸ *See* Fisher, *supra* note 17.

¹⁸⁹ *See* Bowman, *supra* note 25; Bulos, *supra* note 39; Fisher, *supra* note 17; Healy, *supra* note 31; Herrera, *supra* note 16 (one source claimed that the coronavirus is a “bioengineered weapon system”); Mekhennet, *supra* note 37.

States unless the speech involves fraud or illegality. In some instances, social media companies have tried to counteract disinformation by providing accurate information, banning the accounts of those who disseminate false information, or deleting posts. Of course, the ability of social media companies to effectively respond is limited because of the sheer volume of disinformation. In addition, some fear that social media companies will not be fair and unbiased arbiters of information and will instead promote their own political biases. Moreover, even if the disseminators of disinformation are barred from certain social media sites, the internet is such a flexible device that they can usually find other ways to disseminate their message.

One potential solution to disinformation is for governments to respond with truthful information, thereby educating the public. Of course, governmental persuasion efforts are based on the assumption that the public is actually listening to government-provided information and willing to believe it. However, many are skeptical of the government, and there is a risk that individuals will regard governmental attempts to correct disinformation with skepticism. So, despite the plague of disinformation, it is not clear that there are meaningful remedies in free societies.

In the final analysis, perhaps the only effective remedy for disinformation is to hope that the public will read all sources of information carefully and with discretion.

JOURNAL OF INTERNATIONAL MEDIA & ENTERTAINMENT LAW

SUBMISSION GUIDELINES

The *Journal of International Media & Entertainment Law* is a semi-annual publication of the Donald E. Biederman Entertainment and Media Law Institute of Southwestern Law School in association with the Forums on Communications Law and the Entertainment and Sports Industries of the American Bar Association. It provides a forum for practicing lawyers, academicians, and other interested participants to explore the complex and unsettled legal principles that apply to the creation and distribution of media and entertainment products in an international, comparative, and local law context.

Article Length. Feature articles traditionally are between 10,000 and 15,000 words, or fifty-to-sixty double-spaced pages in length. Depending on the topic and depth of focus, the *Journal* also accepts some shorter articles.

Style. The writing should be appropriate for a law review article. To that end, authors should

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