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JOURNAL OF MEDIA LAW & ETHICS

Volume 8, Number 2

Fall/Winter 2020

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Social Media Access, Jury Restraint and the Right to a Fair Trial

Zia Akhtar*

The digital age of internet publishing has allowed the presence in the electronic media information about individuals that leads to their profiling. This can cause the members of the public who sit on juries to be influenced by the prejudicial content of those charged with a crime. The right to a fair trial under Article 6 of the Human Rights Act can be compromised if the jury members are able to access a suspect's personal details and convey it to fellow members which can undermine the defendant's ability to be judged solely on the basis of the crime charged. In the UK the Juries Act 1974, as amended by the Criminal Courts and Justice Act 2015, serves to establish a procedure for trials that stipulates the removal of electronic device for a member of the jury who may not download information of the defendant in the course of the trial. The Contempt of Courts Act 1981 regulates the behaviour of the jury and provides sanctions for conduct that impinges on the court process. The English framework has parallels with the US and Australian legal systems where the jury is also fettered in accessing social media but where the access to the internet for communication about the case and blogging for jurors is permitted. The argument in this paper is that the misuse by the jury of information on the internet about the defendant should be preempted by a legal code that prevents access to the defendant's previous record.

Keywords: Right to a fair trial, Juries Act 1974, Contempt of Court Act 1981, Criminal Justice and Courts Act 2015, due process clause, freedom of expression, bloggers

I. Introduction

In the common law systems there has been considerable apprehension about the impact of social media on jury trials because the internet can prejudice the fair trial of the accused. This could lead to the risk of the jury's assuming the defendant's lack of innocence and a presumption of guilt. The issue for the criminal justice system is to decide when access to social media is permissible and when it endangers the defendant's opportunity to receive a fair trial and a jury verdict that is not tainted with bias.¹

The criminal trials in England and Wales are regulated by the Director of Public Prosecutions (DPP) who has published guidelines for the Crown Prosecution Service (CPS) on

¹ In *R v. Karakaya* [2005] Crim. App. 5, the Court stated: "If material is obtained or used by the jury privately, whether before or after retirement, two linked principles are bedrocks of the administration of criminal justice, and indeed the rule of law, are contravened. The first is open justice, that the defendant in particular, but the public too, is entitled to know of the evidential material considered by the decision making body; so indeed should everyone with a responsibility for the outcome of the trial, including counsel and the judge, and in an appropriate case, the Court of Appeal Criminal Division. This leads to the second principle, the entitlement of both the prosecution and the defence to a fair opportunity to address all the material considered by the jury when reaching its verdict. Such an opportunity is essential to our concept of a fair trial..." Lord Chief Justice Judge, ¶¶24-25

how proceedings in the court may be impacted by social media.² These are structured according to the different forms of behavior that comprise the potential offences which relate to the internet. There is also guidance on the framework of statutes designed to deal with on-line abuse and extends to the Protection from Harassment Act 1997 that creates liability for “alarming a person or causing distress” (section 7(2)) and includes “speech” (§ 7(4)) as applicable to written communications.

The Malicious Communications Act 1988 creates offences under section 1 of electronic communications which are indecent or grossly offensive and convey a false threat, provided that there is an intention to cause distress or anxiety to the victim. These offences are triable in both the Magistrates’ and Crown Court. The Communications Act 2003, section 127 penalises electronic communications of a menacing character which are grossly offensive or indecent, obscene or menacing, or false, for the purpose of causing annoyance, inconvenience or needless anxiety to another. This offence is only triable in the Magistrates’ Court.

The offence of communications sent through social media may alone, or together with other behaviour, amount to an offence of controlling or coercive behaviour in an intimate or family relationship bearing on criminal liability under section 76 of the Serious Crime Act 2015. The guidelines issued by the CPS for prosecutors on cases involving communications sent on social media are intended to deal with people who would use the internet as a tool for spreading hatred.

These guidelines divide types of offence into sections as follows: Category 1: threats of violence to the person or property; Category 2: stalking, controlling or coercive behaviour, disclosing private sexual images without consent, an offence under the Sexual Offences Act 2003, and blackmail; Category 3: Breach of a court order or statutory prohibition, e.g., juror misconduct, contempt, breaches of a restraining order; Category 4: Communications that do not fall into any of the above categories, “those which may be considered grossly offensive, indecent, obscene or false”.³

There is a requirement of malicious intent before a communication can amount to a crime.⁴ Social media also impacts the reputation of the accused through his antecedents becoming public knowledge which could undermine the presumption of innocence in English law. The Attorney General issued a consultation or ‘Call to evidence’ in 2017 to amend the current law on contempt of court, taking into account the impact of social media and to ensure that there is

² *Social Media - Guidelines on prosecuting cases involving communications sent by social media*, Aug. 18, 2018; <https://www.cps.gov.uk/legal-guidance/social-media-guidelines-prosecuting-cases-involving-communications-sent-social-media>.

³ The guidelines distinguish between that which is illegal and that which is merely offensive: “Just because the content expressed in the communication is in bad taste, controversial, or unpopular, and may cause offence to individuals or a specific community, this is not in itself sufficient reason to engage the criminal law.” *Id.* at 9.

⁴ In *Chambers v. Director of Public Prosecutions* [2012] E.W.H.C. 2157 (Admin), [2013] 1 All ER 149, the Court of Appeal quashed the conviction of Paul Chambers, who tweeted, as a joke that he wanted to blow up Robin Hood Airport in Nottingham because of his anger over cancelled flights.

no interference in the proceedings at the trial.⁵ The government's findings have revealed that social media does not currently pose a serious threat.⁶

However, social media can potentially undermine due process and the conduct of a trial because of the information that can be downloaded by a jury member in the form of profiling and case history of the accused.⁷ This has to be separated from the information that is extraneous to the trial and consists of blogging and activity that has no connection to the antecedents and the record of the accused in court.

This paper considers the right to a fair trial that is an inherent principle of the criminal justice system in the UK by maintaining social media distancing of the jury members in a crown court trial. There will be reference to the court judgments and the development of the law after the Law Commission report that has increased the ambit of the Juries Act 1974, as amended by the Criminal Justice and Courts Act 2015. It will evaluate the liability under the Contempt of Court Act 1981, and will undertake a comparative assessment with reference to the US and Australian jurisdictions. The argument of this paper is that a more proactive approach needs to be implemented that should permit freedom of expression such as blogging with the right to privacy of the defendant.

II. Media Blackout and Juries

The right to a fair trial in English law is enshrined by Article 6 § 1 of the ECHR as incorporated into the Human Rights Act 1998. This provides the right to a fair trial in English law as follows:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. ...

To ensure this provision is met, the jurors for a Crown Court trial are selected at random from the electoral register and those who qualify have to be under 70 years and must not meet the criteria for disqualification.⁸ When prospective jurors receive their summons they are also sent a booklet entitled "Your Guide to Jury Service" which explains, amongst other things, that after being sworn in they should not "discuss the evidence with anyone outside jury either face to face, over the

⁵ *Attorney General seeks evidence on the impact of social media on criminal trials, Judges, solicitors and victims' groups are being asked to submit evidence about the impact of social media on criminal trials.* Sept. 17, 2017, <https://www.gov.uk/government/news/attorney-general-seeks-evidence-on-the-impact-of-social-media-on-criminal-trials>.

⁶ *Is Social Media harming our criminal justice system?* March 5, 2019. <https://www.gov.uk/government/news/is-social-media-harming-our-criminal-justice-system>.

⁷ However, the Court of Appeal has held that the jury research into the law affecting their trial automatically did not render a jury's verdict unsafe. *R v. Thompson* [2010] EWCA Crim. 1623; [2011] 1 WLR 200, 207-208.

⁸ 61 HALSBURY'S LAWS OF ENGLAND ¶ 804 (5th ed 2010).

telephone, or over the internet via social networking sites such as Facebook, Twitter or Myspace”.⁹ This precludes access to the information stored on social media that is readily available to those browsing the internet on the accused.¹⁰

The Criminal Justice and Courts Act 2015 (CJCA) amended the Juries Act (JA) of 1974, section 69, to allow judges the power to order jurors to surrender their electronic devices. Section 70 empowers court security officers to search for electronic equipment.¹¹ Section 71 makes it an offence to conduct research into the case using electronic equipment including the internet, while Section 72 makes it an offence to share that information with other jurors. Section 74 (20D) creates an offence of disclosing jury deliberations and repealing Contempt of Court Act 1981, sec. 8, in England and Wales. The breach of either provision can result in imprisonment of up to two years or a fine, and a jury member will be disqualified from further service for a decade.

The breach of these provisions would result in the jurors facing trial in the Crown Court for the alleged misconduct. This is the outcome of the Law Commission report that recommended the jurors should be charged with an indictable offence of juror misconduct in order to “... provid[e] greater clarity about what is and is not permitted”.¹² The amendments to the Juries Act 1974 represents a significant reform in juror conduct and those criminal trial jurors who infringe the Act by utilising the internet will be accused of undermining their oath to “give a true verdict according to the evidence”.¹³

This represents a pendulum swing from the initial judicial responses to the problem of juror research focused on directing the jury to act in a manner which could either prevent illegal search on the electronic media to ensure it did not affect any particular verdict. There is debate on how the jury self-discipline can be enforced and for members to sign an undertaking not to access the internet.¹⁴

The risk of communication about the stored information on the internet is because of the greater flexibility in the composition of juries as a consequence of the Criminal Justice Act 2003, which lifted the prohibition on judges, lawyers and police officers serving on juries. The exponential growth of internet communications being used as a primary source of information has also led to the possibility of jury contamination.¹⁵ The elasticity in the jury framework has resulted in the existence of a self-informing and diverse circle that could make the verdict subjective after deliberation.¹⁶

⁹ HM COURTS AND TRIBUNALS SERVICE, *YOUR GUIDE TO JURY SERVICE* 5 (2011).

¹⁰ See the discussions in J. Spigelman, *The Internet and the Right to a Fair Trial*, 7 TJR 403 (2006), and D. Harvey, *The Googling Juror: The Fate of the Jury Trial in the Digital Paradigm*, [2014] NZLR 203.

¹¹ Section 71 (20A) creates the offence of researching a case. This is not limited to use of the internet, but includes visits, asking others to find information, asking questions and conducting experiments. The prohibited information includes research on anyone involved in the case, including lawyers, judges and witnesses, as well as those involved in the case and research on the law, rules of evidence and procedure.

¹² See LAW COMMISSION, *CONTEMPT OF COURT (1): JUROR MISCONDUCT AND INTERNET PUBLICATIONS* (HMSO. 2013), Law Com. No.340, HC Paper No. 860 report, ¶ 4.38.

¹³ Practice Direction (Criminal Proceedings: Senior Courts) [2013] EWCA Crim. 1631; [2013] 1 WLR 3164, ¶¶ 39M.2, 39E.3.

¹⁴ A. Ashworth, *Editorial: Contempt of court: juror misconduct and internet publications* [2014] CRIM. L.R. 169. See Law Commission, *supra* note 12, ¶¶ 3.2-3.6.

¹⁵ Law Commission, *supra* note 12, ¶¶ 3.26-3.33; D. EADY & A.T.H. SMITH, ARLIDGE, EADY AND SMITH ON CONTEMPT ¶¶ 1-190A-1-190C (first supplement to the fourth edition 2013).

¹⁶ See J. OLDHAM, *THE VARIED LIFE OF THE SELF-INFORMING JURY* (2005).

It is necessary in an adversarial system to ensure the right to a fair trial by maintaining the jury's neutrality. That means preventing members from sourcing additional evidence, and maintaining the jury's central role as an objective arbiter between the prosecution and defence.¹⁷ The most significant impact of social media in criminal trials is when there has been communication with the fellow juror, or information about the defendant has been accessed by a member of a jury that may lead to conveying information to another member. This has the potential of breaching the Contempt of Court Act 1981 (CCA), which places restrictions on the jury in cases that have gone to trial.

Section 8 makes it an offence for the deliberations of the jury to be revealed to the public. This can be distinguished from contempt of court at common law when jurors seek information related to the proceedings beyond the evidence presented in court. The novelty in this is the internet is a means of communication, research and news, which presents challenges that the court has addressed. The fact is that once posted, information never permanently "disappears" from the internet. For example, a Twitter post may be deleted, but the offending text may still be archived in a cache or may have been image-captured at first sight. This means that simply removing offending material from the social media platform does not mean it cannot be found again.¹⁸

The English courts will enforce the right to a fair trial by ensuring no misuse of the information gained by a jury member can impact on the trial. This also applies to cases where a juror has not researched a defendant's profile on the Internet but information has come to their knowledge. In *Attorney General v. Fraill and Another*¹⁹, a juror in the trial of drug dealers had communicated with a defendant via Facebook despite explicit warnings not to use the internet. The ten-week trial conducted at Manchester Crown Court had involved multiple charges against several defendants and was one of a series of four trials. It was at the third trial that was nearing its conclusion when it emerged that the juror and one of the defendants had been communicating on social media.

The accused, Sewart, a mother of two from Bolton, had already been acquitted of conspiracy to supply drugs when co-defendant Fraill sent electronic messages to her on Facebook. At the time, the jury was still deliberating its verdicts for three of her co-defendants. One of them, Fraill set up a profile using the name Jo Smilie, but her own photograph was clearly visible. Sewart admitted that she thought it was a juror but did not think she was doing anything illegal. The court held that,

Information provided by the internet (or any other modern method of communication) is not evidence. Even assuming the accuracy and completeness of this information (which, in reality, would be an unwise assumption), its use by a juror exposes him to the risk of being influenced, even unconsciously, by whatever emerges from the internet. This offends our long-held belief that justice requires that both sides in a criminal trial should know and be able to address or answer any

¹⁷ See K. Crosby, *Controlling Devlin's Jury: what the jury thinks, and what the jury sees online*, [2012] CRIM. L.R. 15, 21. See also NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 86-97 (Oxford: OUP 1978); D.N. MacCormick, *The Coherence of a Case and the Reasonableness of Doubt*, 2 LIVERPOOL L.R. 45 (1980).

¹⁸ Digital Guide Ionos, Aug. 14, 2019, <https://www.ionos.com/digitalguide/websites/website-creation/find-view-and-download-old-versions-of-websites/>.

¹⁹ [2011] EWCA (Crim) 1570.

material (particularly material which appears adverse to them) which may influence the verdict.²⁰

The defendant had also breached the Contempt of Court Act, section 8, by inquiring about the jury deliberations. It is an offence for anyone to deliberately solicit information about any aspect of a jury's deliberations, whether in the course of the trial or after its conclusion.²¹ The sentence of eight months was imposed in the case of Fraill, and two months' imprisonment in the case of Sewart, to be suspended for two years.²² The principle that the jury must not disclose its statements to the public was also upheld.

In *Attorney General v Dallas*,²³ prior to the case being heard, the judge gave a number of directions to the jury stating the importance of deciding the facts only on the basis of what they saw and heard in the courtroom. The judge specifically informed the jury that they must not speak to anyone about the case and must not use on the internet. When the trial commenced, the evidence of the defendant's previous conviction for assault was adduced by a jury member. One juror informed the court usher that Dallas had searched the web and had found out additional information, not adduced at trial, about the defendant's previous conviction which she had shared with the jury.

The trial was aborted while the investigation was launched. The Court found in particular that jury member "the defendant [Dallas] knew perfectly well, first, that the judge had directed her, and the other members of the jury in unequivocal terms that they should not seek information about the case from the internet; second, that the defendant appreciated that this was an order; and, third, that the defendant deliberately disobeyed the order. By doing so, before she made any disclosure to other jurors, she did not merely risk prejudice to the due administration of justice, but she caused prejudice to it."²⁴

In imposing six months' imprisonment, the court explained: "Misuse of the internet by a juror is always a most serious irregularity, and an effective custodial sentence is virtually inevitable. The objective of such a sentence is to ensure that the integrity of the process of trial by jury is sustained."²⁵ This ruling interpreted the grounds of criminal liability for contempt of court in common law. The development of the law had been consistent with the essence of the offence in the instance of the defendant possessing information by searching the internet for evidence that contributed to the verdict.²⁶

This case raised issues of the defendant acting against the directions of the judge to the effect that the jury has to be circumspect in court proceedings and relate only to the information disclosed at the trial of the accused. These principles have also been affirmed in a U.S. case where the judges had given instructions against the research on the internet in order to find information about the defendant.²⁷ The apprehension in common law systems is that protections may be

²⁰ *Id.* at 27-29, 31, 34.

²¹ *Id.* at 35.

²² *Id.* at 57, 60.

²³ EWHC 156 (Admin), [2012] 1 WLR. 991.

²⁴ *Id.* at 38.

²⁵ *Id.* at 43.

²⁶ GUIDE ON ARTICLE 6 ON THE ECHR. RIGHT TO A FAIR TRIAL (CRIMINAL LIMB). Updated April 30, 2020. https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf.

²⁷ In *Clark v. State*, 2009 WL 4276755 (Md. Ct. Spec. App. 2009) (unreported opinion), despite instructions from the judge not to conduct research on the case, a juror in a murder trial looked up

significantly breached when jurors conduct online research about the case without the knowledge of the court or trial counsel. This implies that an enormous "amount of information available increases the likelihood that the juror may be influenced by information that is prejudicial, unreliable, or inaccurate, or even evidence that has been ruled inadmissible".²⁸

III. Posting Commentaries on the Internet

The electronic media encompasses the discussion of the various types of activity that includes the legacy media with an online presence, freelance bloggers, and/or other types of media "reporters". This does impact on the fair trial of the accused because of the virtual space that it provides the jurors to access the social media in the course of a trial. There is also the issue of the juror's use of the Internet/social media for purposes other than seeking information about the defendant. This is activity that is conducted in cyberspace where jurors have been acquainted with each other on Facebook and then posted comments about their jury service, or even blogged about the case.²⁹

There is a greater risk that a communication may become prejudicial when jurors comment on a blog or social media website than when they discuss the case in person, as in the former case the audience that may interact with, comment on, and further disseminate the communication is much greater. As such, the risk that the juror's opinion will be improperly influenced is increased accordingly.³⁰

In Her Majesty's Attorney General Applicant and Kasim Davey, Respondent, and Her Majesty's Attorney General Applicant and Joseph Beard, Respondent,³¹ Kasim Davey, selected as juror in a case involving sex with a child, had a Facebook account in the name of Alex BawseBeats Jones. At the end of the first day's hearing on his way home in the bus he posted a message to the account, using his smart phone, which stated: "Wooooow I wasn't expecting to be in a jury Deciding a paedophile's fate, I've always wanted to Fuck up a paedophile & now I'm within the law!"³²

Davey had about 400 Facebook friends; two of those friends had approved of his comment by using a smiley – a thumbs up sign. On Dec. 4, 2012, he sat again on the jury and, that night, a Facebook friend sent an e-mail to the Crown Court at Wood Green which began: "I have reason to believe someone who has been selected for jury service at your court has been posting about the case on the social networking site Facebook." The e-mail then set out what had been posted and named Mr. Davey as the person who had posted it.³³

definitions online for the terms "livor mortis" and "algor mortis" and the role it might have had in fixing the time of a beating victim's death. When asked about it, the juror responded, "To me that wasn't research. It was a definition." The Court of Special Appeals reversed the conviction and ordered a new trial, finding that the juror's online search was in direct violation of the trial court judge's order prohibiting jurors from researching the case.

²⁸ Caren Myers Morrison, *Jury 2.0*, 62 HASTINGS L.J. 1579, 1584 (2011). See also Dennis Sweeney, *Social Media and Jurors*, 43 MD. B.J. 44, 46 (2010).

²⁹ Amanda McGee, *Juror Misconduct in The Twenty-First Century: The Prevalence of The Internet and Its Effect on American Courtrooms*, 30 LOY. L. A. ENT. L. REV. 301 (2010). Available at: <http://digitalcommons.lmu.edu/elr/vol30/iss2/3>.

³⁰ Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 Duke Law Tech. Rev. 11 (2012).

³¹ [2013] EWHC 2317 (Admin).

³² *Id.* ¶ 6.

³³ *Id.* ¶ 7.

After the judge was alerted to the post, the trial against Adam Kephelas was aborted (he was later retried and convicted of sexual activity with a child) and Davey was charged with contempt of court. He was sentenced to two months jail. The judge rejected any defence of a breach of right to privacy under Article 8 and discrimination under Article 10 of the European Convention on Human Rights, and held that Davey did an act which “created a real risk of interference with the administration of justice and it was specifically intended by him to interfere with the administration of justice”.³⁴

The issue has also arisen of jurors commenting on blogs or social media after a trial has been concluded. The federal courts in the U.S. are bound to uphold the right to a fair trial enshrined as a constitutional right in serious criminal cases.³⁵ This is a component of the due process clauses of the enshrined in the Fifth and Fourteenth Amendments.³⁶ In upholding this principle, the jurors are not informed about a defendant's past crimes under Federal Rules of Evidence 404(b). However, such evidence can be used for other purposes, such as proof of “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” Exposure in the media may lead to the assumption of guilt in the present offence. The jurors are given specific directions that they are not to discuss the case prior to their deliberations and no extraneous material should be used in order to arrive to their verdict.³⁷

The courts have found juror misconduct based on their use of social media or the internet while they served as jurors.³⁸ In *Tapanes v. State*,³⁹ the defendant was tried for first degree murder but was convicted of the lesser offense of “manslaughter with a firearm,” the foreperson used his smart phone to look up “prudent” and “prudence,” which were words that the prosecutor had used repeatedly during closing argument.⁴⁰ The foreperson then shared the definitions with his fellow jurors.⁴¹ The misconduct did not come to the court’s attention until after the jury reached a verdict and the appellate court ruled that the definitions could have influenced the verdict and remanded the case for a new trial. The Court of Appeal noted that a new trial can be necessary if jurors consult “unauthorized materials” that affect their verdict. It also noted that a dictionary is not one of the materials permitted to be taken into the jury room. Thus, a dictionary cannot be considered by the jurors. The fact that the foreperson utilized the smartphone to look up the definition of the word during a break and later shared his recollection of the definition with

³⁴ *Id.* ¶ 30.

³⁵ The Sixth Amendment guarantees a criminal defendant the right to be tried before an “impartial jury.” U.S. CONST. amend. VI. *See* *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946) (“The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community.”).

³⁶ In *Duncan v Louisiana*, 391 U.S. 145, 149 (1968), Justice White stated, “Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which, were they to be tried in a federal court, would come within the Sixth Amendment's guarantee.”

³⁷ Fed. R. Evid. 606(b), which generally prohibits a judge from inquiring into the reasoning that a jury used to reach its verdict, permits a judge to inquire as to whether the jury considered any extraneous material during its deliberations. Such extraneous material would not have been subject to the court examination under the rules of evidence and cross-examination. The introduction of such extraneous material can result in a mistrial.

³⁸ *See, e.g., Russo v. Takata Corp.*, 774 N.W.2d 441, 454 (S.D. 2009).

³⁹ 43 So. 3d 159, 163 (Fla. Dist. Ct. App. 2010).

⁴⁰ *Id.* at 160, 162.

⁴¹ *Id.* at 162.

other jurors during deliberations is no less a juror misconduct than if the foreperson physically brought the smartphone into the jury room and read the definition therefrom.⁴²

The liability for contempt of court is governed by the Federal Criminal Code, 18 U.S.C. §402, Contempts Constituting Crimes,⁴³ and jurors have been found guilty for misconduct for blogging. In *Commonwealth v. Werner*,⁴⁴ contempt was found for a variety of juror online behaviours, including three jurors befriending each other and two jurors posting comments to Facebook about their jury service. One also blogged about the case after the trial. The court refused to set aside the conviction on this basis because of overwhelming evidence of the accused's guilt.

The cases also suggest that lack of disclosure by the jury member of their background while commenting on the case on social media may lead to remedial action.⁴⁵ There is evidence that many jurors do not understand that acts such as tweeting or updating a Facebook status are the type of communication or discussion that courts prohibit. For many jurors, updating a Facebook status to reflect daily thoughts and activities is a matter of habit, and they no longer give it much thought. Others may simply determine that updating a Facebook status is a one-sided communication and, therefore, not the type of communication addressed by the court.⁴⁶ For some, tweeting and blogging are simply an extension of thinking, rather than a form of written communication.

The discussions on social media between jurors who are acquaintances on Facebook is considered to be less hazardous in terms of contempt in some common law courts. The conduct of jurors in criminal trials in Australia is governed by state or territorial legislative provisions. This along with the Evidence Act 1995 (Commonwealth) are the pillars upon which procedural justice is based and the substantive justice in criminal law is dependent on these principles. In the Western Australia Supreme Court case of *Boyd v. The State of Western Australia*,⁴⁷ the court refused to relocate a trial due to prejudicial and threatening statements posted on Facebook. Hall, J., stated:

The nature of the internet is that it now records indefinitely what might once have been transient and ill-considered statements said in the heat of the moment. Such statements should not necessarily be seen as any expression of real intent. The postings were made on personal Facebook pages and were clearly intended for a

⁴² *Id.* at 163.

⁴³ “Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by a fine under this title or imprisonment, or both.”

⁴⁴ 81 Mass. App. 689 (2012).

⁴⁵ A California lawyer who had failed to disclose his profession when he became a jury member in the course of a burglary trial was suspended from practice for 45 days for blogging about a burglary trial while serving as a juror. Digital Media Project, <http://www.dmlp.org/threats/california-bar-v-wilson>.

⁴⁶ Thaddeus Hoffmeister & Ann Charles Watts, *Social Media, the Internet, and Trial by Jury*, 14 ANN. REV. L. & SOC. SCI. 259 (2018). Available at SSRN: <https://ssrn.com/abstract=3273809> or <http://dx.doi.org/10.1146/annurev-lawsocsci-101317-0312214>; see also Paula Hannaford-Agor, *Google Mistrials, Twittering Jurors, Juror Blogs, and Other Technological Hazards*, CT. MGT. REV., Summer 2009, at 42–43.

⁴⁷ [2012] WASC 388.

group of friends and not as public statements. Foolish, exaggerated or emotional comments made between friends should not be taken out of context.⁴⁸

It has been argued that this is a less robust interpretation and that it may be understating the adverse impact of social media use by jurors. Social networking by jurors during trial — whether at the courthouse or at home — carries with it a dangerous potential to undermine the fairness of trial proceedings. The impartiality of a jury relies on the principle that “conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print”.⁴⁹

In *Benbrika v. The Queen*⁵⁰ the Victoria Court of Appeal affirmed the trial judge’s first instance decision where jurors had used Internet sites, including Wikipedia and Reference.com, seeking definitions of terms related to the terrorism trial. These were identical to those issued by the court. The court also stated that the trial judge had found that “it was distinctly possible that they had interpreted his directions as meaning that they should not seek information about the case, rather than using the Internet for more general purposes”.⁵¹

The Court noted the important difference between this kind of web search and surfing for “information that is both inadmissible at trial, and prejudicial to the accused”, which might prompt the discharge of a jury.⁵² This distinction went in the favour of the defendants who were not liable for contempt of court in these proceedings.

Social media use by jurors invites many new litigation challenges and increases the risk of familiar jury concerns, such as exposure to news and media accounts of a trial and contaminates material not admitted into evidence. The communication between jurors and the writing of blogs has brought with it a dimension that is analogous to posting written commentaries on the case. The court has to draw a fine line when this form of information from an “inside” source is simply an unbiased comment or a source that leads to building of a consensus that may influence the verdict at the trial. It may have a direct impact on the “administration, fairness, and integrity of the criminal justice system”.⁵³

IV. Creating a More Informed Jury

The research in common law countries has shown that juries are not always better informed about the procedures of a jury trial. This is because in England sections 69-72 of the Criminal Justice and Courts Act 2015, can put jurors on a social media blackout for the duration of high-profile trials. This may also have an effect on the assessment of the guilt or otherwise of the accused and may undermine the purpose of the substantive law that in a criminal law court is the basis of the trial.

In the U.K., research by the University College London (UCL) Faculty of Laws has shown that nearly one in four jurors (23%) is confused about what he or she is allowed to do online. This uncertainty led some of the jurors surveyed anonymously by UCL to research the judge and lawyers in the case. Others have visited the crime scene on Google Earth or Street View, or shared

⁴⁸ *Id.*

⁴⁹ St. Eve & Zuckerman, *supra* note 30.

⁵⁰ [2010] VSCA 281.

⁵¹ *Id.* 199.

⁵² *Id.* ¶ 214.

⁵³ David Aaronson & Sydney Patterson, *Modernizing Jury Instructions in the Age of Social Media*, 27 ABA CRIM. JUST. 4 (2013).

their experiences on social media sites. Two-thirds of the sample were unaware of previous prosecutions of jurors for such behaviour. In terms of social media, three per cent of jurors shared their knowledge of jury service on social networking sites such as Facebook and Twitter; one per cent blogged or chatted online about doing jury service; and almost all jurors (82%) said they would have liked more information on conducting deliberations.⁵⁴

After the jury in *R. v. Huhn and Price*⁵⁵ failed to reach a verdict after 15 hours of deliberation, it asked a number of questions that suggested it failed to understand its role. The trial judge, Mr. Justice Sweeney, discharged the jury in the light of a series of questions that the jury put to him. The jury had asked the judge: “Can a juror come to a verdict based on a reason that was not presented in court and has no facts or evidence to support it, either from the prosecution or defence?” In coming to his decision to discharge the jury and order a retrial the judge stated: This is not jury misconduct, this is not irregularity, this is a jury which has not, it appears, understood its function.⁵⁶

Among common law systems, the jurors in the U.S. framework, prior to selection for duty, are subject to a far greater degree of scrutiny for bias via that system’s *voir dire* procedure. This procedure permits counsel to cross-examine potential jurors, and prescribes a certain number that may be “excused from service if sufficient bias is established — ‘challenges for cause’ — as well as a number that may be excused without cross-examination — ‘peremptory challenges’”.⁵⁷

Voir dire is part of the U.S. trial system, and pre-trial investigation of jurors has led to the “emergence since the 1970s of specialist jury consultants — often with backgrounds in sociology, psychology, communication, or marketing”, and “the increased use of social media as an essential investigative tool”. There is a degree of “skepticism about the “science” used by trial consultants, however, who have been criticized for “making crude presumptions about the influence that juror characteristics have on the decisions made in a case, while little scientific evidence actually underpins such a relationship”.⁵⁸

The American approach has perceived advantages from the “rigorous cross-examination that occurs during *voir dire* has been argued to serve the object of empaneling an unbiased jury”.⁵⁹ Further, the increasing focus of the internet as a device for “gathering information relevant to cross-examination has lowered the costs associated with effective *voir dire* research, thereby levelling the playing field between litigants of unequal means.”⁶⁰ The consultancy service for juries

⁵⁴ Almost a quarter of jurors were confused about the rule on internet use during a trial. <https://www.ucl.ac.uk/news/2013/may/almost-quarter-jurors-confused-about-rules-internet-use-during-trial>.

⁵⁵ CC 11 Mar 2013.

⁵⁶ See *The Vicky Pryce Case and Trial by Jury*, PUBLIC LAW FOR EVERYONE. <https://publiclawforeveryone.com/2013/02/21/the-vicky-pryce-case-and-trial-by-jury-some-resources/>.

⁵⁷ Brian Grow, *As jurors go online, U.S. trials go off track*, REUTERS, Dec. 9, 2010. <https://www.reuters.com/article/us-internet-jurors/as-jurors-go-online-u-s-trials-go-off-track-idUSTRE6B74Z820101208>; accessed Jan. 10, 2018.

⁵⁸ Miriam Oostinga & Dominic Willmot, *Scientific Jury Selection*, in EUROPEAN ASS’N OF PSYCHOLOGY AND LAW, PSYCHOLOGY AND LAW: FACTBOOK 17 (B. Baker, R. Minhas & L. Wilson, eds. 2017).

⁵⁹ JANE JOHNSTON ET AL., JURIES AND SOCIAL MEDIA: A REPORT PREPARED FOR THE VICTORIA DEPARTMENT OF JUSTICE 11 (Research Report, Standing Council on Law and Justice, 2013).

⁶⁰ *Juror Denies Contempt of Court over Facebook Paedophile Post*, THE GUARDIAN, July 24, 2013; <https://www.theguardian.com/law/2013/jul/23/juror-denies-contempt-court-facebook>; accessed March 14, 2017.

and provision of jury experts may alleviate the attorneys' own preferences and act as a catalyst for an objective jury by initiating the more formulistic approaches in jury selection.⁶¹

There are disadvantages of the U.S. approach. While the *voir dire* process may be premised on weeding out improperly biased jurors, it has been noted that unfettered, strategic use of peremptory challenges — those which counsel may make regarding a juror's suitability without the need to establish bias through cross-examination — on the basis of race, sex, or ethnic membership may in fact undermine the ultimate impartiality of the resultant jury.⁶² Further, *voir dire* is highly susceptible to abuse by attorneys, who may take the opportunity to form a rapport with jurors, to allude to evidence yet to be introduced and to its significance, and to seek to introduce favourable bias.⁶³ The research has provided evidence that these practices are highly prevalent in the deliberations of the jury before they arrive at a verdict.⁶⁴

Traditionally, the investigation of jurors has been protracted and it may lead to the dismissal of a jury even if incidental contact is made with the jurors being vetted. This is less of a challenge in the age of social media, in which interaction with jurors arising from interrogation is not frequent.⁶⁵ It has been found that the intense vetting of jurors by investigators may lead to "diminished responses to jury summonses and an increased distrust of the justice system as a whole".⁶⁶ The presumption of the American Bar Association is that the jurors will also be persuaded to use social media extensively.⁶⁷ The impact of social media on juries has been documented and the prejudicial information conveyed has come to the knowledge of the courts.⁶⁸

Leslie Ellis's study about juror use of social media to communicate about a case carried out for the American Trial Lawyers Association found that:

[S]ome jurors take the instruction very literally – they do not equate updating their Facebook page or tweeting about the case with 'discussing' the case. They are careful not to talk about the case at home with their families, but they do not think that posting about an Attorney's ugly tie or how bored they were during a witness testimony is prohibited. This is more likely to cause problems because jurors may divulge evidence or their opinions without realizing it is prohibited. Moreover, even though jurors' disclosures may

⁶¹ In *Corenevsky v. Superior Court*, 36 Cal.3d 307, 320 (1984), California's Supreme Court held that the court appointment of a jury expert may be appropriate and necessary where a case has been adversely affected by pretrial publicity. The trial court should view the request with "considerable liberality".

⁶² Philip R Weems, *A Comparison of Jury Selection Procedures for Criminal Trials in New South Wales and California*, 10 SYDNEY L. REV. 346 (1984).

⁶³ *Id.*

⁶⁴ Jay M Spears, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1508 (1975).

⁶⁵ Katherine Allen, *The Jury: Modern Day Investigation and Consultation*, 34 Rev. Litig. 533 (2015).

⁶⁶ St. Eve & Zuckerman, *supra* note 30, at 9.

⁶⁷ An American Bar Association panel on social media and jurors on August 3, 2012, suggested that "there are currently 955 million Facebook users, and that figure is expected to rise to one billion this month," [Hayes] Hunt [of Cozen O'Connor, Philadelphia] said. Twitter has 500 million users, he added." Lance J. Rogers, ABA Panelists Explore Intersection of Social Media and Criminal Justice System, 91 CRIM. L. R. 653 (2012).

⁶⁸ A study by Reuters of Westlaw "found 90 verdicts [had been] called into question since 1999" due to jurors' use of the Internet, and "[m]ore than half the cases [were] from the last two years [2008-2010]." Reuters also monitored Twitter posts for three weeks in November and December 2010 and found that people who identified themselves as prospective or sitting jurors were posting on Twitter. Brian Grow, *As Jurors Go Online, U.S. Trials Go Off Track*, REUTERS (Dec. 8, 2010), <http://www.reuters.com/article/2010/12/08/us-internet-jurors-idUSTREGB74820101208>.

be permissible, this is still a cause for concern. The posts on their blogs can influence what they are deliberating and the trial information jurors are considering is no longer subject to the regular rules of evidence, which is a key issue for judges when they are deciding whether a juror's disclosure is problematic.⁶⁹

Most undermining are jurors who understand the "intent of the judge's instructions and simply ignore it."

Publicized examples of this scenario include a juror who tweeted about giving away millions of dollars of someone else's money, or how 'fun' it would be to inform a defendant he is guilty before the jury reported their verdict to the court. In a worst-case example, a juror in a Queens County, New York, rape trial emailed his friends, one of whom was a prosecutor, about the jury's deliberations. We cannot know why these jurors decided to defy the instructions so directly – it may be that they did not take their jobs seriously, could not resist the urge (one blogger reported getting out of jury duty because she said there was no way she would be able to stop herself from blogging about the case during the trial), or did not understand the consequences of their actions.⁷⁰

Ellis argues that, "Research on jury decision making has proven that the old concept of 'Tabula Rasa' – that jurors are empty tablets to be filled with information – is inaccurate.

Rather, jurors are very active pursuers of information. They also try very hard to make the right decision, and they struggle when they think they are missing a critical piece of information.

Just as we have heard about dozens of incidents of jurors' disclosing information on line, we have also heard about many incidents of jurors' bringing on information they acquired on-line. And as with the disclosures we do not know if they are doing it more often than they used to, or as we are just hearing about it more after. Jurors may have a more difficult time understanding why they cannot have information they want in an age of internet access. Verdicts have been overturned when jurors looked up definitions of legal terms, searched defendant's criminal histories and looked up symptoms of "rape trauma syndrome," just to name a few examples.⁷¹

There are possible remedies which would cause the juries not to access the internet during the trial proceedings. According to Ellis, "Judges will always instruct jurors not to disclose or import information, and some jurors will always ignore them. But there are ways to reduce the frequency with which it happens." Ellis states one remedy is "to be proactive about it in *voir dire*.

Trial counsel should ask potential jurors if they have an online footprint. Do they blog, do they have Facebook or MySpace pages, or do they have Twitter accounts? If so, how often do they post, tweet, update, etc.? This will give counsel an idea of how prevalent an issue it might be. Some medical and research professionals have discussed the existence of "internet addictions" or "online

⁶⁹ Leslie Ellis, *Friend or Foe, Social Media, the Jury and You*, AM. SOC. OF TRIAL CONSULTANTS, THE JURY EXPERT, Sept. 26, 2011; <http://www.thejuryexpert.com/2011/09/friend-or-foe-social-media-the-jury-and-you/>.

⁷⁰ *Id.*

⁷¹ *Id.*

addictions,” which can be generally defined as “online-related compulsive behavior which interferes with normal living. The validity of such a disorder is heavily debated, but some people do find it difficult to stay offline.”⁷²

This is a process that requires overseeing jurors who have become “reliant on having constant access to information who may find it difficult to abide by the judge’s orders”⁷³ not to access the internet in an on-going trial. There is cautionary advice from jury researcher Nancy Marder on the perspective of finding the jurors in contempt for breaching the judicial guidelines of accessing social media while the trial is proceeding. This is because the termination of the trial after the juror has been penalized leads to the increase in cost and waste of time in the reenactment of the second trial on the same matter. The jurors who have infringed the court’s stipulation and caused a mistrial have sometimes found themselves the subject of contempt proceedings, resulting in fines, or sometimes a jail sentence.⁷⁴

However, Marder does not recommend lowering the threshold for contempt because “the difficulty with punitive measures is that they do not alleviate the problem except perhaps by serving as a deterrent to other jurors who might be tempted to engage in such misconduct. Moreover, punitive measures entail a high cost to the judicial system. Contempt proceedings and retrials require time and money. Perhaps even more harmful in the long run, they place jurors and judges in an antagonistic, rather than a cooperative, relationship.”⁷⁵

The States and Territories in Australia have developed model directions for jury trials. In New South Wales (NSW), these are contained in the NSW Judicial Commission’s Criminal Trial Courts Bench Book. The guidelines suggest that the judge can add the following if he or she considers it appropriate: “That Googling for information or using sites such as Facebook, Twitter, blogs, MySpace, LinkedIn, You Tube and other similar sites is prohibited.”⁷⁶ Victoria’s model directions also contain a warning on internet usage by the jury, although, similar to the NSW directions, they do not specifically require the judge to address the issue of social media access.

You must not use any research tools, such as the Internet, to access legal databases, earlier decisions of this or other courts, or other material of any kind relating to the matters in the trial. You must not search for information about the case on Google or conduct similar searches. You also must not consult with any other people about these matters, or ask anyone else to undertake such investigations.⁷⁷

However, research about jury decision-making in Australian courts has found that it is “assumed that jurors pay attention to the proceedings, reserve judgment until all evidence is presented, give consideration to opposing arguments and suppress the influence of irrelevant information when directed. Research into human cognition indicates that this model is flawed.”⁷⁸

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Nancy S. Marder, *Jurors and Social Media: Is a Fair Trial Still Possible*, 67 SMU L. Rev. 617 (2014); <http://scholar.smu.edu/smulr/vol67/iss3/12>.

⁷⁵ *Id.*

⁷⁶ JUDICIAL COMMISSION OF NSW, CRIMINAL TRIAL COURTS BENCH BOOK (September 2011), § 1-440, http://www.judcom.nsw.gov.au/publications/benchbks/criminal/the_jury.html#p1-440. Accessed March 11, 2013.

⁷⁷ Judicial College of Victoria, Criminal Charge Book, part 1.5.2, <http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#1286.htm>. Accessed March 11 2013.

⁷⁸ Saul Kassin & Samuel Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations* 23 Personality & Soc. Psychol. Bull. 1050 (1997).

This implies that in order to prepare for a trial, the jurors will utilise any pertinent information that is relevant to the case.

The studies have also determined that judicial directions, in general, have limited effectiveness. These reflect similar outcomes in the U.K. research. In one such study, Professor Cheryl Thomas found that jurors admitted checking the internet even though they were told not to by the judge. Thomas found that written guidelines were twice as efficacious as oral directions, and recommended that research “should be carried out to determine what form of written guidelines and judicial directions are most comprehensible to jurors and are most likely to be taken seriously.”⁷⁹

Chesterman, Chan and Hampton have observed that directions to avoid or suppress media coverage of proceedings and other prejudicial information were of limited effectiveness.⁸⁰ The New Zealand Law Commission’s 1999 study of juries has been prominent in the harnessing of jury methodology in deciding when the witnesses are credible.⁸¹ This estimates how this faulty jury understanding and evaluation of witness credibility can be reversed and enhanced in making assessments.⁸² The findings of Professor Ian Coyle has confirmed that “cognitive heuristics and other psychological factors interact with the way in which judicial directions are presented when the jurors are assessing witness demeanour and credibility.”⁸³ In New Zealand, the jury trial has suffered from contamination when its members have acted on extraneous evidence not introduced in criminal proceedings.⁸⁴

It is noteworthy that the Australian courts have been reluctant to allow electronic media coverage of the procedures of high-profile trial of defendants in criminal cases. This has come into focus in the historic criminal allegations against the Catholic clergy and, in particular, one in which there are accusations of children being abused. It has caused the prosecution of a senior member of the clergy who was extradited from Italy to face allegations of child sex abuse in Australia.

In *Queen v Pell*,⁸⁵ the conservative Cardinal Pell was accused of indecently assaulting choir boys and committing a penetration offence at the committal hearing. The magistrate dismissed the most serious charges owing to credibility issues of witnesses, and other charges were withdrawn by prosecutors. The Cardinal was committed to stand trial for sexual assault allegations involving two then-13-year-old choirboys in 1996 and was convicted of five offences.⁸⁶

⁷⁹ Cheryl Thomas, *Are Juries Fair?*, MINISTRY OF JUSTICE RESEARCH SERIES 1/10, Feb. 2010.

⁸⁰ M. Chesterman, J. Chan, & S. Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales*, LAW AND JUSTICE FOUNDATION OF NSW, at 144-145 (2001).

⁸¹ Jill Hunter, Dorne Boniface & Donald Thomson, *What Jurors Search For and What They Don’t Get*, UNSW PILOT JURY STUDY, LAW & JUSTICE FOUNDATION OF SYDNEY (2010).

⁸² Ian R. Coyle, *How do decision makers decide when witnesses are telling the truth and what can be done to improve their accuracy in making assessments of witness credibility?* REPORT TO THE CRIMINAL LAWYERS ASSOCIATION OF AUSTRALIA AND NEW ZEALAND, CENTRE FOR LAW GOVERNANCE AND PUBLIC POLICY (2013).

⁸³ Young, Cameron & Tinsley, *Juries in Criminal Trials: Part Two*, vol 1, ch 9, para 287 (New Zealand Law Commission preliminary paper no 37, November 1999).

⁸⁴ In *Guy v R.*, [2014] NZSC 165, evidence marked with official stamps but not formally introduced as evidence was found in the jury room.

⁸⁵ [2018] VSCA 329.

⁸⁶ DPP v Pell (2019) VCC 260.

The court had conducted the trial in camera and excluded both the print and electronic media from trial coverage. The reason for suppression had been concern that potential jurors for an expected second Pell trial, on separate abuse charges, might be prejudiced by public reports of the first. Cardinal Pell's appeal was based on a number of grounds, principally unreasonableness and the prohibition of video evidence in the defence's closing address.⁸⁷

The Victoria prosecution service commenced proceedings for contempt of court against 36 local editors, journalists and media organisations, accusing them of aiding contempts by international media and of "scandalising the court" in relation to the trial. As many as 100 journalists accused of breaching the suppression order have been threatened with a charge of contempt of court and could face possible jail terms.⁸⁸ The High Court quashed the verdict in its entirety at the Cardinal's appeal stage. The social media erupted "over the outrage of the verdict" and the case, that had received immense media attention, those who supported the Cardinal in this debate "were in the minority".⁸⁹

IV. Conclusion

The challenge is how to adapt old legal doctrines to the realities of a new communications environment. As to the framework of the Contempt of Court Act, the clauses should be broadly defined to take account of the human instinct to find more information and balance that with rule of fairness in proceedings.⁹⁰ The information compiled on social media is about characters, issues and events, and this includes all issues where opinion plays a part such as trial by jury. This is because science has advanced in the digital age when information technology has become an opinion-making tool. It is pertinent in jury trials where the accused is tried for alleged crimes, and it is imperative that jury access to information about the defendant held on the internet should be prohibited to ensure the right to a fair trial.

There is a radical solution that may be proposed by installing the concept of a "mixed jury," that is the form of jury trial that involves lay members sitting alongside professional arbitrators and reaching a verdict together. The professional jurors may be trained assessors, facilitators or judges, which is a practice in civil law jurisdictions.⁹¹ In this model, the professional jury member would participate in monitoring the jury by ensuring that other jury members do not subvert the tribunal's deliberations by information gained from their own research, or from exposure to publicity about the case.⁹² However, this has been rejected because the "professional" member of

⁸⁷ DPP v Pell (2019) VCC 260.

⁸⁸ Melissa Davey, *George Pell, cardinal found guilty of child sexual assault*, THE GUARDIAN, Feb. 26, 2019; <https://www.theguardian.com/australia-news/2019/feb/26/cardinal-george-pell-vatican-treasurer-found-guilty-of-child-sexual-assault>.

⁸⁹ Neil Debiet, *George Pell's successful appeal was clear result in a case that cut the nation to the core*, ABC news. abc.net.au/news/2020-04-07/george-pell-vatican-christian-response/12130182

⁹⁰ K. Crosby, *Juror Punishment, Juror Guidance and the Criminal Justice and Courts Act* [2015] Crim. L.R. 578 ("An interdisciplinary link between legal history and the mainstream of jury studies can help explore such issues by reframing the problem within historical ambiguity rather than legalistic certainty.").

⁹¹ Roxanne Burd & Jacqueline Horan, *Protecting the right to a fair trial – has trial by jury been caught in the world wide web?* 36 CRIM. L. J. 119 (2012).

⁹² *Id.*

the jury may exert undue influence on the lay members.⁹³ This could also change the composition of jury trial and its meaning in common law courts that have traditionally viewed it as a forum where the verdict is delivered by peers.

The social media has created virtual space by harnessing the “trending” environment from web to mobile applications in the chain of electronic communications. In the contemporary digitised, globalised era, every smart phone holder is a potential publisher and broadcaster, and the information about a suspect in a criminal case is accessible. While an increasing use of the internet to profile individuals consists of the process of separating the malicious from the credible information, the requirement is to remove these dual influences that can subvert the trial because of the information that is readily available by surfing on the internet.

The Law Commission on Contempt of Court for juror misconduct and internet publications has proposed reforms, some of which were implemented, such as the amendments to the Juries Act 1974 by the Criminal Courts and Justice Act 2015. Other proposals were abandoned, such as the plan for digital archives and notification. The Attorney General's Consultation on the issue of contempt and the integrity of trials may lead to further reform, such as a strengthening of the powers available under the Contempt of Courts Act.

The amended Juries Act serves as a mechanism to prevent the electronic media access of the members of the jury. This makes it an indictable offence for the jury member to access information on social media that prejudices a fair trial. This is deemed to generate pressure on the jury members to convict the accused. The object should be the protection of the administration of justice, generally, in the same way as the two existing exceptions to section 8 (permitted disclosure to the court with which juror is sitting, and where there is allegation of an offence in relation to the jury, e.g., jury tampering).

The comparative law of the countries where the jurors have been subject to the same obligations should be the basis for reform, as common law has emphasised the jury as a tribunal of fact. The legal approaches should be dictated by reason and experience as this area of law can be ambiguous, and there should be guidelines to compel jurors to be attentive and objective in the determination of guilt. The law should be proactive rather than reactive in dealing with the ever-changing world of modern electronic media and its impact on the justice system.

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⁹³ *Id.*

To Post or Not To Post: The Ethics of Mugshot Websites

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Mugshot websites have become popular — and controversial — across the United States as news outlets seek more Web traffic and the advertising revenue that accompanies it. Proponents argue that online photo galleries showing recent arrests in the community are a modern incarnation of a practice that newspapers and television stations have done for years and provide a valuable public service. However, critics contend such sites may demonize innocent people, perpetuate racial stereotypes, and permanently brand individuals with a digital scarlet letter. As the national conversation on criminal justice shifts following the police killing of George Floyd, newsrooms are beginning to reevaluate their mugshot galleries and several have decided to discontinue them. With the law providing little, if any, help, according to First Amendment scholars, the issue is primarily an ethical one. This paper analyzes the controversy through the lens of the Society of Professional Journalists' Code of Ethics. It concludes that, while mugshot sites are not an inherently unethical journalism practice, many news outlets present mugshots utilizing ethically dubious methods that urgently need to be reformed.

Keywords: mugshots, newspapers, websites, police, crime, race

I. Introduction

When John McCarthy was arrested in 2019, word quickly spread at the New Jersey middle school where he taught after someone spotted his mugshot online and shared it. The 56-year-old music teacher insisted the police had arrested the wrong person for stealing credit cards. As it turned out, the arrest was indeed a mistake, caused by a typo on a warrant. Police eventually freed McCarthy, but permanent damage had been done.¹

After spending three days in jail for a crime he did not commit, McCarthy returned to work where he faced ridicule from students. “My kids (students) were showing me my mugshot” on a website that features people who were arrested in New Jersey, he recalled. There were laughing comments on the mugshot site along with social media posts about his arrest from his current and

¹ Kathleen Hopkins, *A Teacher Was Jailed For 3 Days Due to Mistaken Identity. He Claims ‘Humiliation’ By Cops*, USA TODAY, Dec. 20, 2019, <https://www.usatoday.com/story/news/nation/2019/12/20/jackson-teacher-john-mccarthy-jailed-after-mistaken-identity/2673781001/>.

former students.² McCarthy's attorney added: "There were memes all over the school and on the Internet. He's embarrassed deeply."³ A year later, his mugshot remains online.⁴

McCarthy is among the many innocent people victimized by a controversial media trend: mugshot websites. When somebody gets arrested, police take a booking photograph, commonly known as a mugshot. In many states, these photos are public record and shared with news media, who immortalize them on their websites, even if the charges are not serious or the person has not been convicted.⁵ These online photo galleries have become popular across the United States as news outlets, particularly newspapers, seek more Web traffic and the advertising revenue that accompanies it. While the sites are based entirely on information already available from local police departments, they often do not tell the whole story, including who was ultimately convicted or who had had charges dropped.

With the law providing little, if any, help, the issue is primarily an ethical one. UCLA law professor Eugene Volokh, a renowned First Amendment scholar, explained: "Newspapers certainly have a First Amendment right to publish such material, and to keep it up (so long as they accurately describe the defendants as just having been accused) — and, of course, a First Amendment right not to. The question is how they should exercise this right."⁶ Adam Johnson, an analyst for media watchdog group Fairness & Accuracy in Reporting (FAIR), added: "It's not enough to hide behind slogans about 'public information' and 'free speech'; the issue is a moral — not a legal — one."⁷

Newspaper editors defend the sites, saying the public not only has a right to know but demands to know as a matter of safety. The 18,000-circulation *Wausau Pilot & Review* in Wisconsin, for example, states on its mugshot gallery, "This weekly feature ... is being published in response to reader concerns about crime and safety in the Wausau area."⁸ However, as the zeitgeist on criminal justice has shifted in recent years, expedited by national protests over the May 2020 police killing of George Floyd, some newsrooms are beginning to reevaluate their mugshot galleries.

At the moment, almost anything goes when it comes to online mugshot galleries. There are no codes of conduct or best practices for sites to emulate. Among newspapers and TV stations, standards differ widely. Poynter, a renowned media studies institute, outlined pressing issues that news media operating mugshot sites must grapple with: "Is this journalism? Voyeurism? Entertainment? ... Is it fair to highlight people who have been arrested but not been convicted of a crime? What if the charges are dropped or they're acquitted? What are the legal implications of

² Antony G. Attrino, *N.J. Teacher Spent 3 Days In Jail After Mistaken-Identity Warrant Arrest. He Plans to Sue*, NJ ADVANCE MEDIA (Dec. 17, 2019), <https://www.nj.com/ocean/2019/12/nj-teacher-spent-3-days-in-jail-after-mistaken-identity-warrant-arrest-he-plans-to-sue.html>.

³ Hopkins, *supra* note 1.

⁴ See *Arrest Information, John Mccarthy*, ARRESTS.ORG, https://newjersey.arrests.org/Arrests/John_Mccarthy_43086238/ (last visited Jun. 27, 2020).

⁵ Elliott C. McLaughlin, *Media Taking Mug Shots—Foreign, Familiar—To Bank*, CNN (Dec. 8, 2008), <http://www.cnn.com/2008/CRIME/12/08/mugshots.fascination/index.html>.

⁶ Eugene Volokh, *Should Newspapers Discontinue Their Crime Blotter / Mugshots Sections?*, REASON: VOLOKH CONSPIRACY, May 7, 2019, <https://reason.com/2019/05/07/should-newspapers-discontinue-their-crime-blotter-mugshots-sections/>.

⁷ Adam Johnson, *The Media's Profitable, Indefensible Addiction to Mugshots*, FAIR, Jan. 23, 2019, <https://fair.org/home/the-medias-profitable-indefensible-addiction-to-mugshots/>.

⁸ *Marathon County Crime Gallery: Sept. 3, 2020*, WAUSAU PILOT & REVIEW, <https://wausapilotandreview.com/2020/09/03/marathon-county-crime-gallery-sept-3-2020/> (last visited Sep. 4, 2020).

highlighting these people? ... In an age when things seem to live forever online, what impact could this have on people's digital identities?"⁹

This article will analyze these issues through the lens of the Society of Professional Journalists' (SPJ) Code of Ethics, an ethos voluntarily embraced by thousands of writers, editors, and news professionals. It has four major principles: Seek truth and report it, minimize harm, act independently, and be accountable.¹⁰ In short, this article argues that mugshot sites are not inherently unethical because they are inline with journalism norms and provide a valuable public service. Still, many sites utilize ethically dubious methods to present mugshots that overstep acceptable boundaries. News outlets could address much of the warranted criticism by adhering to SPJ's basic guidelines as a framework. However, the additional work required to do so may make shuttering the sites more practical, as several newspapers have recently elected.

II. Journalism or Voyeurism?

Critics argue mugshot galleries are more voyeurism than journalism: by allowing readers to view neighbors, colleagues, and acquaintances in embarrassing situations, the sites pander like trashy supermarket tabloids to society's sordid interest in gossip and sensational crime stories. But many journalists contend that the sites inform the public about important news by modernizing the media's long-standing practice of reporting on local crime and those involved in it.¹¹

Although mugshot galleries are a hot trend in digital media, they are not entirely novel, nor are they Internet-only. "For more than a century, police departments and news organizations have worked together to disseminate photos of people after their arrest," according to the *New York Times*.¹² In their heyday, most daily newspapers devoted space to highlights from the local police department blotter, a log of arrests and incidents.¹³ For example, for decades, the *Baltimore Sun* published a page in its print edition of police arrest reports that gives names, addresses, and charges for people arrested the previous day. In 1988, FOX aired "America's Most Wanted," a weekly television broadcast featuring photos of fugitives and reenactments of their alleged crime.¹⁴ It ran for 22 years, becoming the network's longest-running show.¹⁵

In the late 1990s, the mugshot phenomenon hit the Internet when public records site *The Smoking Gun* began curating a gallery of mugshots, featuring celebrities, infamous fugitives, and the "world's dumbest criminals."¹⁶ The popularity of the content spurred entrepreneurs to create entire websites devoted to mugshots.¹⁷ Legacy media executives saw the money that could be made from such sites and joined in the fray. Daily metro newspapers such as the *Arkansas*

⁹ Steve Myers, *Archived Chat: The Ethics of Posting Mug Shots Online*, POYNTER INST., Apr. 8, 2009, <https://www.poynter.org/reporting-editing/2009/archived-chat-the-ethics-of-posting-mug-shots-online/>.

¹⁰ *SPJ Code of Ethics*, SOC'Y OF PROF. JOURNALISTS (revised Sep. 6, 2014), <http://www.spj.org/ethicscode.asp>.

¹¹ Earnest L. Perry, *Coverage of Crime*, in *AMERICAN JOURNALISM: HISTORY, PRINCIPLES, PRACTICES*, eds. W. David Sloan and Lisa Mullikin Parcell 190 (2002).

¹² Maria Cramer, *The Mug Shot, a Crime Story Staple, Is Dropped by Some Newsrooms and Police*, N.Y. TIMES, July 3, 2020, <https://www.nytimes.com/2020/07/03/us/mugshot-san-francisco-police.html>.

¹³ Myers, *supra* note 9.

¹⁴ Frank J. Prial, *Freeze! You're on TV*, N.Y. TIMES (Sep. 25, 1988), <http://www.nytimes.com/1988/09/25/magazine/freeze-you-re-on-tv.html>.

¹⁵ *America's Most Wanted*, METACRITIC, <https://www.metacritic.com/tv/americas-most-wanted> (last visited Sep. 4, 2020).

¹⁶ Kevin Rector, *High-Caliber Ammunition: The Smoking Gun Makes its Mark Online with its Relentless Pursuit of Documents*, AM. JOURNALISM REV., June/July 2008, <http://ajr.org/Article.asp?id=4545>.

¹⁷ McLaughlin, *supra* note 5; see, e.g., OREGONCRIMENEWS.COM, <https://oregoncrimenews.com/> (last visited Sep. 4, 2020).

*Democrat-Gazette*¹⁸, *Quad City Times*¹⁹, and *Allentown Morning Call*²⁰ have for the past several years maintained sections on their websites featuring mugshots of recently arrested residents. Even small newspapers, such as the *Hernando Sun*,²¹ a weekly Florida newspaper launched in 2015, now have online mugshot galleries. A recent survey found that 40 percent of newspapers publish mugshot galleries.²² Meanwhile, TV news stations in several large markets such as Phoenix²³ and Charlotte and many in smaller markets²⁴ maintain mugshot galleries. Although less common, some radio stations also offer such content.²⁵

These sites have been wildly successful. An editor at *The Times of Northwest Indiana* said mugshots had been a “game-changer” for the newspaper’s online traffic.²⁶ *The Times of Wayne County*’s owner said mugshots are his newspaper’s most popular content.²⁷ Before discontinuing its gallery in June 2020, the *Palm Beach Post* estimated its mugshots drew half of the newspaper website’s 45 million monthly page views.²⁸

However, publishing such content online raises new ethical issues that are unique to digital media, particularly for respectable newspapers, which are expected to “adhere to the highest standards of professional journalism.”²⁹ To increase clicks and keep readers engaged, newspapers often go beyond reporting the facts and utilize tabloid tactics. For example, some news media curate select mugshot galleries like the *New York Daily News*, which has compiled more than 100 of the “World’s most outrageous mugshots”³⁰ and a “Babes behind bars: most attractive mugshots” slideshow.³¹ Media critic Michael Miner contends that such galleries suggest newspapers are “choosing mugs with the same careful regard for the overall effect as a florist assembling a bouquet.”³²

¹⁸ *Right2Know*, ARKANSAS DEMOCRAT-GAZETTE, <https://www.arkansasonline.com/right2know/> (last visited Sep. 4, 2020).

¹⁹ *Mugshot Report*, QUAD-CITY TIMES, https://qctimes.com/news/local/crime-and-courts/mugshot-report/article_aa0c01e2-7535-11e6-a1bf-4ff7e661113f.html (last visited Sep. 4, 2020).

²⁰ *Mugshots: Lehigh Valley Suspects*, THE MORNING CALL, <https://www.mcall.com/news/police/mc-mugshots-lehigh-valley-suspects-photogallery.html> (last visited Sep. 4, 2020).

²¹ *Mugshot Gallery*, HERNANDO SUN, <https://www.hernandosun.com/index.php/mugshots> (last visited Sep. 4, 2020).

²² Keri Blakinger, *Newsrooms Rethink a Crime Reporting Staple: The Mugshot*, THE MARSHALL PROJECT (Feb. 11, 2020), <https://www.themarshallproject.org/2020/02/11/newsrooms-rethink-a-crime-reporting-staple-the-mugshot>.

²³ *Mug Shots*, FOX 10 PHOENIX, <https://www.fox10phoenix.com/tag/series/mug-shots> (last visited Sep. 4, 2020).

²⁴ See, e.g., *Mugshots*, WBBJ 7 EYEWITNESS NEWS, <https://www.wbbjtv.com/mugshots/> (last visited Sep. 4, 2020).

²⁵ See, e.g., *Wayne County Mugshots*, WFIW RADIO, <https://www.wfiwradio.com/wayne-county-mug-shots/> (last visited Sep. 4, 2020).

²⁶ Corey Hutchins, *Mugshot Galleries Might Be a Web-Traffic Magnet. Does That Justify Publishing Them?*, COLUMBIA JOURNALISM REVIEW (Oct. 14, 2018), https://www.cjr.org/united_states_project/mugshots-ethics.php.

²⁷ Ryan Kailath, *Legislation Lets Most Police Agencies Decide Whether to Release Mugshots*, WBFO (Apr. 15, 2019), <https://news.wbfo.org/post/legislation-lets-most-police-agencies-decide-whether-release-mugshots>.

²⁸ Tim Padgett, *Newspapers Catch Mug-Shot Mania*, TIME (Sep. 21, 2009), <http://www.time.com/time/magazine/article/0,9171,1921604,00.html>.

²⁹ See, e.g., *Newport News Daily Press: Statement of Journalistic Ethics*, ASNE, <https://members.newsleaders.org/resources-ethics-newport> (last visited Sep. 4, 2020).

³⁰ *World’s Most Outrageous Mugshots*, N.Y. DAILY NEWS, <https://www.nydailynews.com/news/world-hilarious-mug-shots-gallery-1.14220> (last visited Sep. 4, 2020).

³¹ *Babes Behind Bars: Most Attractive Mugshots*, N.Y. DAILY NEWS, <https://www.nydailynews.com/entertainment/gossip/top-10-attractive-mug-shots-gallery-1.1334391> (last visited Sep. 4, 2020).

³² Michael Miner, *Doing Face Time: The Ethics of a Burgeoning Trend in Journalism*, CHI. READER, Dec. 16, 2010, <http://www.chicagoreader.com/chicago/mugs-in-the-news-journalism-ethics/Content?oid=2888360>.

Many sites — including Patch.com, a hyperlocal news site that features mugshot galleries for several of the communities it covers³³ — allow visitors to make comments on the mugshots. A public defender likened the feature to “online Salem pillories.”³⁴ *Sarasota Herald-Tribune* columnist Carrie Seidman observed: “The photos draw a steady stream of comments that range from praise for the arresting officers (‘Good job!’ ‘Keep it up!’ ‘Way to go!’ — these in response to the arrest of a white 17-year-old trafficking heroin) to uncensored disdain for the suspects (‘Death penalty!’ ‘Glad you got this monster!’ ‘An absolute human stain’ — these for a black 22-year-old charged with burglary and sexual battery.)”³⁵ Salt Lake City criminal defense attorney Ron Yengic called the sites “despicable ... The public at large loves to see people degraded ... We have become a very mean society ... without mercy ... that doesn’t understand the presumption of innocence at all. It does not add anything to the public debate about crime and how we deal with crime. It just gives the citizenry at large a way to make fun of people.”³⁶

But proponents point out that entertaining is part of the journalism business. Indeed, many journalism textbooks teach that journalists’ mission is to “entertain, inform, and educate.”³⁷ Criticizing newspapers for running mugshots galleries to increase website traffic is akin to criticizing a reporter for crafting a story people will want to read, proponents argue. “It’s America’s Most Wanted and COPS and probably a little Jerry Springer in there too,” said Ryan Chief, who founded *Busted*, a magazine and website featuring mugshots. “I’m not claiming I’m Clark Kent or Bruce Wayne. There’s obviously a sensationalized factor as well ... for the same reason people watch COPS ... or for that matter read the *L.A. Times* or the *Chicago Tribune* for an article about someone arrested for a DUI or a sexual assault.”³⁸

SPJ’s Code suggests, however, there should be limits to entertaining. Newspapers are institutions that are valued for their credibility and, as such, must maintain certain standards of decency. That means drawing distinctions between essential information and the gratuitous. As the SPJ implores: “Avoid pandering to lurid curiosity.”³⁹ This falls under the code’s tenet to “Minimize harm.” Because marginalized people are much more likely to be targeted by police for minor infractions, according to studies, this can also lead to more significant harm to American society’s most vulnerable groups.⁴⁰ FAIR’s Johnson explains, “It leads to summary public shaming, firings, diminished social status — all before a trial has even taken place. In the age of SEO, it’s a form of extrajudicial punishment that largely harms the poor and people of color.” SPJ’s Ethics Code does not merely speak to the need to weigh the harms before publishing each mugshot but calls on journalists to think about how they contribute to class and cultural stereotypes. “Avoid stereotyping,” it states.⁴¹

³³ See, e.g., *Will County Jail Roundup for August 27*, JOILET (ILL.) PATCH, <https://patch.com/illinois/joliet/will-county-jail-roundup-august-27> (last visited Sep. 4, 2020).

³⁴ Padgett, *supra* note 29.

³⁵ Carrie Seidman, *Are Social Media Mugshots the New Scarlet Letter?*, FLA. TIMES-UNION, Oct. 10, 2019, <https://www.jacksonville.com/news/20191010/seidman-are-social-media-mugshots-new-scarlet-letter>.

³⁶ Vince Horiuchi, *Your Mugshot is Online; It Could Be Gone — for a Price*, SALT LAKE TRIBUNE, Sep. 6, 2011, <http://www.sltrib.com/sltrib/home/52450098-183/com-mugshot-mugshots-florida.html.csp>.

³⁷ See, e.g., Tony Harcup, *THE ETHICAL JOURNALIST* 5 (2007).

³⁸ Molika Ashford, *Mugshot Publishing Continues to Expand*, STINKYJOURNALISM.ORG, Feb. 26, 2010, <http://www.stinkyjournalism.org/editordetail.php?id=653>.

³⁹ *SPJ Code of Ethics*, *supra* note 10.

⁴⁰ See, e.g., Rocco Parascandola, *Nearly 90% of People Arrested On Misdemeanor Charges In Nyc Are Minorities, According to Watchdog Report*, N.Y. DAILY NEWS, Aug. 1, 2016, <https://www.nydailynews.com/new-york/nyc-crime/minorities-90-nyc-misdemeanor-arrests-report-article-1.2734328>; and Wendy Sawyer, *Ten Key Facts About Policing: Highlight From Our Work*, PRISON POLICY INITIATIVE, June 5, 2020, <https://www.prisonpolicy.org/blog/2020/06/05/policingfacts/>.

⁴¹ *SPJ Code of Ethics*, *supra* note 10.

Prison reform activist Johnny Perez argued mugshot galleries “reaffirm[] existing biases and creates biases where none exist.” It is perhaps not a coincidence that sites that conspicuously violate the SPJ’s Code trade on existing stereotypes. It may be the case that all mugshot galleries, on some level, work to reinforce the idea that to be in trouble with the law is to be vulgar and without class. Cultural anthropologists Pierre Bourdieu and Gayle Rubin argue that those who are seen as possessing high cultural capital have privileged access to legal resources.⁴² In other words, those of higher class and cultural capital are less likely to appear on such a website. Their social connections and legal representatives could be used to circumvent the law. Accordingly, those with low cultural capital would be more likely to be displayed on mugshot websites because they do not have the same access to legal resources.

For that reason, the *Montgomery Advertiser* eliminated its mugshots in 2018. The newspaper reported that in June 2018, for example, only about half of the 342 people arrested locally appeared in its gallery. “Those with the means can quickly bond out, thereby removing their picture from the website and avoiding news roundups,” the editorial board stated. “Those with less will almost assuredly sit in jail for some time and have their photo posted on ours or another news website’s mugshot gallery.”⁴³

Some mugshot galleries, however, seem to be explicitly organized to reify the hierarchy of cultural capital by demeaning those who are thought to be at the bottom of the social ladder. Certain features on the sites, such as allowing visitors to leave anonymous comments, serve to increase harm by inviting ridicule. Similarly, special sections and specialized websites, such as “most outrageous mugshots” and “most attractive mugshots,” arguably contravene SPJ’s guideline. While the industry would certainly have even lower revenues without mugshot galleries, decency borders should also be recognized. Newspapers should not sell their souls to stay in business; otherwise, they risk becoming tawdry tabloids instead of respected sources of information.

III. Fairness & Balance

Another major criticism of mugshot galleries is that they are unfair because they do not tell the entire story. The *Waterloo-Cedar Falls Courier* is somewhat exceptional in that it only runs mugshots if there is a staff-reported story to accompany it.⁴⁴ Beyond the photos, most sites offer scant information, such as the suspects’ names, charges, and arrest date. No explanations of the charges or details about the circumstances surrounding the arrests are provided. *Kingsport Times-News*, a small daily newspaper in Tennessee, for example, shows arrests in the region during the past few days, including those charged with drunk driving or marijuana possession.⁴⁵ *The Daily Press*, a newspaper in Newport News, Virginia, has a gallery that is even less informative. In many cases, the gallery only shows names and photos but includes no information

⁴² Katherine Sender, *Sex Sells Sex, Class, and Taste in Commercial Gay and Lesbian Media*, GLQ: A J. OF LESBIAN AND GAY STUDIES 354 (2003).

⁴³ Editorial Board, *Here’s Why the Advertiser No Longer Runs Arrest Mugshot Galleries, Videos*, MONTGOMERY ADVERTISER, July 20, 2018, <https://www.montgomeryadvertiser.com/story/news/crime/2018/07/20/heres-why-advertiser-no-longer-runs-online-mugshot-galleries-videos/807497002/>.

⁴⁴ *Mugshots of 2020*, WATERLOO-CEDAR FALLS COURIER, https://wcfcourier.com/news/local/mugshots-of-2020/collection_671344a1-a33c-58bd-abb4-bc5b82877ef3.html#anchor_item_8 (last visited Sep. 4, 2020).

⁴⁵ Staff Reports, *Kingsport, Sullivan County Mugshots Online*, KINGSPORT TIMES-NEWS, https://www.timesnews.net/news/local-news/kingsport-sullivan-county-mug-shots-online/article_c0703cc4-93bc-5ef2-ab57-95908d5a8962.html (last visited Sep. 4, 2020).

about why they were arrested or what they were charged with.⁴⁶ Some newspapers have much more controversial practices, such as showing mugshots of juveniles as young as 16 on their website.⁴⁷

The information on the sites is not always reliable. Sometimes, police make mistakes or provide misinformation. “Several of the [police departments] warned us that the data they input can be flawed,” said Matt Waite, a journalism professor at University of Nebraska-Lincoln who previously helped build the *Tampa Bay Times*’ now-defunct mugshots site.⁴⁸ In other cases, people featured on online galleries have been innocent or later acquitted of charges.⁴⁹ Most websites do not follow up to see how the case played out in court.⁵⁰ Many innocent people may not be aware they are on these sites unless someone tells them or they actively look for themselves. People who were arrested but never charged may also end up on the sites, according to Waite:

The question is when does the mugshot appear on the county jail website? If I’m arrested on suspicion of watering my lawn illegally (and yes, I’ve seen loads of mugshots for this in Florida), I’m taken to the county jail and the booking process starts. I’m fingerprinted, photographed, and my information is keyed into the computer by a jail deputy. In many jurisdictions, when that deputy hits save, the mug goes out. Has a prosecutor reviewed the case? Have formal charges been filed? Nope. A prosecutor may look at the case and it could be dropped by the afternoon, but in many cases, since the mug hit the website, it gets captured. That’s why, when we launched the mugshot site at the *Tampa Bay Times* in 2009, we mass deleted everything in 60 days. We had no way of connecting the jail records to the county court system, so if charges were never filed, dropped or a case saw a judge and the person was found innocent, we had no way of knowing. So if you were going to scrape mugs in the first place, and you had no way to know what the outcome would be, then you really had one ethical option left and that was to not hold mugs longer than some cutoff. We asked court clerks about what the average time to an adjudication would typically be, and they told us around 60 days. The better option was to not scrape them to begin with, but management went forward with it at the time and we tried to mitigate the issues as we found them.⁵¹

This kind of incomplete reporting arguably violates the first tenet of SPJ’s Code of Ethics to “Seek the truth and report it.”⁵² John Watson, a media law and ethics professor at American University, argued mugshots could be just as likely to mislead a reader as they are to inform if they are missing important details about the arrest such as where, when and how the alleged crime

⁴⁶ *Pictures: Mugshots From Local Arrests*, NEWPORT NEWS DAILY PRESS, <https://www.dailypress.com/tidewater-review/dp-tr-pictures-mug-shots-arrests-photogallery.html> (last visited Sep. 4, 2020).

⁴⁷ Pamela Manson, *Utah Couple Sue Newspaper and Weber County for \$40M, Say Posting Son’s Jail Photo Online Caused ‘Severe’ Trauma*, SALT LAKE TRIBUNE, Aug. 24, 2017, <https://www.sltrib.com/news/2017/08/24/lawsuit-says-minors-mugshot-appeared-online-accuses-standard-examiner-weber-county-of-defamationbr/>.

⁴⁸ Myers, *supra* note 9.

⁴⁹ Doug Smith, *Should Mug Shots Really Be Posted Online?*, MY FOX TAMPA BAY, Sept. 23, 2011), <http://www.myfoxtampabay.com/dpp/news/local/pinellas/online-mug-shots-092311>.

⁵⁰ Myers, *supra* note 9.

⁵¹ Interview with Matt Waite, Professor of Practice, College of Journalism and Mass Communications at the University of Nebraska-Lincoln, E-mail. (Aug. 27, 2020).

⁵² *SPJ Code of Ethics*, *supra* note 10.

occurred and whether it was severe.⁵³ For example, he cited “public lewdness,” a charge that could mean a range of things from urinating in public to exposing oneself to children. A photo captioned simply “public lewdness” might wrongly influence a reader to think the person pictured is a pervert when he merely could not find a public restroom and relieved himself in a back alley when a cop happened by.

Kelly McBride, who is ethics chair of the Poynter Institute and has been dubbed “Journalism’s Top Ethics Expert,”⁵⁴ said because the mugshots only tell an incomplete story, they disregard journalistic ethics:

It’s unethical to report an arrest and never follow up. What’s the journalistic purpose of doing that? Mostly it’s for prurient purposes ... And it can cause great harm to the individual who is wrongly arrested for something horrible like assault, but never actually charged. Imagine if that’s the first thing that comes up on your Google search.⁵⁵

Some sites will freely take down photos upon request if the person was wrongly arrested, the charges are dropped, or the case leads to an acquittal. But several websites charge a fee to remove content, regardless of whether the person was acquitted or convicted of the charges. Due to the popularity of the news media’s mugshot galleries, opportunistic Web entrepreneurs with no journalism training have created stand-alone mugshot websites, whose motivation appears to be making money by charging people money to remove their images. The American Bar Association called such sites an “online extortion scheme.”⁵⁶ It can be a lucrative business as these sites charge as much as \$400 to remove a mugshot.⁵⁷ The founders of Mugshots.com are accused of extorting at least 5,700 individuals in the U.S. to rake in more than \$2.4 million.⁵⁸ Although mugshot galleries curated by the news media do not charge for removal, some newspapers by policy do not remove mugshots from their sites even if the defendant has been found not guilty or their record has been expunged.⁵⁹ To protect against a possible defamation lawsuit, most mugshot websites use prominently featured legal disclaimers such as: “Arrest and booking photos are provided by law enforcement officials. Arrest does not imply guilt, and criminal charges are merely accusations. A defendant is presumed innocent unless proven guilty and convicted.”⁶⁰

But some journalists say disclaimers and corrections aren’t enough. After wrestling with their consciences, several newsrooms in recent years decided that posting mugshots of people who have been arrested but not convicted is not responsible journalism. In 2018, major

⁵³ McLaughlin, *supra* note 5.

⁵⁴ Laura Wagner, *Journalism’s Top Ethics Expert Isn’t Concerned with Right and Wrong*, VICE NEWS, June 12, 2020, https://www.vice.com/en_us/article/xg8ygd/its-about-ethics-in-journalism.

⁵⁵ Myers, *supra* note 9.

⁵⁶ Jason Tashea, *2018’s Most Important Legal Tech Stories*, ABA J., Dec. 21, 2018, <http://www.abajournal.com/news/article/toptentech>.

⁵⁷ David Kravets, *Mug-Shot Industry Will Dig Up Your Past, Charge You to Bury It Again*, WIRED, Aug. 2, 2011, <https://www.wired.com/2011/08/mugshots/>.

⁵⁸ Olivia Solon, *Haunted By a Mugshot: How Predatory Websites Exploit the Shame of Arrest*, THE GUARDIAN, June 12, 2018, <https://www.theguardian.com/technology/2018/jun/12/mugshot-exploitation-websites-arrests-shame>.

⁵⁹ Horiuchi, *supra* note 37.

⁶⁰ See, e.g., *Mug Shots from Williamsburg, James City, York Arrests*, NEWPORT NEWS DAILY PRESS, <https://www.dailypress.com/news/crime/va-vg-mug-shots-williamsburg-james-city-york-pictures-photogallery.html> (last visited Jun. 27, 2020).

newspaper chain Gannett removed mugshot galleries from all of its sites. ⁶¹ Bob Gabordi, executive editor of Gannett newspaper *Florida Today*, explained:

Our decision to drop the mugshot galleries is meant to add more fairness to the process. We get phone calls and messages nearly every day from people who have appeared in the mugshot gallery whose cases were subsequently dropped even before reaching court ... We know this will cost us traffic — or clicks — on our digital sites. Some people like to flip through the photographs for their own reasons. Honestly, that has been a factor in it taking me so long to make this decision: Higher traffic equals additional revenue in today's media world. But at what cost? Reporting on crime and arrests is a public service obligation to you. But in the end, we want the *Florida Today* brand to stand for something more than the parading across your digital screens photographs of human beings at their lowest life moments.⁶²

In February 2020, the *Houston Chronicle* revised its mugshot policy, announcing it will cease posting slideshows of locals arrested who have not been convicted and are still presumed innocent under the law. “Mugshot slideshows whose primary purpose is to generate page views will no longer appear on our websites,” said Mark Lorando, a managing editor at the *Chronicle*.⁶³ “We’re better than that.” In June, newspaper chain Gatehouse Media, which merged with Gannett in 2020, announced it would remove mugshot galleries from all Gatehouse newspaper sites. A few days later, the *Tampa Bay Times*, *Orlando Sentinel*, and the *South Florida Sun-Sentinel* did the same.⁶⁴ Keri Blakinger of the Marshall Project, a journalism organization focused on criminal justice issues, attributes the deplatforming trend to a growing concern over racial inequities in policing:

I think part of the reason that this began changing was because of a shift in the national conversation around criminal justice generally in recent years. But also, newspapers were starting to get a deluge of takedown requests from people who wanted their images taken off the Internet. Then came the police killing of George Floyd and the widespread protests that forced many primarily white-run newsrooms to think even more critically about their relationships with communities of color and their coverage of police and crime.⁶⁵

⁶¹ Kristen Hare, *Gannett Took Mugshot Galleries Off Former Gatehouse Sites Yesterday*, POYNTER INST., June 10, 2020, <https://www.poynter.org/reporting-editing/2020/gannett-took-mugshot-galleries-off-former-gatehouse-sites-yesterday/>.

⁶² Rob Gabordi, *No More Mugshot Photo Galleries: Why Florida Today is Dropping Photos of People Arrested*, FLA. TODAY, June 4, 2018, <https://www.floridatoday.com/story/opinion/columnists/bob-gabordi/2018/06/04/why-florida-today-dropping-publishing-photo-galleries-arrests/667362002/>.

⁶³ Blakinger, *supra* note 22.

⁶⁴ Kristen Hare, *Update: Even More Newspapers are Cutting Mugshots Galleries*, POYNTER INST., June 23, 2020, <https://www.poynter.org/reporting-editing/2020/more-newspapers-are-cutting-mugshots-galleries/>.

⁶⁵ Holly Butcher Grant, *‘It’s Pure Schadenfreude’: Why Mugshot Galleries are Going but Not Gone*, NAT’L PRESS CLUB JOURNALISM INST., June 11, 2020, <https://www.pressclubinstitute.org/2020/06/11/its-pure-schadenfreude-why-mugshot-galleries-are-going-but-not-gone/>.

According to FAIR's Johnson, such thoughtful and deliberate decision-making is rare when it comes to mugshots. "Now the ethos for most newsrooms is: splash as many mugshots as possible online, and, frequently, laugh at them while doing so."⁶⁶

This begs the question: Should all news outlets follow suit and cease publishing photo galleries of residents arrested but not convicted? Writing in *Columbia Journalism Review*, Colorado College journalism professor Corey Hutchins argued that "it's not inherently unethical to publish mugshots," but "some media ethics specialists argue [changes are needed]."⁶⁷ Ted Gest, a founding partner of John Jay College's Center on Media, Crime and Justice, agrees mugshots should not be off-limits, but journalists should tell the whole story. "I'm not going to condemn someone" for publishing mugshots, he said. However, he added, "My question would be: Is it fair to people if you don't show the disposition of the case?"⁶⁸

While journalists should always strive for accuracy in their reporting, mistakes are inevitable. Newspapers would never be published if perfection were required. This is why newspapers are often said to be the "first rough draft of history."⁶⁹ Even before the Internet, there was a long-standing tradition of reporting on crime using only police as the source. Often, initial arrest reports were never further investigated. A *Tampa Bay Times* reporter explained:

It's common practice for newspapers to run crime blotters — lists of calls to which law enforcement officers responded, whether or not an arrest was made. Is that unethical as well? There's no follow-up, and a call indicates even less about guilt than an arrest. Yet, it's useful information about what's going on in a neighborhood. Is that unethical, too?⁷⁰

For a limited period, at least, mugshots and the charges against those depicted in them represent our best approximation of the truth. Accused criminals do not instantly go to trial; in certain jurisdictions, it can take up to several months following an arrest for a case to commence. McBride said that requiring newspapers to follow up on all initial arrest reports represents a departure from journalism's accepted norms. "I realize that the industry practice has been different. And, indeed, when I was a police reporter I didn't follow up on everything."

But, she added: "I can't defend that. Because if it's important enough to spend the resources putting into the paper, you should be dedicated enough to make sure your audience knows the whole truth about the matter."⁷¹ McBride is not alone. Many critics of mugshot sites insist newspapers should report on how the charges played out. "I think it would be far more useful to pull court records and report on convictions and sentences," crime victim advocate Tina Trent said. "You could run the mugshots once somebody has been actually found guilty."⁷²

While such a proposal may seem fair, it raises logistical issues. Most newsrooms do not have the staff resources to follow up on every single case, said McBride, who wonders whether artificial intelligence might help facilitate such efforts in the future.⁷³ Additionally, tracking a

⁶⁶ Johnson, *supra* note 7.

⁶⁷ Hutchins, *supra* note 27.

⁶⁸ *Id.*

⁶⁹ Jeffrey Frank, *Washington Mystery: Why Is it So Hard to Write About Our Nation's Capital?*, THE NEW YORKER, Nov. 18, 2002, at 99.

⁷⁰ Myers, *supra* note 9.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Hutchins, *supra* note 27.

criminal case as it moves through the court system can be tricky for even experienced lawyers. Fewer than one in 40 felony cases now make it to trial.⁷⁴ When deals get struck and charges get dropped, news releases often do not get issued.⁷⁵ Even when a judge or jury issues a verdict, the outcome may not mesh with what actually happened. For example, a conviction may be the result of inadequate legal representation, a faulty witness, or planted evidence. An acquittal does not necessarily equate with innocence. It just means that the prosecution could not convince a jury beyond a reasonable doubt. Such occurrences are common in sexual assault cases.

A possible compromise to this quandary of how to tell the “whole truth” is to give those charged a chance to clear their names in the media. In other words, there should also be a means to allow the accused to respond to or resist the categorization of being a miscreant. Mugshot sites should have a mechanism to remove people who were acquitted or had charges dropped. SPJ’s Code states, “Be accountable ... Admit mistakes and correct them promptly.”⁷⁶ Removal fees for the innocent and acquitted should be eliminated. In addition, sites should give the innocent and acquitted the option of being featured in a special “exonerated” section proclaiming the dismissal of the charges against them. Edward Wasserman, dean of the Graduate School of Journalism at the University of California, Berkeley, explained:

An acquittal or a dropped case is essentially no different from a correction, and if media organizations, to their credit, are more aggressive now in setting right often trivial errors they make, they ought to bring the same zeal toward clearing innocent people of baseless reputational harm that they, in the normal course of doing what they consider their duty, have done a great deal to cause.⁷⁷

Even those who are convicted should have an opportunity to tell their side of the story. This is consistent with SPJ’s Code, which states: “Diligently seek out subjects of news stories to give them the opportunity to respond to allegations of wrongdoing.”⁷⁸

IV. Right to Know vs. Personal Privacy

Finally, mugshot sites create a conflict between the public’s right to know and personal privacy. In the case of mugshot galleries, audiences are seeking information about private individuals that those individuals would rather not have disclosed. So, site operators must weigh the relative importance of two ethical principles — providing information that will help the public make decisions and respecting an individual’s right to privacy. Certainly, it is embarrassing to have your mugshot online for friends, family, neighbors, and coworkers to see. And, in the Internet Age, the embarrassment may never end.

In the past, if someone got arrested for a minor offense, chances are the public would not read about it in the newspaper or see the person’s face on the evening news. At worst, there might be a brief mention of what happened in the police blotter — a record that would disappear after a week or so when the recycle truck came to collect old newspapers. But the Web has changed that. Now, individuals risk being branded negatively forever. As the *New York Times* observed in a

⁷⁴ Richard A. Oppel, Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES, Sept. 25, 2011, <https://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html>.

⁷⁵ Miner, *supra* note 33.

⁷⁶ *SPJ Code of Ethics*, *supra* note 10.

⁷⁷ Miner, *supra* note 33.

⁷⁸ *SPJ Code of Ethics*, *supra* note 10.

story about disgraced former Congressman Anthony Weiner and negative online data, “The Web is like an elephant — it never forgets, and if let loose it can cause a lot of trouble.”⁷⁹ More and more prospective employers are using Internet searches to find information about people,⁸⁰ and mugshot galleries often show up first on searches. Thus, the mugshots can be “the modern-day equivalent of branding someone with a scarlet letter,” according to Seidman.⁸¹

Terrill Swift discovered this after spending 15 years in prison for a crime he did not commit. Although exonerated by DNA evidence for rape and murder, he has since struggled to get back on his feet because his mugshot still appears online. He said:

I thought that once you were exonerated that everything would take care of itself ... I come out a fully grown man, 32. It's hard enough to try to find a job because I have no history, right? It's hard enough to get an apartment because I have no credit. And then when you finally start to establish that and then you go to these different places and you want to go and get an apartment, well, “Hold on, why is your picture on this particular website?” And then you have to explain the very thing that you are trying to remove yourself from because it's a memory that you want to get past. But you can't, because it's always in your face.⁸²

Scott Ciolek, an attorney who has sued several of the sites, said, “When you have your mugshot online in any form, it has the effect of limiting your future prospects in all avenues of your life.”⁸³ FAIR's Johnson added, “Given the permanence of the Internet and the reputational risk associated with potential employers, partners and friends, a much stricter and thoughtful policy with regard to the treatment of people who have been arrested is needed.”⁸⁴

Significant points of debate surround the period the photos are displayed online and whether they are findable via search engines. Some websites store the content indefinitely, which means innocent people may have their mugshots Google-able for the rest of their lives. Other sites remove the content after two months.⁸⁵ Some newspapers take measures to prevent their website content from being indexed by search engine bots, reducing the chances that a link to the mugshot will appear when someone searches for the arrested person.⁸⁶ But many sites do not take such measures, and many even utilize search engine optimization practices to ensure their content appears first if someone does an Internet search for the name of a person in their mugshot gallery.⁸⁷ “Not only do these pages humiliate their subjects, but they also damage their chance of finding a job, housing or even potential dates because mugshots create a powerful visual

⁷⁹ Paul Sullivan, *Negative Online Data Can Be Challenged, at a Price*, N.Y. TIMES, June 10, 2011, <https://www.nytimes.com/2011/06/11/your-money/11wealth.html>.

⁸⁰ Jennifer Preston, *Social Media History Becomes a Job Hurdle*, N.Y. TIMES, July 20, 2011, <https://www.nytimes.com/2011/07/21/technology/social-media-history-becomes-a-new-job-hurdle.html>.

⁸¹ Seidman, *supra* note 36.

⁸² Jeanne Armstrong & John McGill, *Wrongfully Convicted Man Supports 'Long Overdue' Charges Against Mugshots.com*, CBC RADIO (May 22, 2018), <https://www.cbc.ca/radio/asithappens/as-it-happens-tuesday-edition-1.4672905/wrongfully-convicted-man-supports-long-overdue-charges-against-mugshots-com-1.4671939>.

⁸³ Jess Bidgood, *After Arrests, Quandary for Police on Posting Booking Photos*, N.Y. TIMES, June 26, 2015, <https://www.nytimes.com/2015/06/27/us/after-arrests-quandary-for-police-on-posting-booking-photos.html>.

⁸⁴ Johnson, *supra* note 7.

⁸⁵ Myers, *supra* note 9.

⁸⁶ *Id.*

⁸⁷ Kravets, *supra* note 59.

association between the subject and criminal activity, regardless of guilt,” according to *The Guardian*.⁸⁸

Despite attempts by Google to tweak its algorithm to reduce the sites’ prominence in search results dramatically, many sites “appear to have worked around the changes and bubbled back to the top,” *The Guardian* reports. Sites also utilize social media to attract additional clicks. For instance, in an August 2019 Facebook post, the *Wausau Pilot & Review* boasted that its latest mugshot gallery was “The longest felony mugshot gallery we’ve had in more than a year. The local police have been BUSY.”⁸⁹

The police arguably share responsibility for creating this controversy, too. These online galleries would likely not be possible if not for their cooperation. Back when *The Smoking Gun* began its mugshot section, it was able to collect its information only after filing tedious, time-consuming Freedom of Information Act requests.⁹⁰ Now, many police departments not only share arrest records with newspapers but in many cases even seem to encourage them to use the information.⁹¹ Several police departments, for instance, allow computers in newsrooms to automatically download arrest records and mugshots each day from their servers.⁹² A number of police departments also operate their own mugshot galleries on their websites. For example, Sarasota County (Florida) Sheriff’s Office has more than 50,000 followers on Facebook and its mugshot posts are among its most viewed content. Sheriff Tom Knight said anytime the mugshots on the website go down, the agency’s phones “blow up” with complaints.⁹³ Consequently, some critics say media are just a symptom of the problem, and that law enforcement is to blame for the problems caused by online galleries.⁹⁴ After all, not all police departments release mugshots. The New York Police Department, for example, releases photos and arrest records only if they are actively searching for a person.⁹⁵ In July 2020, San Francisco Police Department adopted a similar policy.⁹⁶ “When law enforcement is doing it, it helps to reinforce the idea that this is OK,” Ciolek said.⁹⁷

In an attempt to limit the attention given to mugshots, eighteen states have enacted laws cracking down on mugshot websites by banning them from charging removal fees, restricting the release of mugshots from law enforcement agencies, or requiring that the postings be accurate.⁹⁸ But so far, the laws have been largely ineffective in providing relief to those whose photos are featured on the sites, according to Eumi Lee, a California judge who previously researched the effectiveness of mugshot laws when she was a professor.⁹⁹ She said, “They haven’t worked” because mugshot websites have ignored the laws or quickly figured out ways to work around them. Moreover, the burden of enforcing such laws typically falls on the person whose photo is posted and lawsuits require time and money, which many of those arrested don’t have.

⁸⁸ Solon, *supra* note 60.

⁸⁹ *The longest felony mugshot gallery we've had in more than a year*, WAUSAU PILOT & REVIEW, FACEBOOK, Aug. 1, 2019, <https://www.facebook.com/wausaupilotandreview/posts/the-longest-felony-mugshot-gallery-weve-had-in-more-than-a-year-the-local-police/1320750008084303/>.

⁹⁰ Rector, *supra* note 16.

⁹¹ Ashford, *supra* note 39.

⁹² Myers, *supra* note 9.

⁹³ Seidman, *supra* note 36.

⁹⁴ Bidgood, *supra* note 85.

⁹⁵ Ashford, *supra* note 39.

⁹⁶ Cramer, *supra* note 12.

⁹⁷ Bidgood, *supra* note 85.

⁹⁸ Rebecca Beitsch, *Fight Against Mugshot Sites has Shown Little Success*, ROME NEWS-TRIBUNE, Jan. 3, 2018, http://www.northwestgeorgianews.com/fight-against-mugshot-sites-has-shown-little-success/article_618f68ce-e6c9-5560-b943-179586d713fc.html.

⁹⁹ *Id.*

Many journalists have also balked at legal reforms. When New York lawmakers in 2019 proposed banning disclosure of mugshots and arrest info, the Schenectady *Daily Gazette* argued it would “deprive New York’s citizens of information” the “public has [a] vested interest in seeing.”¹⁰⁰ In an editorial, the newspaper contended:

Members of the public have a right to know who has been arrested and charged with crimes. We have a right to see what the suspects look like. We have a right to know the circumstances behind arrests. If you’re an adult who finds yourself subject to the state’s criminal justice system, you have no right to expect that your identity or the crime for which you are accused will remain confidential.

Chief, of *Busted*, said mugshot galleries play a vital role in community journalism. “This is public information ... It informs communities of recent arrests,” he said. “By doing so, we’re educating them on what’s going on in their community.” Chief cited one instance in which a mugshot he published helped identify a sex offender at a YMCA in a Michigan community. It prompted background checks that identified 22 registered sex offenders who were not supposed to have been allowed membership.¹⁰¹

Mugshot galleries also help communities to police against the police, argued *New York Post* columnist Bob McManus. Without the transparency they provide, it would be “a move toward corrupt law enforcement, to say nothing of Soviet-style secret arrest and prosecution. And it would deprive communities of necessary crime and public-safety information.”¹⁰²

Given these considerations, an argument can be made that mugshot sites have merits. The SPJ Ethics Code states that journalists have an obligation only to the public. “Act independently,” it states. “Journalists should be free of obligation to any interest other than the public’s right to know.”¹⁰³ That said, there is a difference between what the public wants to know and what it needs to know. While there is value in informing the public about a child molester or drug dealer in the neighborhood, it is questionable if there is significant value in featuring people charged with minor misdemeanors such as driving with an expired license as many sites do.

Not all crimes are equally newsworthy. While SPJ’s Code advises journalists to “Minimize harm,” this does not mean to avoid harm altogether. Some individuals will be harmed in the form of public shame and ridicule so that the community may be safer. But those charged with minor offenses or not charged at all should be overlooked. “If the benefit of publishing it is just, ‘Well, it happened’ ... I don’t think that’s a good enough reason,” said Bastiaan Vanacker, who directs the Center for Digital Ethics and Policy at Loyola University Chicago.¹⁰⁴ In addition, juveniles should be left off the sites. As SPJ’s Code notes, “Use special sensitivity when dealing with children and inexperienced sources or subjects.”

Lastly, steps should be taken to prevent such websites from being indexed by search engines. Otherwise, the mugshots could continue to be accessible in search engines through cache

¹⁰⁰ Gazette Editorial Board, *Editorial: Public Has Right to View Suspect Info*, DAILY GAZETTE, Jan. 22, 2019, <https://dailygazette.com/article/2019/01/22/editorial-public-has-right-to-view-suspect-info>.

¹⁰¹ Ashford, *supra* note 39.

¹⁰² Bob McManus, *Don’t Embarrass the Criminals!*, CITY J., Feb. 5, 2019, <https://www.city-journal.org/cuomo-mugshot-ban>.

¹⁰³ *SPJ Code of Ethics*, *supra* note 10.

¹⁰⁴ Hutchins, *supra* note 27.

memory long after being removed from the website's server. SPJ's Code advises journalists to "Consider the long-term implications of the extended reach and permanence of publication."¹⁰⁵ As Laura Hazard Owen, deputy editor of Harvard University's Nieman Journalism Lab, put it: "The old American newspaper standard is: Never change anything that's true; news values come first. But [today], it's clear that standard isn't exactly working; a brief item on Page A17 in one day's print newspaper doesn't have the same sort of impact as a permanent digital record."¹⁰⁶

V. Conclusion

As concerns over injustices in policing continue to grow, mugshot websites are likely to come under increased scrutiny. While more newspapers may opt to do away with their controversial mug shots galleries, the practice will likely not wholly cease anytime soon due to their First Amendment protections and consumer demand. Mugshot websites arguably offer benefits to society — even if their owners are operating them for purely opportunistic reasons — but there are questionable practices in the industry that urgently need to be addressed or news media websites risk being likened to tabloid journalism. By implementing a handful of measures, mugshot websites may be able to alleviate many ethical concerns.

Specifically, limiting the duration for storing mugshots on servers and preventing content from being data-mined and indexed by search engines will help those featured in online galleries from having their digital identities permanently tainted. It will also ensure that newspapers of record do not perpetually publicize information that may be incorrect or outdated, a betrayal of their mission. Creating a mechanism for innocent people to clear their names and allowing everyone featured on the site to offer an explanation will provide fairness and balance, two fundamentals of journalism ethics. Banning comments on mugshots may help those pictured avoid gratuitous ridicule from the community. Explaining charges could lessen the likelihood of readers making false assumptions and spreading misinformation. Finally, news outlets should consider whether all types of criminals, regardless of the seriousness of offense and age of the offender, should be included in their database. While there are merits to being egalitarian in covering crime, not all crimes may be newsworthy.

Of all these suggestions, limiting the searchability of mugshot galleries may trouble news editors who champion transparency. However, these limitations do not signal that the news sector is ignoring its responsibility to provide information to the public. On the contrary, news editors who place limits around the searchability of their mugshot galleries could help to create a culture of more careful and responsible information gathering. Performing a quick general search for a particular person's name will not immediately uncover a mugshot if it exists. Yet those who seek specific information about another's criminal record would still be able to find it on the newspaper's or TV station's website. Because the information can be found at a site connected to a news outlet, there will be a greater chance that further information about the alleged crime (or its dismissal) can be provided. Operating mugshot galleries in this manner also has the benefit of redirecting web traffic to the news outlet's website. If mugshots cannot be found on larger search engines such as Google, those seeking such information must go to the news source. Greater web traffic allows news media to attract more advertisements to their site and build funds for further news reporting.

¹⁰⁵ *SPJ Code of Ethics*, *supra* note 10.

¹⁰⁶ Laura Hazard Owen, *Fewer Mugshots, Less Naming and Shaming: How Editors in Cleveland are Trying to Build a More Compassionate Newsroom*, NIEMANLAB, Oct. 18, 2018, <https://www.niemanlab.org/2018/10/fewer-mugshots-less-naming-and-shaming-how-editors-in-cleveland-are-trying-to-build-a-more-compassionate-newsroom/>.

Of course, implementing all of these changes will require time and resources. News media would no longer automatically upload any and all mugshots and leave them online indefinitely. Manual curating and updating will be necessary. In some cases, existing mugshot galleries may need a major overhaul. News outlets committed to ethical journalism may realize that eliminating the sites is the easier solution.

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THE TROUBLE WITH “TRUE THREATS”

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*In the midst of prevalent abusive language online, the U.S. Supreme Court’s decision in *Elonis v. United States* did not resolve many issues in how to determine whether a statement is a “true threat” under federal law, and the court denied certiorari in three subsequent cases that presented the opportunity to clarify the law on this point. In the absence of such guidance, federal courts have applied various factors to rule in these cases. This paper quantifies and analyzes how these courts have applied various factors, showing the need for clear standards for what communication can be considered “true threats.”*

Keywords: True Threats, Internet, First Amendment, abusive speech

I. Introduction

The Internet presents nearly infinite possibilities for expression: to share information and ideas; to discuss and debate; and to communicate across boundaries, be they physical, social or political. But we have also seen that the internet has a dark side, with the more troublesome elements of human society—including hatred, intimidation and violence—replicated, and even magnified, online.

A particularly disturbing phenomenon is online harassment. A 2016 study found that 47 percent of Internet users in the United States had been harassed online, including 12 percent who reported that the abuser attempted to actually physically harm them.¹ A 2017 study found that 10 percent of Americans said that they had received physical threats online, with men more likely to have experienced such threats than women.² In another 2017 poll, one-third of women surveyed reported that they had been subjected to harassment on Twitter, with 27 percent reporting that this included direct or indirect threats of violence.³

¹ Amanda Lenhart, Michele Ybarra, Kathryn Zickuhr and Myeshia Price-Feeney (Data & Society Research Institute; Center For Innovative Public Health Research), *Online Harassment, Digital Abuse, and Cyberstalking in America* (Nov. 21, 2016), https://www.datasociety.net/pubs/oh/Online_Harassment_2016.pdf.

² Maeve Duggan, *Online Harassment 2017*, Pew Research Center (July 11, 2017), <http://www.pewinternet.org/2017/07/11/online-harassment-2017/>. The figure was 12 percent for men, 8 percent for women. There was a more dramatic difference by age, with 25 percent of those aged 18 to 29 reporting receiving such threats, while only five percent of those 30 and over reported receiving such threats. *Id.*

³ Amnesty International, *Toxic Twitter – Women’s Experiences of Violence and Abuse on Twitter*, ch. 3, <https://www.amnesty.org/en/latest/research/2018/03/online-violence-against-women-chapter-3/>. This poll, conducted for Amnesty International, collected and compared results for eight countries. Overall, an average of 25 percent of the women in the eight countries reported harassment on Twitter. Again, younger users were much more likely to have seen such behavior. *Id.*

A primary means of penalizing such behavior under federal law⁴ is prosecution under 18 U.S.C. § 875(c), which provides that “[w]hoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.”⁵ This statute is silent on whether the person making the threatening communication has to have any particular state of mind to be convicted under the statute, such as the intention to intimidate the target of the threat or the intention to actually carry out the threat.⁶ This omission has forced the courts to determine what criteria they should use to determine guilt under the law.

It was originally hoped that the U.S. Supreme Court would resolve this question in the 2015 case of *Elonis v. United States*.⁷ But the Court resolved *Elonis* “on narrow statutory grounds,”⁸ leaving the issue of the “true threats” standard unresolved. More recently, the Court declined three other opportunities to address this question, when it denied *certiorari* in subsequent cases raising the issue.⁹ This leaves the law unclear, which may have implications for how often the federal anti-harassment law is used.¹⁰ Yet, despite its lack of clear guidance, federal courts have tried to use the U.S. Supreme Court’s *Elonis* decision as a marker for determining what standard can be used when determining whether a communication is threatening.

⁴ Virtually every state has its own laws addressing online harassment. For information on these statutes, see *Bullying Laws Across America*, Cyberbullying Resource Center, <https://cyberbullying.org/bullying-laws>.

⁵ 18 U.S.C. § 875(c).

⁶ The requirement of a criminal intent, or “mens rea,” for conviction of a crime has a long history in English and American criminal law. See Eugene J. Chesney, *Concept of Mens Rea in the Criminal Law*, 29 AM. INST. CRIM. L. & CRIMINOLOGY 627 (1938-39), <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=2828&context=jclc>. See also *Morissette v. United States*, 342 U.S. 246, 250–52 (1952) (describing how the concept is “is as universal and persistent in mature systems of law ...”) and *United States v. Balint*, 258 U.S. 250, 251–52 (1922) (“[T]he general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it.”).

⁷ *Elonis v. U.S.*, 575 U.S. 723 (2015).

⁸ See Petition for a Writ of Certiorari at 3, *Knox v. Pennsylvania*, No. 18-949 (filed Jan. 18, 2019), available at <https://www.scotusblog.com/case-files/cases/knox-v-pennsylvania/>, cert. denied, --- U.S. ---, 139 S. Ct. 1547, 203 L. Ed. 2d 746 (U.S. Apr. 15, 2019).

⁹ See *Knox v. Pennsylvania*, --- U.S. ---, 139 S. Ct. 1547, 203 L. Ed. 2d 746 (U.S. Apr. 15, 2019) (denying certiorari) and *Kansas v. Boettger*, No. 19-1051, 2020 WL 3405868, 2020 U.S. LEXIS 3370 (U.S. June 22, 2020) (denying certiorari). For more on these cases, see text accompanying notes 90-116, *infra*.

¹⁰ In 2014, Professor Danielle Citron found 50 prosecutions under 18 U.S. Code § 875(c) in the prior eight years: an average of 6.25 a year. Emily Bazelon, *Essay: Do Online Death Threats Count as Free Speech?*, N.Y. TIMES MAG., Nov. 25, 2014, <https://www.nytimes.com/2014/11/30/magazine/do-online-death-threats-count-as-free-speech.html>. Professor Orin Kerr, reacting to this finding, found in his own research that from fiscal years 2005 to 2012, there were 242 completed prosecutions involving section 875(c), an average of 30.25 a year. Orin Kerr, *The Volokh Conspiracy: How rare are online threat prosecutions?*, WASH. POST, Dec. 1, 2014, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/01/how-rare-are-online-threat-prosecutions/?utm_term=.34ce65428859. Kerr’s results led Citron to undertake another study, in which she found an average of 25 cases pursued to trial or plea each year for the prior six years. Danielle Citron, *United States v. Elonis and the Rarity of Threat Prosecutions*, FORBES, Dec. 3, 2014, <https://www.forbes.com/sites/daniellecitron/2014/12/03/united-states-v-elonis-and-the-rarity-of-threat-prosecutions/#2f88fc252bee>. In a separate study, *Think Progress* found that there had been 280 prosecutions under the federal statute during fiscal years 2012 through 2016, an average of 56 a year; 177 of these ended in convictions. Joshua Eaton, *Department of Justice turns a blind eye to online stalking and abuse*, ThinkProgress.com, Sept. 18, 2017, <https://thinkprogress.org/exclusive-department-of-justice-fails-to-prosecute-online-stalking-and-abuse-new-data-shows-c82e9cdc21ff/>.

We identified and examined all reported federal decisions in which courts made this determination, starting from the date of the *Elonis* ruling through the fifth anniversary of the ruling.¹¹ In this paper, we quantify these results to show which criteria federal courts used to make these determinations. Our analysis highlights the confusion and disagreement in the courts on how the federal online harassment statute should be applied, and what, exactly is required for conviction under the statute. The end result of this confusion can be that valid cases are not successfully prosecuted, or prosecuted at all, leaving the lurking dangers of online communication unaddressed.

II. The History of “True Threats”

Prosecutions for conveying insults and threats under 18 U.S.C. § 875(c) and equivalent state statutes have generally been dealt with under the legal doctrine of “true threats,”¹² which the U.S. Supreme Court has held are not protected by the First Amendment right of free speech.¹³ But this legal principle remains ill-defined, and—since it was developed in the pre-Internet era—is often an awkward fit for harassment via modern, online media.

The First Amendment construct of “true threats” was first articulated in the 1969 decision in *Watts v. United States*.¹⁴ In *Watts*, an anti-Vietnam protestor said at a demonstration that he was going to defy the draft. “I am not going,” he said. “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.,” referring to President Lyndon B. Johnson.¹⁵ The protestor was convicted of threatening the president under 18 U.S.C. § 871, but the Supreme Court majority vacated the conviction. “The statute initially requires the Government to prove a true ‘threat,’” the court majority said. “We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term.”¹⁶ Rather than a threat, the majority said that the statement was “a kind of very crude offensive method of stating a political opposition to the President.”¹⁷

It took more than thirty years until the Supreme Court took another look at what constitutes a “true threat.” When it did, in *Virginia v. Black*, Justice Sandra Day O’Connor’s plurality opinion generally upheld Virginia’s law barring the burning of a cross with intent to intimidate, but invalidated a provision of the law allowing the jury to construe the burning of the cross as *prima facie* evidence of such intent.¹⁸

For a statement to be a “true threat,” O’Connor wrote, the speaker must intend for a threat to be conveyed. But it does not matter whether the speaker actually intended to carry out the threat.

¹¹ We collected decisions issued from June 1, 2015, the day the *Elonis* decision was released, through June 1, 2020. See note 127, *infra*.

¹² Throughout this paper, “true threats” is contained within quotation marks, to indicate that it is a legal term of art with a specific meaning. However, in quotations and titles of articles, cases and other sources, quotations are used only when they were used in the original. The courts vary on whether they use quotation marks or not, sometimes in the very same decision. See, e.g., *Virginia v. Black*, 538 U.S. 343, 359–60 (2003) (referring to both “true threats,” with quotation marks, and true threats, without quotation marks, in the same paragraph).

¹³ *Virginia v. Black*, 538 U.S. at 359 (2003). See also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (“[T]hreats of violence are outside the First Amendment”);

¹⁴ 394 U.S. 705 (1969).

¹⁵ *Id.* at 706.

¹⁶ *Id.* at 708.

¹⁷ *Id.*

¹⁸ 538 U.S. 343 (2003).

“True threats” encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence¹⁹ to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats “protect[s] individuals from the fear of violence” and “from the disruption that fear engenders,” in addition to protecting people “from the possibility that the threatened violence will occur.” Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.²⁰

Under this formulation, in order to convict someone of making “true threats” the prosecution must show that the defendant actually intended to convey an actual threat. Such intent must be demonstrated and cannot simply be assumed. But even with this parameter established, it remained unclear what type of intent was necessary: just the intent to convey a threat, or the intent to carry it out.

III. The “Objective” and “Subjective” Tests for “True Threats”

In the wake of the *Watts* and *Black* rulings by the U.S. Supreme Court, the federal courts of appeal crafted two competing standards for what constituted a “true threat.” The standards differ on whether the proper focus on determining whether a statement is a “true threat” is a reasonable interpretation of the message itself, or on the speaker’s intention in making the statement.²¹ These differing results “reflect[] widespread confusion among courts nationwide about the implications of [the U.S. Supreme Court’s] decision in *Virginia v. Black*.”²²

The more commonly accepted of these two standards is the so-called “objective” standard, and inquires whether the speaker should have known and understood the content of the communication and could have reasonably foreseen that the words would be understood as a threat by a reasonable person hearing or reading the statement.²³ This standard requires that “an

¹⁹ In the context of extortion statutes, several courts have extended the “injury to the person” element to cover threats of injury to reputation or mental well-being, although some courts have rejected this approach. *See, e.g.*, *U.S. v. Jackson*, 180 F.3d 55, 71 (2d Cir. 1999), *modified on other grounds on reh’g*, 196 F.3d 383 (2d Cir. 1999), *cert. denied sub. nom. Medina v. U.S.*, 530 U.S. 1267 (2000) (“We conclude that where a threat of harm to a person’s reputation seeks money or property to which the threatener does not have, and cannot reasonably believe she has, a claim of right, or where the threat has no nexus to a plausible claim of right, the threat is inherently wrongful and its transmission in interstate commerce is prohibited by [U.S.C.] § 875(d)”). *See also* Thomas B. Merritt, *Injury to Reputation or Mental Well-Being as Within Penal Extortion Statutes Requiring Threat of “Injury to the Person,”* 87 A.L.R.5th 715, § 3(a) (2001 supp. 2018) (collecting cases). The government has urged the U.S. Supreme Court to extend 18 U.S.C. § 875(c) to similarly cover threats of injury to reputation or mental well-being, but the court has declined to do so. *See* *Elonis v. U.S.*, 575 U.S. 723, ---, 135 S. Ct. 2001, 2008, 192 L. Ed. 2d 1, 12 (2015).

²⁰ *Virginia v. Black*, 538 U.S. at 359-60 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (2003)) (citations omitted).

²¹ *See* Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J. L. & PUB. POL’Y 283, 288 (2001) (“To determine when speech is protected by the First Amendment, and therefore not punishable as a threat, most circuits have adopted either a reasonable speaker or a reasonable listener test.”). *See also* *U.S. v. Elonis*, No. Crim. A. 11-13, 2011 WL 5024284, at *2 (E.D. Pa. Oct. 20, 2011).

²² Petition for a Writ of Certiorari at 16, *Elonis v. U.S.*, 575 U.S. 723 (2015) (No. 13-983).

²³ *See* Case Comment (David T. Holland), *Constitutional Law—Eleventh Circuit Holds True Threats Doctrine Analyzed Under Objective Standard—United States v. Martinez*, 736 F.3d 981 (11th Cir. 2013), 47 SUFFOLK U. L. REV. 953, 956 (2014).

objectively reasonable jury could find beyond a reasonable doubt [that a statement is] a serious expression of an intent to injure another person.”²⁴

The objective, reasonable person test requires that the defendant intentionally make a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm.²⁵

In this approach, the determination of the defendant’s intent is made with regard to how individuals other than the speaker—including the target of the alleged threat and third-party hearers—perceive the statement. This approach was adopted by the First, Second, Third, Fourth, Fifth, Sixth, Eighth and Eleventh circuits.²⁶

The other standard, labelled the “subjective” standard, focuses on the speaker’s actual understanding of his or her statement, and whether the speaker actually intended to convey a threat. “Under a subjective analysis, the threat is examined by looking at whether the alleged offender actually intended his or her actions to be perceived as a threat.”²⁷ Under this standard, “the only intent requirement for a ‘true threat’ is that the defendant intentionally or knowingly communicate the threat,”²⁸ and “the element of intent [is] the determinative factor separating protected expression from unprotected criminal behavior.”²⁹ Thus “[t]he Government must ... show that [the defendant] made the statements intending that they be taken as a threat.”³⁰

In order for a statement to be a “true threat” under this “subjective” standard, “the speaker must subjectively intend to threaten”³¹ and “a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault.”³² This approach is clearly a minority one, and had been

²⁴ U.S. v. Martinez, 736 F.3d 981, 984 (11th Cir. 2013).

²⁵ U.S. v. Kosma, 951 F.2d 549, 559 (3d Cir. 1991).

²⁶ See Paul T. Crane, “True Threats” and the Issue of Intent, 92 VA. L. REV. 1225, 1243 (2006) (“[T]he preferred approach of the lower courts, by an overwhelming margin, was the objective test.”). See also U.S. v. Nishnianidze, 342 F.3d 6, 16 (1st Cir. 2003); U.S. v. Kelner, 534 F.2d 1020, 1027 (2d Cir. 1976); U.S. v. Sovie, 122 F.3d 122, 125 (2d Cir. 1997); U.S. v. Kosma, *supra* note 25, 951 F.2d at 559 (3d Cir. 1991); U.S. v. Elonis, 730 F.3d 321, 331 (3d Cir. 2013), *rev’d on other grounds*, 575 U.S. 723 (2015); U.S. v. White, 670 F.3d 498, 508 (4th Cir. 2012); Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 616 (5th Cir. 2004); U.S. v. Jeffries, 692 F.3d 473, 479 (6th Cir. 2012); U.S. v. Mabie, 663 F.3d 322, 332-33 (8th Cir. 2011), *cert. denied*, 568 U.S. 829 (2012); U.S. v. Nicklas, 713 F.3d 435, 440 (8th Cir. 2013) and U.S. v. Martinez, *supra* note 24, 736 F.3d 981, 988 (11th Cir. 2013). Besides the various approaches of the federal courts, Elonis’s *certiorari* petition cited numerous rulings from states’ highest appellate courts adopting such an “objective” standard. Petition for a Writ of Certiorari at 17-18, *Elonis v. U.S.*, 575 U.S. 723 (2015) (No. 13-983) (citing cases from Arizona; Arkansas; California; Colorado; Connecticut; the District of Columbia; Hawaii; Iowa; Louisiana; Mississippi; Montana; North Dakota; Oregon; Pennsylvania; South Dakota; Washington; and Wisconsin).

²⁷ Case Comment (David T. Holland), *supra* note 23, at 956.

²⁸ Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1075 (9th Cir. 2002), *as amended* (9th Cir. July 10, 2002), *cert. denied*, 539 U.S. 958 (2003).

²⁹ U.S. v. Gilbert, 813 F.2d 1523, 1529 (9th Cir. 1987).

³⁰ U.S. v. Bagdasarian, 652 F.3d 1113, 1122 (9th Cir. 2011).

³¹ U.S. v. Keyser, 704 F.3d 631, 638 (9th Cir. 2012).

³² *Id.* (quoting U.S. v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990), *overruled in part on other grounds by* Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 290 F.3d 1058, 1066-70 (9th Cir. 2002) (en banc)).

adopted by only the Ninth and (apparently) Tenth circuits.³³ The Tenth Circuit later declared that its prior ruling was limited, and that it followed the “objective” standard.³⁴

The Seventh Circuit, meanwhile, equivocated over its approach. In two separate rulings, different panels of the court each adopted a different one of the two standards. One panel of the court accepted the “objective” test in 2005,³⁵ while another panel used the “subjective” standard in a 2008 case without mentioning the earlier ruling.³⁶

But it is the “objective” standard that has been adopted by a majority of the federal circuits, while only one has clearly adopted the “subjective” standard. In summary,

Most courts still hold that the true-threat standard requires an objective inquiry into whether a reasonable person would regard the statement as genuinely threatening. But a minority of courts have read *Black* to mean that the standard is purely subjective, and thus the government must show only the speaker’s subjective intent to threaten.³⁷

The existence of a majority and minority rule in a split among the circuits makes the application of 18 U.S.C. § 875(c) uncertain.³⁸ That uncertainty may also present constitutional due process concerns.³⁹

IV. The *Elonis* Case

There was widespread hope that this conflict would be resolved in the most recent U.S. Supreme Court decision applying the “true threats” doctrine, *Elonis v. United States*.⁴⁰ In *Elonis*, a man who had been fired from his job at an amusement park was charged after he posted messages on Facebook that appeared to threaten the amusement park, his wife, state and local

³³ See *U.S. v. Twine*, 853 F.2d 676, 680 (9th Cir. 1988); *U.S. v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005); *Planned Parenthood v. Am. Coal. of Life Activists*, *supra* note 28, 290 F.3d at 1071 (9th Cir. 2002); *Bagdasarian*, *supra* note 30, 652 F.3d at 1117 (9th Cir. 2011); *U.S. v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005); and *U.S. v. Heineman*, 767 F.3d 970, 975 (10th Cir. 2014). For the complications of the Ninth Circuit’s evolution on this issue, see *Crane*, *supra* note 26, 92 VA. L. REV. at 1265–69.

³⁴ See *United States v. Wheeler*, 776 F.3d 736, 744 (10th Cir. 2015) (“We have consistently held that statements amount to true threats when a reasonable person would interpret the statements to be threats.”)

³⁵ *U.S. v. Stewart*, 411 F.3d 825, 828 (7th Cir. 2005).

³⁶ *U.S. v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008) (noting, incorrectly, that “This circuit has not yet addressed the issue.”).

³⁷ Petition for a Writ of Certiorari at 2, *Knox v. Pennsylvania*, No. 18-949 (filed Jan. 18, 2019), available at <https://www.scotusblog.com/case-files/cases/knox-v-pennsylvania/>, cert. denied, --- U.S. --, 139 S. Ct. 1547, 203 L. Ed. 2d 746 (U.S. Apr. 15, 2019).

³⁸ See Julian W. Smith, *Evidence of Ambiguity: The Effect of Circuit Splits on the Interpretation of Federal Criminal Law*, 16 SUFFOLK J. TRIAL & APP. ADVOC. 79, 95 (2011) (discussing several circuit splits in federal criminal law and arguing that such splits indicate ambiguities that should be resolved in favor of defendants).

³⁹ See Trevor W. Morrison, *Fair Warning & the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. CAL. L. REV. 455, 483 (2001), <https://web.law.columbia.edu/sites/default/files/microsites/constitutional-governance/files/Fair-Warning-and-the-Retroactive-Judicial-Expansion.pdf> (due process implications of circuit splits in federal criminal law and U.S. Supreme Court resolutions of such splits).

⁴⁰ See, e.g., Lisa T. McElroy, *Facebook case: Does believing that a message is a threat make it so under law?*, L.A. TIMES, Dec. 1, 2014, <https://www.latimes.com/opinion/op-ed/la-oe-mcelroy-threats-ferguson-supreme-court-20141202-story.html>. The court’s decision in *Elonis* is at 575 U.S. 723 (2015).

police, a kindergarten class and an FBI agent.⁴¹ Elonis, who posted some of the messages under the pseudonym “Tone Dougie,” claimed that the posts were rap lyrics similar in style to the rap artist Eminem.⁴² He also wrote that the lyrics were “fictitious,” with no “resemblance to real persons,” and stated, “I’m doing this for me. My writing is therapeutic.”⁴³

Despite this, Elonis was charged under 18 U.S.C. § 875(c), which as described *supra* does not include an intent requirement.⁴⁴ This left the trial court to determine what the prosecution had to prove regarding Elonis’s state of mind in order to convict Elonis. Ruling on pre-trial motions, the trial court rejected Elonis’s argument that the statute was unconstitutional,⁴⁵ and also held that whether Elonis’s posts constituted “true threats” was a question of fact to be determined by a jury.⁴⁶ The trial court also discussed how the jury should be instructed to make this determination:

What standard the jury should apply to decide if the postings contain a true threat is an interesting question. There seems to be general agreement that the court should instruct the jury on an objective test. Some courts apply an objective test that focuses on the reaction of the “reasonable recipient” to the statements. Others focus on the “reasonable speaker” and what he or she might anticipate would be the reaction to the communications.⁴⁷

The trial court noted that the Third Circuit “had clearly adopted the [“objective”] ‘reasonable speaker’ test.”⁴⁸ Thus, the trial court rejected Elonis’s request that the jury be instructed that “the government must prove that he intended to communicate a true threat.”⁴⁹ Instead, the jury was instructed that

A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.⁵⁰

This approach was reinforced by the government’s closing argument at trial, which, “emphasized that it was irrelevant whether Elonis intended the postings to be threats.”⁵¹ “It doesn’t matter what he thinks,” the prosecutor stated.⁵² The jury found Elonis guilty of threatening his wife, state and local police, the kindergarten class, and the FBI agent.⁵³ The court

⁴¹ U.S. v. Elonis, No. Crim. A. 11-13, 2011 WL 5024284, at *1 (E.D. Pa. Oct. 20, 2011). The posts are recited in the appeals court decision, *see* U.S. v. Elonis, 730 F.3d 321, 324-26 (3d Cir. 2013), and the U.S. Supreme Court decision. *See Elonis*, 575 U.S. at ---, 135 S. Ct. at 2005-07, 192 L. Ed. 2d at 8-11. For more detail on the posts *see* Bazelon, *supra* note 10.

⁴² *Elonis*, 575 U.S. at ---, 135 S. Ct. at 2004, 192 L. Ed. 2d at 8.

⁴³ *Id.*

⁴⁴ *See* text accompanying note 5-6, *infra*.

⁴⁵ U.S. v. Elonis, No. Crim. A. 11-13, 2011 WL 5024284, at *4 (E.D. Pa. Oct. 20, 2011).

⁴⁶ *Id.* at *2.

⁴⁷ *Id.* (footnote omitted).

⁴⁸ *Id.* (citing U.S. v. Kosma, *supra* note 25, 951 F.2d 549, 559 (3d Cir. 1991)).

⁴⁹ *Elonis* v. U.S., 575 U.S. at ---, 135 S. Ct. at 2007, 192 L. Ed. 2d at 11 (2015).

⁵⁰ U.S. v. Elonis, 730 F.3d 321, 327 (3d Cir. 2013)..

⁵¹ U.S. v. Elonis, 841 F.3d 589, 595 (3d Cir. 2016) (after U.S. Supreme Court decision and remand)

⁵² *Id.*

⁵³ U.S. v. Elonis, 730 F.3d at 327 The jury acquitted Elonis of threatening the amusement park where he had worked.

then denied a post-trial motion to dismiss the indictment.⁵⁴ As a result of his conviction, Elonis spent more than three years in prison.⁵⁵

Elonis appealed, arguing that the “reasonable speaker” test that the trial court had used to construct the jury instruction was unconstitutional because of the U.S. Supreme Court’s decision in *Virginia v. Black*,⁵⁶ and because it did not require the jury to find that he actually intended to carry out the threats.⁵⁷ But the Third Circuit rejected these arguments, holding that “We do not find that the unconstitutionality of *Virginia [v. Black]*’s *prima facie* evidence provision means the ‘true threats’ exception requires a subjective intent to threaten.”⁵⁸

Elonis appealed this ruling to the U.S. Supreme Court, where his petition for *certiorari* initially presented the question of

Whether, consistent with the First Amendment and *Virginia v. Black*, conviction of threatening another person requires proof of the defendant’s subjective intent to threaten, as required by the Ninth Circuit and the supreme courts of Massachusetts, Rhode Island, and Vermont; or whether it is enough to show that a “reasonable person” would regard the statement as threatening, as held by other federal courts of appeals and state courts of last resort.⁵⁹

In granting review, the Supreme Court asked the parties to also address an additional question: “Whether, as a matter of statutory interpretation, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant’s subjective intent to threaten.”⁶⁰

The eventual majority decision in the case, written by Chief Justice John Roberts, held that it does. The use of a “reasonable hearer” standard in this circumstance, the Supreme Court ruled, effectively applied a “negligence” standard for the crime, rather than the requirement that a criminal defendant be aware of the criminal nature of the act when committing it.⁶¹ If the perception of the subject of the threat is the controlling factor, the court held, the defendant cannot be sure if a particular statement is a threat or not.⁶²

Elonis’s conviction cannot stand. The jury was instructed that the Government need prove only that a reasonable person would regard Elonis’s communications as threats, and that was error. Federal criminal liability generally does not turn solely on the results of an act without considering the defendant’s mental state. ... Under Section 875(c), “wrongdoing must be conscious to be criminal.”⁶³

⁵⁴ U.S. v. Elonis, Crim. No. 11-13, 2011 WL 5023011 (E.D. Pa. Oct. 20, 2011).

⁵⁵ Bazelon, *supra* note 10.

⁵⁶ For a discussion of *Virginia v. Black*, see text accompanying note 18, *supra*.

⁵⁷ U.S. v. Elonis, 730 F.3d 321, 327 (3d Cir. 2013).

⁵⁸ *Id.* at 330.

⁵⁹ Petition for a Writ of Certiorari at (i), *Elonis v. U.S.*, 575 U.S. 723 (2015) (No. 13-983) (citation omitted).

⁶⁰ *Elonis v. U.S.*, 573 U.S. 916 (2014) (granting certiorari).

⁶¹ *Elonis v. U.S.*, 575 U.S. at ---, 135 S. Ct. at 2011, 192 L. Ed. 2d at 15.

⁶² *Id.* (“Elonis’s conviction ... was premised solely on how his posts would be understood by a reasonable person. Such a ‘reasonable person’ standard is a familiar feature of civil liability in tort law but is inconsistent with ‘the conventional requirement for criminal conduct—*awareness* of some wrongdoing.’”) (quoting *Staples v. U.S.*, 511 U.S. 600, 606–07 (1994) (quoting *U.S. v. Dotterweich*, 320 U.S. 277, 281 (1943))); emphasis added by the court in *Elonis*).

⁶³ *Id.*, 575 U.S. at ---, 135 S. Ct. at 2012, 192 L. Ed. 2d at 15 (quoting *Morissette v. U.S.*, 342 U.S. 246, 252 (1952)).

The majority held that “[t]here is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat.”⁶⁴ Thus the court held that the federal crime of making threatening communications required proof that the defendant intended to issue threats or knew that his communications would be viewed as threats. The question of whether the target would reasonably regard the communication as threatening, the court held, could not be determinative.⁶⁵ But the majority declined to decide whether a conviction based on a defendant’s reckless behavior could stand, saying the issue was not raised in *Elonis*’s case.⁶⁶

The court’s ruling resolved a minor issue regarding 18 U.S.C. § 875(c), but it failed to answer the more important questions: whether the “objective” or “subjective” test should be applied to “true threats” generally, and what criteria should be used to determine whether particular words and/or behavior constitutes a “true threat.” The majority opinion in *Elonis* clearly limited application of the decision, stating, “Given our disposition, it is not necessary to consider any First Amendment issues.”⁶⁷ As explained by the Fourth Circuit, “the [Supreme] Court’s holding in *Elonis* was purely statutory; and, having resolved the [case] on statutory grounds, the Court declined to address whether a similar subjective intent to threaten is a necessary component of a ‘true threat’ for purposes of the First Amendment.”⁶⁸

Justice Alito noted the limited nature of the majority opinion in *Elonis* in his own opinion concurring with the result in the case, and criticized the majority for not going far enough in defining the correct standard under section 875(c). He explained,

The Court’s disposition of this case is certain to cause confusion and serious problems. Attorneys and judges need to know which mental state is required for conviction under 18 U.S.C. § 875(c), an important criminal statute. This case squarely presents that issue, but the Court provides only a partial answer. The Court holds that the jury instructions in this case were defective because they required only negligence in conveying a threat. But the Court refuses to explain

⁶⁴ *Id.*

⁶⁵ *Id.* Disregard for the victim is not uncommon in criminal cases. “Once a victim reports a crime to the police, the state—police, prosecutors, and judges—takes over. What actually happened to the victim frequently seems to matter only insofar as it guides law enforcement officials in determining how much attention to give the complaint and how to classify the offense. For the most part, victims’ opinions are rarely solicited; personal costs incurred by the victim are considered irrelevant. Instead, what was once a private matter now becomes the business of strangers to be handled mainly as they see fit.” Deborah P. Kelly, *Victims’ Perceptions of Criminal Justice*, 11 PEPP. L. REV. 5, 5 (1984), <http://digitalcommons.pepperdine.edu/plr/vol11/iss5/4>.

⁶⁶ *Elonis v. U.S.*, 575 U.S. at ---, 135 S. Ct. at 2013, 192 L. Ed. 2d at 17.

⁶⁷ *Id.*

⁶⁸ *United States v. White*, 810 F.3d 212, 220 (4th Cir. 2016), *cert. denied*, --- U.S. ---, 136 S. Ct. 1833, 194 L. Ed. 2d 837 (2016). *See also* *U.S. v. Kirsch*, 151 F. Supp. 3d 311, 317 (W.D.N.Y. 2015) (“No case reported thus far extends *Elonis*’s holding beyond [18 U.S.C.] § 875(c) ...”), *rev’d in part on other grounds*, 903 F.3d 213, 232 (2nd Cir. 2018) (“Neither the Supreme Court nor this court has decided whether *Elonis* extends beyond 18 U.S.C. § 875(c).”), *cert. denied*, --- U.S. ---, 139 S. Ct. 1272, 203 L. Ed. 2d 279 (2019), and *State v. Trey M.*, 186 Wash. 2d 884, 896-97, 383 P.3d 474, 479-80 (Wash. 2016) (“*Elonis* is a case of statutory construction, and, as such, it is limited to the federal statute that it addressed, 18 U.S.C. § 875(c).” *But see* Jessica L. Opila, *How Elonis Failed to Clarify the Analysis of True Threats in Social Media Cases and the Subsequent Need for Congressional Response*, 24 MICH. TELECOMM. & TECH. L. REV. 95, 105 (2017) (“This intent element is analogous to the *mens rea* requirement discussed in *Elonis*, but the Supreme Court did not take the opportunity in *Elonis* to clarify whether the subjective mental state now required is necessary under both the First Amendment and the statute (18 U.S.C. § 875(c)), or the statute alone.”).

what type of intent was necessary. Did the jury need to find that Elonis had the *purpose* of conveying a true threat? Was it enough if he *knew* that his words conveyed such a threat? Would *recklessness* suffice? The Court declines to say. Attorneys and judges are left to guess.⁶⁹

In addition to calling for such a standard, Alito suggested one: “that a defendant may be convicted under § 875(c) if he or she consciously disregards the risk that the communication transmitted will be interpreted as a true threat.”⁷⁰ And he encouraged lower courts to follow this rule, noting that “[n]othing in the Court’s non-committal opinion prevents lower courts from adopting that standard.”⁷¹

The only dissent in the *Elonis* case came from Justice Clarence Thomas, who not only disagreed with the result but also complained that the majority had not set a standard that lower courts could use in prosecutions under the statute.

Rather than resolve the conflict, the Court casts aside the approach used in nine Circuits and leaves nothing in its place. Lower courts are thus left to guess at the appropriate mental state for § 875(c). All they know after today’s decision is that a requirement of general intent will not do. But they can safely infer that a majority of this Court would not adopt an intent-to-threaten requirement, as the opinion carefully leaves open the possibility that recklessness may be enough.

This failure to decide throws everyone from appellate judges to everyday Facebook users into a state of uncertainty.⁷²

On remand, the Third Circuit held that while the Supreme Court had held that the standard used in the jury instruction during Elonis’s trial was improper, the error was “harmless.”⁷³ Thus the court upheld his conviction. In doing so, the appeals court held that the statute includes both an objective element and a subjective element:

We believe Section 875(c) contains both a subjective and objective component, and the Government must satisfy both in order to convict a defendant under the statute. The Supreme Court focused on the subjective component. It held that to satisfy the subjective component of Section 875(c), the Government must demonstrate beyond a reasonable doubt that the defendant transmitted a communication for the purpose of issuing a threat or with knowledge that the communication would be viewed as a threat.

The Government must also satisfy the objective component, which requires it to prove beyond a reasonable doubt that the defendant transmitted a communication that a reasonable person would view as a threat.⁷⁴

⁶⁹ *Elonis v. U.S.*, 575 U.S. at ---, 135 S. Ct. at 2013-14, 192 L. Ed. 2d at 18 (Alito, J., concurring in part and dissenting in part) (emphasis in original).

⁷⁰ *Id.*, 575 U.S. at ---, 135 S. Ct. at 2016, 192 L. Ed. 2d at 20.

⁷¹ *Id.*

⁷² *Id.*, 575 U.S. at ---, 135 S. Ct. at 2018, 192 L. Ed. 2d at 23 (Thomas, J., dissenting).

⁷³ *U.S. v. Elonis*, 841 F.3d 589, 592 (3d Cir. 2016), *cert. denied*, --- U.S. ---, 138 S. Ct. 67, 199 L. Ed. 2d 21 (U.S. 2017).

⁷⁴ *Id.*, 841 F.3d at 596.

In practice, the appeals court held, this means that a conviction under section 875(c) has two requirements: first, that the speaker either intended to convey a threat, or knew that the recipient would perceive it as a threat; and, second, that a third party would deem the language as threatening.

[I]t is not for the defendant to determine whether a communication is objectively threatening—that is the jury’s role. If a defendant transmits a communication for the purpose of issuing a threat or with knowledge that the recipient will view it as a threat, and a jury determines that communication is objectively threatening, then the defendant has violated Section 875(c) whether or not he agrees the communication was objectively threatening.⁷⁵

Although the U.S. Supreme Court majority had held that the jury had been erroneously instructed to apply a recklessness standard, on remand the appellate court held that Elonis would also have been convicted if the jury had been properly instructed to apply the objective standard. “The record contains overwhelming evidence,” the appeals court held, “demonstrating beyond a reasonable doubt that Elonis knew the threatening nature of his communications, and therefore would have been convicted absent the error.”⁷⁶ Considering each of the counts for which Elonis was convicted, the appeals court held that for each count Elonis could not deny knowing that his comments would be perceived as threats, and thus upheld his convictions.⁷⁷

Elonis then again sought review by the U.S. Supreme Court, questioning whether the standard for the recipient’s understanding of whether a statement is threatening under section 875(c) is a “reasonable person” standard or the particular recipient’s understanding based on the facts and circumstances of a particular case.⁷⁸ “A conflict has emerged,” Elonis’s *certiorari* petition seeking review of the Third Circuit’s latest decision argued, “over whether the government must also put on evidence in a ‘threat’ case going to whether the communication would have been understood by a reasonable recipient—as opposed to some particular recipient, whether reasonable or not—as a threat.”⁷⁹ This time the Supreme Court denied *certiorari*, leaving the Third Circuit’s decision intact.⁸⁰

V. Subsequent *Certiorari* Petitions: The Supreme Court Ducks the Issue

This conflict described by Elonis in his second *certiorari* petition was the same one that had been pointed out by Justice Alito in his partial concurrence to the Supreme Court’s *Elonis* majority ruling⁸¹ and by Justice Thomas in his dissent from that decision.⁸² The issue was also later raised by Justice Sotomayor in a concurrence and Justice Thomas in a dissent from denials of *certiorari* in two later cases.⁸³ The issue remains unresolved, after three subsequent *certiorari*

⁷⁵ *Id.* at 597 (footnote omitted).

⁷⁶ *Id.* at 598.

⁷⁷ *Id.* at 598; 598-99 (count 2); 599-600 (count 3); 600 (count 4); and 601 (count 5).

⁷⁸ Petition for a Writ of Certiorari at (i), *Elonis v. U.S.*, *cert. denied*, --- U.S. ---, 138 S. Ct. 67, 199 L. Ed. 2d 21 (2017) (No. 16-1231). The petition also questioned whether the erroneous jury instruction really was harmless. *Id.*

⁷⁹ *Id.* at 19.

⁸⁰ *Elonis v. U.S.*, *cert. denied*, --- U.S. ---, 138 S. Ct. 67, 199 L. Ed. 2d 21 (2017).

⁸¹ See text accompanying notes 69-71, *supra*.

⁸² See text accompanying note 72, *supra*.

⁸³ See text accompanying notes 84-89 and note 116, *infra*.

petitions presented the opportunity to resolve the questions regarding the appropriate standard for “true threats.”

A. *Perez v. Florida*

The first of these petitions was in *Perez v. Florida*, in which the Court denied *certiorari* in the conviction of a man who stated, apparently as a joke while drunk, that he had a Molotov cocktail and would use it to blow up a liquor store and then “the whole fucking world.”⁸⁴ Perez was convicted under a Florida statute that made it a crime “to threaten to throw, project, place, or discharge any destructive device with intent to do bodily harm to any person or with intent to do damage to any property of any person.”⁸⁵ The jury was instructed that it should convict if the prosecution showed that “an ordinary reasonable person” would perceive the statement as communicating intent to inflict harm or loss on another and that Perez intended to make the threat.⁸⁶ The Florida Court of Appeals affirmed the conviction and 15-year sentence in a *per curiam* opinion,⁸⁷ followed by the *certiorari* petition to the U.S. Supreme Court.

Justice Sonya Sotomayor concurred with the denial of *certiorari* in *Perez*, just as she had joined in the majority decision in *Elonis*. But in her separate opinion concurring with the denial, Sotomayor echoed the same concerns about the lack of clarity in the standard for a “true threats” conviction that Justice Alito had expressed in his partial concurrence in *Elonis*.⁸⁸ Sotomayor wrote that the court needed to address gaps in its true-threat jurisprudence: “The Court should,” she wrote, “... decide precisely what level of intent suffices under the First Amendment [to constitute a “true threat”]—a question we avoided two Terms ago in *Elonis*.”⁸⁹ While Kagan framed the problem as a First Amendment issue, any such constitutional requirement would necessarily also apply to section 875(c) prosecutions.

B. *Knox v. Pennsylvania*

The second opportunity for the Supreme Court to clarify the “true threats” standard came in an appeal of the prosecution by Pennsylvania of Jamal Knox.⁹⁰ Knox was prosecuted on multiple charges stemming from three separate incidents,⁹¹ including for making terroristic threats in a rap song, “Fuck the Police,”⁹² that Knox and his co-defendant Rashee Beasley wrote

⁸⁴ *Perez v. Florida*, *cert. denied*, --- U.S. ---, ---, 137 S. Ct. 853, ---, 197 L. Ed. 2d 480, 481 (2017) (Sotomayor, J., concurring), *reh’g denied*, --- U.S. ---, 137 S. Ct. 2111, 197 L. Ed. 2d 909 (2017). The defendant’s statement that he had a “Molotov cocktail” apparently stemmed from a bartender’s initial mishearing him saying that he had a mixture of vodka and grapefruit juice that he called a “Molly cocktail.” *Id.*, --- U.S. at ---, 137 S. Ct. at ---, 197 L. Ed. 2d at 481 (Sotomayor, J., concurring).

⁸⁵ *Id.*, --- U.S. at ---, 137 S. Ct. at 853, 197 L. Ed. 2d at 481. The statute is Fla. Stat. §790.162 (2007).

⁸⁶ *Id.*, --- U.S. at ---, 137 S. Ct. at 853-54, 197 L. Ed. 2d at 481.

⁸⁷ *Perez v. State*, 189 So.3d 797 (Fla. App., 5th Dist. Mar. 15, 2016) (*per curiam*), *reh’g and reh’g en banc denied* (Fla. App., 5th Dist. Apr. 26, 2016).

⁸⁸ See text accompanying notes 69-71, *supra*.

⁸⁹ *Perez v. Florida*, *cert. denied*, --- U.S. at ---, 137 S. Ct. at 855, 197 L. Ed. 2d at 482-83 (Sotomayor, dissenting).

⁹⁰ *Com. v. Knox*, Nos. CP-02-CR-0003870-2013, CP-02-CR-0004264-2013, and CP-02-CR-0006621-2012 (Pa. C.P., Allegheny County, Crim. Div. sentence Feb. 21, 2014), *aff’d*, 156 A.3d 326 (table), 2016 WL 5379299 (text) (Pa. Super. Aug. 2, 2016), *aff’d*, 190 A.3d 1146 (Pa. 2018), *cert. denied*, --- U.S. ---, 139 S. Ct. 1547, 203 L. Ed. 2d 746 (U.S. Apr. 15, 2019).

⁹¹ *Com. v. Knox*, 156 A.3d 326 (table), 2016 WL 5379299 at *1 (text) (Pa. Super. Aug. 2, 2016).

⁹² In 1998, the rap group N.W.A. issued a similarly-titled song, “Fuck tha Police,” which criticized police brutality in lyrics that depicted a court proceeding in which a Caucasian police officer was found guilty of being a “redneck, white bread, chickenshit motherfucker.” The song was listed at 417 in *Rolling Stone*

and performed in a video posted to YouTube.⁹³ In the video, a verse sung by Knox named the Pittsburgh police officers who had conducted a traffic stop when Knox was driving and Beasley was in the front passenger seat, which resulted in both being charged with narcotics and other offenses.⁹⁴ The YouTube video was posted while these charges were pending.⁹⁵

Based on the statements in the video, Knox and Beasley were eventually convicted of witness intimidation and making terroristic threats.⁹⁶ On appeal, the Pennsylvania Superior Court affirmed the conviction, holding that by posting the video online Knox had knowingly communicated the threats.⁹⁷ Knox then appealed to the Pennsylvania Supreme Court,⁹⁸ which also upheld the conviction, noting that any political or social commentary in the lyrics was secondary to threats against the individual police officers.

[The lyrics] do not merely address grievances about police-community relations or generalized animosity toward the police. They do not include political, social, or academic commentary, nor are they facially satirical or ironic. Rather, they primarily portray violence *toward* the police, ostensibly due to the officers' interference with Appellants' activities. In this regard, they include unambiguous threats ...

* * *

... Appellant [also] mentions Detective Zeltner and Officer Kosko by name, stating that the lyrics are "for" them. Appellant proceeds to describe in graphic terms how he intends to kill those officers. In this way, the lyrics are both threatening and highly personalized to the victims.⁹⁹

In affirming the convictions, the court majority did not substantially discuss *Elonis*.¹⁰⁰ But *Elonis* was discussed in the separate opinion of two justices concurring in part and dissenting in part, and then only in stating that the standard that the Pennsylvania court had previously adopted, based on an objective, reasonable-listener standard, was no longer viable after the U.S. Supreme Court's decisions in *Black* and *Elonis*.¹⁰¹

In his petition for *certiorari* to the United States Supreme Court seeking review of the Pennsylvania Supreme Court's decision, Knox argued that "[i]t is time for [the] Court to settle ... once and for all" what the proper standard is for a "true threat:" whether "the government must show objectively that a 'reasonable person' would regard the statement as threatening, or whether

magazine's 2004 listing of "The 500 Greatest Songs of All Time." See "The RS 500 Greatest Songs of All Time," *Rolling Stone*, Dec. 2004, archived at <https://web.archive.org/web/20080622145429/http://www.rollingstone.com/news/coverstory/500songs>.

⁹³ The video was posted to YouTube by a third party and linked to on a Facebook page apparently owned by Beasley. *Com. v. Knox*, 190 A.3d 1146, 1149 (Pa 2018).

⁹⁴ *Com. v. Knox*, 156 A.3d 326 (table), 2016 WL 5379299 at *2 (text) (Pa. Super. Aug. 2, 2016).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at *4. The court also rejected Knox's First Amendment arguments as having been waived when he did not object to introduction of the video into evidence. *Id.* at *5.

⁹⁸ See *Commonwealth v. Knox*, 641 Pa. 44, 165 A.3d 887 (Pa. 2017) (per curiam) (granting review).

⁹⁹ *Commonwealth v. Knox*, 647 Pa. 593, 190 A.3d 1146, 1158-59 (Pa 2018) (footnotes omitted).

¹⁰⁰ *Id.*, *passim*.

¹⁰¹ *Id.* 620, at 190 A.3d at 1162 (Wecht, J. concurring and dissenting) (citing *J.S. ex rel. H.S. v. Bethlehem Area School Dist.*, 569 Pa. 638, 807 A.2d 847 (2002)).

it is enough to prove only the speaker's subjective intent to threaten."¹⁰² But the U.S. Supreme Court declined to take the case,¹⁰³ leaving the guilty verdict in *Knox* in place and leaving *Elonis*—flawed as it is—as the leading precedent of determining what constitutes a “true threat.”

C. *Kansas v. Boettger*

A third *certiorari* petition before the U.S. Supreme Court, seeking review in a Kansas case, raised the same issue.¹⁰⁴ In this consolidated case, two men were independently convicted of making threats under Kansas' statute regarding making a reckless criminal threat.¹⁰⁵ One defendant, Timothy C. Boettger, was found to have threatened a police officer by telling the officer's son that the son would find his father “in a ditch.”¹⁰⁶ The other defendant, Ryan Robert Johnson, was convicted after a jury determined that he threatened to burn down his elderly mother's home and kill her.¹⁰⁷

The Kansas Court of Appeals affirmed both convictions. In the *Boettger* case, the court rejected the defendant's argument that the jury instructions improperly used a subjective standard to determine whether Boettger's language was threatening, based on the perception of the officer's son, rather than an objective standard.¹⁰⁸ As for Johnson, the appeals court held that “it is clear a reasonable jury would have found the language Johnson used when he spoke to his mother a criminal threat either with intent to place [her] in fear or with reckless disregard of the risk of causing fear.”¹⁰⁹

But the Kansas Supreme Court reversed both of the convictions, holding that “allowing for a conviction if a threat of violence is made in reckless disregard for causing fear” makes the Kansas statute unconstitutionally overbroad “because it can apply to statements made without the intent to cause fear of violence,” and because “[t]he provision significantly targets protected activity.”¹¹⁰ In making this ruling, the Kansas Supreme Court relied on a Tenth Circuit opinion, observing that that court had “read [*Virginia v.*] *Black* as establishing that a defendant can be constitutionally convicted of making a true threat only if the defendant intended the recipient of the threat to feel

¹⁰² Petition for a Writ of Certiorari at 1, *Knox v. Pennsylvania*, No. 18-949 (filed Jan. 18, 2019), available at <https://www.scotusblog.com/case-files/cases/knox-v-pennsylvania/>, cert. denied, --- U.S. ---, 139 S. Ct. 1547, 203 L. Ed. 2d 746 (U.S. Apr. 15, 2019).

¹⁰³ *Knox v. Pennsylvania*, --- U.S. ---, 139 S. Ct. 1547, 203 L. Ed. 2d 746 (U.S. Apr. 15, 2019) (denying certiorari).

¹⁰⁴ See Petition for a Writ of Certiorari, *Kansas v. Boettger*, No. 19-1051 (U.S. filed Feb. 20, 2020), available at https://www.supremecourt.gov/DocketPDF/19/19-1051/133646/20200220120411005_Boettger%20and%20Johnson%20Petition--PDF.pdf.

¹⁰⁵ See Kan. Stat. § 21-5415. The consolidated cases were *State v. Boettger*, 450 P.3d 805 (Kan. 2019), cert. denied, *Kansas v. Boettger*, No. 19-1051, 2020 WL 3405868, 2020 U.S. LEXIS 3370 (U.S. June 22, 2020) and *State v. Johnson*, 450 P.3d 790 (Kan. 2019), cert. denied sub nom *Kansas v. Boettger*, No. 19-1051, 2020 WL 3405868, 2020 U.S. LEXIS 3370 (U.S. June 22, 2020).

¹⁰⁶ *State v. Boettger*, 450 P.3d at 807.

¹⁰⁷ *State v. Johnson*, 450 P.3d at 792.

¹⁰⁸ *State v. Boettger*, 397 P.3d 1256, at *6 (Kan. Ct. App. 2017) (table; unpublished), rev'd, 450 P.3d 805 (Kan. 2019), cert. denied, *Kansas v. Boettger*, No. 19-1051, 2020 WL 3405868, 2020 U.S. LEXIS 3370 (U.S. June 22, 2020).

¹⁰⁹ *State v. Johnson*, 407 P.3d 675, at *5 (Kan. Ct. App. 2017) (table; unpublished), rev'd, 450 P.3d 790 (Kan. 2019), cert. denied, *Kansas v. Boettger*, No. 19-1051, 2020 WL 3405868, 2020 U.S. LEXIS 3370 (U.S. June 22, 2020).

¹¹⁰ *State v. Boettger*, 450 P.3d at 818 (Kan. 2019). See also *State v. Johnson*, 450 P.3d at 794 (“[Johnson] argues the [statutory] provision is unconstitutionally overbroad. His arguments are nearly identical to those we addressed in *State v. Boettger*.” (citations omitted)).

threatened.”¹¹¹ As to the Supreme Court’s *Elonis* ruling, the Kansas court observed that “[t]he *Elonis* majority stopped short of answering the question before us about whether a statute must require subjective intent to survive a First Amendment attack.”¹¹²

The *certiorari* petition filed by the state of Kansas sought review of these decisions on the grounds that “lower courts are divided on whether a true threat under the First Amendment requires specific intent to threaten violence,”¹¹³ and urged that the U.S. Supreme Court should “grant *certiorari* to resolve the constitutional uncertainty.”¹¹⁴ Despite this plea, the Supreme Court once again denied *certiorari*.¹¹⁵ Justice Thomas dissented, saying that the Court “should squarely decide whether the Constitution permits States to criminalize threats of violence made in reckless disregard of causing fear.”¹¹⁶

While the *certiorari* petition in the *Boettger* case was pending, the Colorado Supreme Court reached its own conclusions regarding what evidence should be used to determine whether online statements constitute a “true threat.” In 2013, a student at Arapahoe High School in Centennial, Colo. shot a student, who later died, and then killed himself while seeking revenge against a librarian and debate coach. In the wake of the shooting, students at Littleton High School in Littleton, Colo. and Thomas Jefferson High School in Denver, both within eight miles of Arapahoe High School, got involved in a bitter discussion on Twitter about which of their schools cared most about the shooting. In that context, several students, including “A.C.” from Thomas Jefferson High and “R.D.” from Littleton High, got into a heated exchange of publicly accessible Twitter messages. In a series of tweets directed at A.C., R.D. threatened to shoot A.C., including the statement, “If I see your bitch ass outside of school you catching a bullet bitch.” After A.C. dismissed the threat as “all talk,” R.D. responded, “haha alright hoe, we’ll see whose [sic] a bitch tomorrow.” R.D. also tweeted a photo of a handgun that he found online.¹¹⁷

The juvenile court declared R.D. a juvenile delinquent, accepting the state’s argument that the tweets would constitute harassment under Colo. Stat. § 18–9–111(1)(e) if written by an adult.¹¹⁸ But the Colorado Court of Appeals reversed, finding that “R.D.’s Tweets did not constitute true threats because they were not ‘a serious expression of an intent to commit an act of unlawful

¹¹¹ State v. Boettger, 450 P.3d at 814 (quoting United States v. Heineman, 767 F.3d 970, 978 (10th Cir. 2014)).

¹¹² *Id.* at 817.

¹¹³ See Petition for a Writ of Certiorari, Kansas v. Boettger, *supra* note 104, at 9.

¹¹⁴ *Id.*

¹¹⁵ Kansas v. Boettger, No. 19-1051, 2020 WL 3405868, 2020 U.S. LEXIS 3370 (U.S. June 22, 2020) (denying certiorari).

¹¹⁶ *Id.*, slip op. at 6, 2020 WL 3405868 at *3, 2020 U.S. LEXIS 3370 at *8 (Thomas, J., dissenting). Thomas added that the Kansas Supreme Court and other state courts “reached the opposite conclusion by overreading our decision in *Black*,” *id.*, slip op. at 1, 2020 WL 3405868 at *1, 2020 U.S. LEXIS 3370 at *2 but that since some state courts—notably the Connecticut and Georgia supreme courts, *id.* slip op. at 4-5, 2020 WL 3405868 at *2, 2020 U.S. LEXIS 3370 at *2 had ruled the opposite way, “I would grant certiorari to resolve the split on this important question.” *Id.*, slip op. at 2, 2020 WL 3405868 at *1, 2020 U.S. LEXIS 3370 at *1.

¹¹⁷ People in Interest of R.D., 2020 CO 44, ¶ 8 (Colo. 2020).

¹¹⁸ At the time, the statute in part made it a crime to, “with intent to harass, annoy, or alarm another person. ... [i]nitiate[] communication with a person, anonymously or otherwise, by ... text message, instant message, computer, computer network, or computer system in a manner intended to ... threaten bodily injury” People In Interest of R.D., 2020 CO 44, ¶ 30 (quoting Colo. Rev. Stat. § 18-9-111(1)(e) (2013)). The statute was subsequently amended in 2015. *Id.*, n.15.

violence to a particular individual or group of individuals.”¹¹⁹ The appellate court based this on three factors: to whom the statement was communicated; the manner in which the statement was communicated; and the subjective reaction of the person whom the statement concerned.¹²⁰ This is the minority-rule “subjective” test described above for determining whether a statement is a “true threat.”¹²¹

The Colorado Supreme Court reversed the appeals court’s ruling, establishing a new standard for evaluating whether online statements constitute a “true threat” by adding two additional factors to the Court of Appeals formulation. “We hold,” the court wrote, “that a true threat is a statement that, considered in context and under the totality of the circumstances, an intended or foreseeable recipient would reasonably perceive as a serious expression of intent to commit an act of unlawful violence.”¹²² The court continued:

[W]here the alleged threat is communicated online, the contextual factors courts should consider include, but are not limited to (1) the statement’s role in a broader exchange, if any, including surrounding events; (2) the medium or platform through which the statement was communicated, including any distinctive conventions or architectural features; (3) the manner in which the statement was conveyed (e.g., anonymously or not, privately or publicly); (4) the relationship between the speaker and recipient(s); and (5) the subjective reaction of the statement’s intended or foreseeable recipient(s).¹²³

The court noted that this was “not meant to constitute an exhaustive list,” and that other factors could also be used.¹²⁴ But because neither the juvenile court nor the appeals court had considered the factors that it listed, the Colorado Supreme Court reversed.¹²⁵ In a footnote, the court wrote that it need not resolve whether the test for true threats under the First Amendment “also requires consideration of the speaker’s subjective intent to threaten the victim(s),” since the Colorado statute at issue already had such a requirement.¹²⁶

Since the U.S. Supreme Court’s decision in *Elonis* did not resolve the dispute among the circuits over which standard to use in prosecutions under section 875(c), and the larger question of what standard is required by the First Amendment, lower courts must find their own way on this question. Our study examines how federal courts have applied and interpreted the U.S. Supreme Court’s *Elonis* decision, and shows that they continue to struggle over which criteria to apply in “true threats” cases. As we become more aware of dangerous and threatening speech being conveyed online, and the sometimes-dire consequences of such language, it has become increasingly important to resolve this question.

VI. Criteria Used to Determine “True Threats” Under 18 U.S.C. § 875(c)

From the date that *Elonis* was decided through the fifth anniversary of the ruling, there were 47 federal court decisions in which and courts cited the Supreme Court’s decision in *Elonis*

¹¹⁹ People In Interest of R.D., 2016 COA 186, ¶ 11 (Colo. App. 2016) (quoting People v. Stanley, 170 P.3d 782, 786 (Colo. App. 2007) (quoting Virginia v. Black, 538 U.S. 343, 359 (2003))).

¹²⁰ *Id.* at ¶ 10.

¹²¹ See text accompanying notes 27-33, *supra*.

¹²² People In Interest of R.D., 2020 CO 44, ¶ 4 (Colo. 2020).

¹²³ *Id.*

¹²⁴ *Id.* at ¶ 62.

¹²⁵ *Id.* at ¶ 68.

¹²⁶ *Id.* at ¶ 4, n.1.

while determining what is required under 18 U.S.C. § 875(c).¹²⁷ In each of these decisions, courts selected one or more factors that they used to determine whether the *mens rea* requirement was met.

The specific criteria that courts used to determine whether the defendants' comments constituted a "true threat" in each of the 47 decisions are summarized in Figure 1, which shows the number of cases using a specific criterion.¹²⁸

While the conflict between the differing "objective" and "subjective" standards for determining whether a statement is a "true threat" remains an important issue, these 47 cases are analyzed according to the factors the courts used to rule whether a particular communication could constitute a "true threat." Depending on the nature of the court and the status of the case, these courts used the criteria to determine guilt, to affirm or reverse a verdict, to grant or deny a pre- or post-trial motion to dismiss charges, or to decide an appeal of a denial of such a motion. The criteria used in each individual ruling are shown in Table 1 at the end of this paper.

The most commonly-used factor in the cases in our study was whether the speaker intended the communication to be viewed as a threat. This factor was used in over half the cases (32 cases, 68.1 percent of the 47 total cases).¹²⁹ The speaker's knowledge that the communication would be viewed as a threat, an essential component of the minority-rule "subjective" standard for guilt under section 875(c), was the second most common factor used, utilized in 15 cases (31.9 percent). The third most frequently used factor, in seven cases (14.9 percent), focused on the speaker's knowledge of the background and surrounding circumstances.

More seldomly used factors were those focused on the person hearing the statement, using either the recipients' perception of the statement or the effect the statement had on the hearer to determine whether a statement was truly threatening (six cases, 12.8 percent); the specific words used (also six cases, 12.8 percent); whether the speaker acted for the purpose of issuing a threat (five cases, 10.6 percent); the speaker's mental state (also five cases, 10.6 percent); and a third parties' understanding of the statement (four cases, 8.5 percent). Three cases (6.4 percent) used other, disparate criteria.

¹²⁷ We collected decisions issued from June 1, 2015—the date that the *Elonis* decision was released—through June 1, 2020. These cases were found by Shepardizing *Elonis* on the Nexis Uni database for Lexis headnotes 15 and 17, which both focus on the elements of terrorist threats. This produced a list of cases, including those not focused on "true threats" under 28 U.S.C. § 875(c) and similar statutes. The non-"true threats" cases were removed, and the resulting cases analyzed to determine which factor(s) the courts used or said should be used to determine whether a statement did or did not constitute a "true threat." We last collected decisions on June 24, 2020.

¹²⁸ Cases that used more than one criterion are counted for each one used, so the total is more than 47.

¹²⁹ Individual rulings are counted once for each factor used, so that an individual ruling may be counted more than once. As a result, the percentages add up to more than 100 percent.

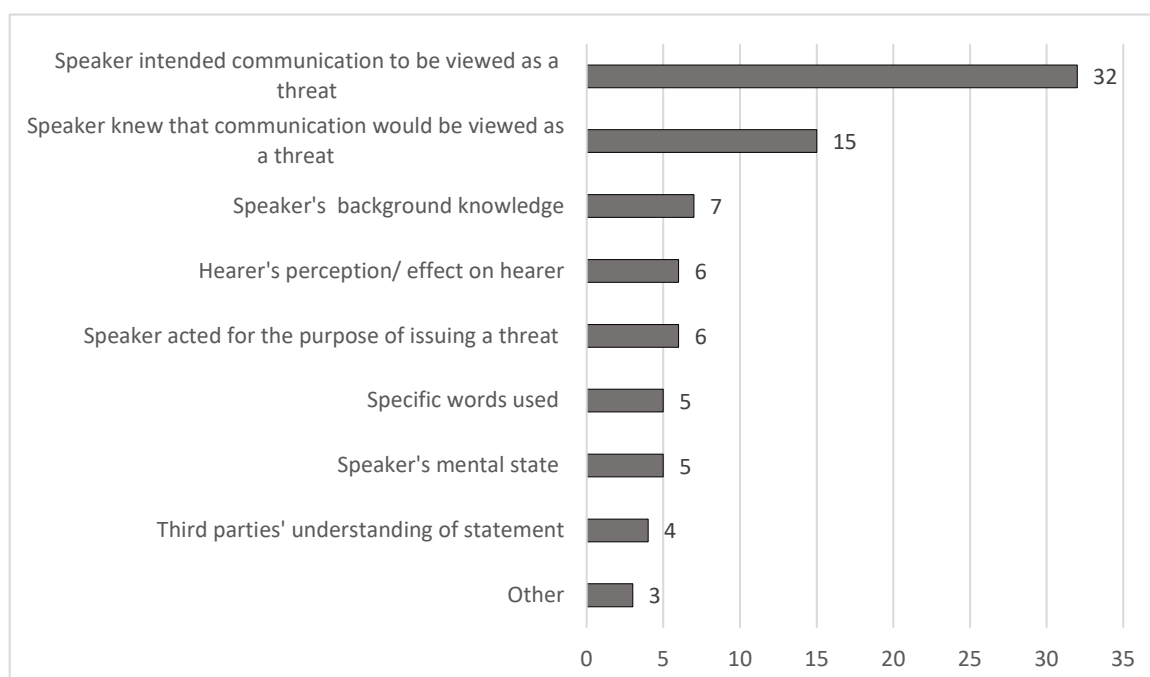
Selected cases illustrating the use of each of these criteria are summarized in the remainder of this section.

A. Speaker intended communication to be viewed as a threat

The defendant's intent that the communication would be viewed as a threat was used as a criterion in 32 cases (68.1 percent), making it the most commonly used factor. This is logical, since *mens rea* is an important element of any crime, particularly when the crime involves words that can subject to varying interpretations based on the language used, the context of the speech, and other factors.

In one of these cases, *United States v. Toltzis*, the defendant was indicted for sending threatening messages to various individuals based on their sexual orientation, national origin, and ethnic background.¹³⁰ He sought to dismiss two counts stemming from mailing letters to one victim and the victim's former wife that contained racial slurs, degrading accusations, and statements urging the target to kill himself. As summarized by the court, Toltzis's argument for dismissal was that "the declaration that [the victim] should kill himself and the statement 'death

Figure 1: Criteria Used to Determine "True Threats" Under 18 U.S.C. § 875(c)



to Iranians' are not explicit enough to show that [the] defendant possessed a subjective intent to kill or injure the subject."¹³¹ But the court rejected this argument in denying the motion to dismiss:

Due to the extremely personal nature of sending a letter directly to the homes of [the victim] and his family, the court is not willing to rule out the possibility that a

¹³⁰ 2016 WL 3479084, 2016 U.S. Dist. LEXIS 83302 (N.D. Cal. 2016).

¹³¹ *Id.* at *3, 2016 U.S. Dist. LEXIS 83302, at *8.

reasonable jury could infer from defendant's actions that he possessed the subjective intent to threaten.¹³²

In *United States v. Ivers*, the defendant moved for a judgment of acquittal after a jury found him guilty of threatening a federal judge who had ruled against him in an insurance case.¹³³ The court rejected the motion, observing that Ivers persisted in sending letters to the judge even though a U.S. marshal had warned him that the letters could be seen as threatening, and that he had previously been charged with threatening a state judge.¹³⁴ The court also cited Ivers's own testimony that he was "glad" the federal judge felt threatened from his letters, and his failure to apologize or express remorse.¹³⁵ This showed, the court said, that Ivers intended the communication to be threatening.

In *United States v. Stevens*, the Tenth Circuit affirmed the trial court's denial of a motion to dismiss charges against the defendant, based on the lower court's finding that "Mr. Stevens's messages were 'targeted at specific people, groups of people, and their family members,' and because they 'repeatedly assert[ed] that the targets of the messages are going to die unless they comply with [his] wishes.'" ¹³⁶ Based on this, the trial and appeals courts both concluded that a "jury could determine that 'a reasonable person would interpret the statements to be threats.'" ¹³⁷

In *United States v. Yassin*, a magistrate denied a pre-trial dismissal motion, noting the fact that the defendant had maintained several Twitter accounts was evidence that the defendant intended to communicate threats and had used the various accounts in an effort to mask her identity.¹³⁸

The cases applying this factor focus on the *intention* of the speaker. But the courts that apply this factor do so without guidance from the U.S. Supreme Court, since the *Elonis* ruling failed to address the constitutional consequences of using the speaker's intention as a factor in determining whether a statement is a "true threat."

B. Speaker knew that communication would be perceived as a threat

Because section 875(c) does not specify a mental state requirement, in *Elonis* the Supreme Court held that it had to "read into the statute 'only that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct.'" ¹³⁹ Thus the court held in *Elonis* that the "mental state requirement is satisfied ... if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat."¹⁴⁰ Courts that interpret "true threats" in this way are hewing to what the Supreme Court

¹³² *Id.* at *4, 2016 U.S. Dist. LEXIS 83302, at *11.

¹³³ 2019 WL 78940, 2019 U.S. Dist. LEXIS 358 (D. Minn. 2019).

¹³⁴ *Id.* at *4, 2019 U.S. Dist. LEXIS 358 at *9.

¹³⁵ *Id.*

¹³⁶ 881 F.3d 1249 (10th Cir. 2018) (quoting *U.S. v. Stevens*, 2016 WL 7442657, *2, 2016 U.S. Dist. LEXIS 178674, *5 (N.D. Okla. 2016)).

¹³⁷ *U.S. v. Stevens*, 2016 U.S. Dist. LEXIS 178674 at *5 (quoting *U.S. v. Wheeler*, 776 F.3d 736, 744 (10th Cir. 2015)), *aff'd*, 881 F.3d 1249 (10th Cir. 2018).

¹³⁸ 2017 U.S. Dist. LEXIS 53686 (W.D. Mo. 2017). The magistrate's recommendation to deny the motion was adopted in *U.S. v. Yassin*, 2017 U.S. Dist. LEXIS 52690 (W.D. Mo. 2017).

¹³⁹ *Elonis v. U.S.*, 575 U.S. 723, ---, 135 S. Ct. 2001, 2010, 192 L. Ed. 2d 1, 14 (2015) (quoting *Carter v. U.S.*, 530 U.S. 255, 269 (2000) (quoting *U.S. v. X-Citement Video*, 513 U.S. 64, 72 (1994))).

¹⁴⁰ *Id.* at 2012, 192 L. Ed. 2d at 17.

intended. But the lower courts still differ on which portion of the Supreme Court's statement to utilize.

Courts focused on the latter conception, the defendant's "knowledge that the communication would be viewed as a threat,"¹⁴¹ in 15 cases (31.9 percent). Such an examination can also include a focus on the defendant's mental state at the time that the statement is made and can overlap with courts' examinations of a defendant's mental capacity.¹⁴² For example, in *United States v. White* the defendant believed his ex-wife owed him money and sent a series of emails threatening violence if she did not pay.¹⁴³ In appealing his conviction, the defendant argued that the jury instructions allowed a conviction based on how his ex-wife was affected by the communication, without regard to his subjective intent in sending the messages. The court held that the error was harmless since "no jury could reasonably conclude that the defendant's conduct was anything but purposeful,"¹⁴⁴ based on the "direct and declarative" language used in the e-mails.¹⁴⁵

This criterion is also demonstrated in *United States v. McNeil*. In this case defendant Terrence Joseph McNeil posted the names, home addresses, photographs, and branches of the military of approximately 100 United States servicemen and women with threats to injure them by saying he planned to "kill them in their own lands, behead them in their own homes, stab them to death as they walk their streets, etc." In denying McNeil's motion to dismiss, the trial court used two criteria to uphold the jury's guilty verdict, including holding that the language of the indictment was "sufficient that a jury may conclude the alleged statements are of a threatening nature communicated by McNeil ... with the knowledge that these communications would be viewed as a threat."¹⁴⁶

C. Speaker's background knowledge

Beyond examining a defendant's mental state, some courts have allowed examination of circumstantial evidence for a clearer understanding of the situation in which an alleged threat was made. There were seven post-*Elonis* "true threats" cases (14.9 percent) that used the defendant speaker's knowledge of the circumstances in which a statement was made as a determinative factor.

In *Mabie v. United States*, the defendant was already serving an 88-month sentence for his threat conviction when the U.S. Supreme Court issued its ruling in *Elonis*, and he sought to have his conviction vacated in light of that ruling. The court rejected this, saying that evidence

¹⁴¹ *Id.*

¹⁴² See text accompanying notes 168-174, *infra*.

¹⁴³ *U.S. v. White*, 810 F.3d 212 (4th Cir. 2016), *cert. denied*, *White v. U.S.*, --- U.S. ---, 136 S. Ct. 1833, 194 L. Ed. 2d 837 (U.S. 2016). It was in an earlier appeal in this case, prior to the Supreme Court's ruling in *Elonis*, that the Fourth Circuit adopted the "objective" standard for "true threats," based on the defendant's knowing communication of a statement that contains a "true threat." See *United States v. White*, 670 F.3d 498, 508-10 (4th Cir.2012). See also note 24, *supra*. In light of *Elonis*, the Fourth Circuit changed its rule to be based on two factors: whether "the defendant transmitted the communication 'for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat,' or, perhaps, with reckless disregard for the likelihood that the communication will be viewed as a threat," and "in keeping with our prior cases, the prosecution must show that an ordinary, reasonable recipient who is familiar with the context in which the statement is made would interpret it as a serious expression of an intent to do harm." *United States v. White*, 810 F.3d at 221 (citations omitted).

¹⁴⁴ *U.S. v. White*, 810 F.3d. at 221 n.3.

¹⁴⁵ *Id.* at 222.

¹⁴⁶ *United States v. McNeil*, 228 F. Supp. 3d 809, 814 (N.D. Ohio 2017).

showed that Mabie “manifested intent to threaten over a series of time by his actions, and through an escalation of his words and *in the context* of his communications.”¹⁴⁷

After a remand that rejected a jury instruction in light of *Elonis*,¹⁴⁸ the defendant in *United States v. Houston* sought to preclude the testimony of the county sheriff’s jailer in a section 875(c) prosecution because “it is irrelevant, unfairly prejudicial, and invites the jury to decide that the defendant is guilty in conformity with a character trait.”¹⁴⁹ The court held that the testimony, which focused on the defendant’s behavior before the allegedly threatening phone call, was admissible to show the defendant’s intent to communicate a threat.¹⁵⁰

D. Hearer’s perception / effect on hearer

Six cases, 12.8 percent, determined whether a communication constituted a “true threat” by examining how the intended victim(s) understood and reacted to the communication. Courts used this factor even though *Elonis* appears to stand for the principle that the hearer’s perception has no relevance to whether a statement was a “true threat.”¹⁵¹ But these courts nevertheless held that the hearer’s understanding of a comment had evidentiary implications.

In *United States v. Mundle*, the defendant went on an intoxicated rampage against his mother, in which he demanded money, showed her his gun, and told her he was going to kill her, his stepfather and himself.¹⁵² He then went on to hold her hostage.¹⁵³ Over the phone, he told his sister that he was going to kill their mother and stepfather.¹⁵⁴

Prior to trial, the prosecution moved to admit testimony from the mother and stepfather detailing the defendant’s abusive behavior prior to the statements at issue. The defendant argued that this testimony would create “unfair prejudice” against him,¹⁵⁵ but the court allowed the evidence “because it provides crucial context to and is inextricably intertwined with the Defendant’s charged conduct.”¹⁵⁶

This ruling was affirmed on appeal. Mundle, the appeals court held, had “transmit[ed] the communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat,” which is part of the Government’s burden of proof to convict under 18 U.S.C. § 875(c).¹⁵⁷ Further, the appeals court added, “Mundle’s continuing aggression towards

¹⁴⁷ Mabie v. U.S., 2015 U.S. Dist. LEXIS 147370, *5 (E.D. Mo. 2015) (emphasis added). Mabie’s sentences in this and other cases were affirmed on appeal. See U.S. v. Mabie, 862 F.3d 624 (7th Cir. 2017), *cert. denied*, --- U.S. ---, 138 S. Ct. 1452, 200 L. Ed. 2d 726 (U.S. 2018).

¹⁴⁸ See U.S. v. Houston, 792 F.3d 663 (6th Cir. 2015).

¹⁴⁹ U.S. v. Houston, 2015 WL 6449519, *5, 2015 U.S. Dist. LEXIS 145269, *15 (E.D. Tenn. 2015) (after remand by U.S. v. Houston, 792 F.3d 663 (6th Cir. 2015)).

¹⁵⁰ 2015 WL 6449519 at *7, 2015 U.S. Dist. LEXIS 145269 at *21. The court also held that the jury should be instructed in retrial to limit its consideration of the jailer’s testimony to only one of Houston’s allegedly threatening statements.

¹⁵¹ See *infra* note 183, and accompanying text.

¹⁵² U.S. v. Mundle, 2016 WL 1071035, 2016 U.S. Dist. LEXIS 34736 (S.D.N.Y. 2016), *sentence aff’d*, 700 Fed. Appx. 70 (2d Cir. 2017), *cert. denied*, Mundle v. U.S., --- U.S. ---, 139 S. Ct. 291, 202 L. Ed. 2d 191 (U.S. 2018).

¹⁵³ *Id.*, 2016 WL 1071035 at *2, 2016 U.S. Dist. LEXIS 34736, at *5-6.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at *2, 2016 U.S. Dist. LEXIS 34736, at *4.

¹⁵⁶ *Id.* at *2, 2016 U.S. Dist. LEXIS 34736, at *5.

¹⁵⁷ 700 Fed. Appx. 70, 72 (2d Cir. 2017) (quoting *Elonis*, 575 U.S. at ---, 135 S. Ct. at 2012, 192 L. Ed. 2d at 17), *cert. denied*, Mundle v. U.S., --- U.S. ---, 139 S. Ct. 291, 202 L. Ed. 2d 191 (U.S. 2018).

his family members up to and including the day of the call supports the inference that the threats conveyed to his sister would be perceived as real.”¹⁵⁸

In another case, *United States v. Kabbaj*, a trial court refused to release the defendant from pre-trial detention a defendant charged under 18 U.S.C. § 875(c) for allegedly threatening a federal judge. While the defendant may have a valid defense, the court held, “the United States has substantial evidence, including the proffered testimony of Judge Thyng concerning the severely harmful and continuing effects of Mr. Kabbaj’s statements upon her.”¹⁵⁹

E. Speaker acted for the purpose of issuing a threat

In some cases, the defendant is accused of acting “for the purpose of issuing a threat,” and evidence will examine the reasoning and rationale behind the communication at issue. Such evidence can either point to the surrounding circumstances and how they influenced the defendant’s intention in making the statement, or they can serve as extra knowledge to interpret and decipher the threat’s validity. This approach was taken in six cases, 12.8 percent.

One of these cases was *United States v. Dierks*, in which the defendant was charged with making three posts on Twitter that threatened a United States Senator.¹⁶⁰ Rejecting a motion to dismiss, the court ruled that the question of whether the tweets actually constituted “true threats” was a question for the jury, which must decide whether the government’s and the defendant’s differing interpretations of the tweets are more persuasive.

As [the] defendant himself concedes, whether a statement constitutes a threat is a question generally to be decided by the trier of fact. This principle rings especially true where a defendant alleges an alternative, non-threatening interpretation to the statement or statements for which he is indicted.¹⁶¹

In *United States v. Stoner*, the government sought to admit evidence of the defendant’s prior threatening behavior in order to show that he posted an allegedly threatening video to YouTube, arguing that the evidence was “intrinsic to the Government’s charge that Defendants [...] transmitted the communications for the purpose of issuing a threat.”¹⁶² While the court deferred deciding this issue until trial,¹⁶³ the attempt shows the prosecution’s belief that such evidence was valuable and acceptable in the wake of *Elonis*.

F. Specific words used

In five cases (10.6 percent) courts used *Elonis*’s language that “the crucial element separating legal innocence from wrongful conduct is the threatening nature of the communication,”¹⁶⁴ to focus on the specific words used in a statement to determine whether a statement was a “true threat.” In this formulation, a statement which has detailed and well-thought-out threatening language is manifestation of a speakers’ intent to convey a threat.

¹⁵⁸ *Id.*

¹⁵⁹ 2016 WL 11660082, at *13, 2016 U.S. Dist. LEXIS 125226, at *36 (E.D. Pa. 2016).

¹⁶⁰ *U.S. v. Dierks*, 2017 WL 4873067, 2017 U.S. Dist. LEXIS 178380 (N.D. Iowa 2017)

¹⁶¹ *Id.* at *3, 2017 U.S. Dist. LEXIS 178380, at *9-10 (citations omitted).

¹⁶² 2017 WL 4883378, at *8, 2017 U.S. Dist. LEXIS 179095, at *19 (M.D. Pa. 2017).

¹⁶³ *Id.* at *8, 2017 U.S. Dist. LEXIS 179095, at *21.

¹⁶⁴ *Elonis*, 575 U.S. at ---, 135 S. Ct. at 2011, 192 L. Ed. 2d at 5 (quotation marks and citation omitted).

In *United States v. Khan*, defendant Mohammad Khan sought dismissal of the charges against him under section 875(c), arguing that the statute was unconstitutionally vague because an individual “cannot know with any certainty which statements are acceptable and which he is supposed to avoid,” which he argued “leaves the door open for arbitrary and selective justice.”¹⁶⁵ But the court denied the motion on the grounds that “rather than making the statute void for vagueness, the narrowing construction [of the statute] . . . actually alleviates possible void-for-vagueness concerns. . . . An ordinary citizen can understand what is meant by the terms ‘threat to kidnap’ and ‘threat to injure,’ and we are persuaded that the statute provides sufficient standards to allow enforcement in a non-arbitrary manner.”¹⁶⁶

Similarly, the trial court in *U.S. v. Turk* denied the defendant’s motion to dismiss charges based on statements that he intended to assault a district attorney so severely that the DA would require hospitalization, and also intended to assault the district attorney’s wife. The motion was denied on the grounds that the “court can infer [subjective intent to injure another] when the defendant’s statements are so graphic and specific that the defendant must have had the purpose of issuing a threat or knowledge that the communication would be viewed as a threat.”¹⁶⁷

G. Speaker’s mental state

Courts focused on admissibility of evidence regarding whether the defendant had an incriminating mental state at the time of the communication at issue in another five cases (10.6 percent) involving charges regarding “true threats.”

This was an issue in *United States v. LaFontaine*, in which the court denied the government’s motion to exclude audio recordings of conversations between the defendant and officials who claimed they were threatened, which the defendant sought to use “as examples of Defendant’s courteous demeanor and tone of voice, to rebut the government’s narrative that Defendant grew increasingly frustrated and angry to the point of eventually issuing the threat.”¹⁶⁸ The court allowed the audio recordings as proof that the defendant lacked the requisite mental state and did not intend for the communication to be threatening or did not know that it the recipient would perceive it as threatening.¹⁶⁹ Such “circumstantial evidence,” the court observed, “is most likely to be the only evidence of subjective state of mind.”¹⁷⁰

The court in *United States v. Conley* took a different approach.¹⁷¹ For several months before the defendant was charged with extortion, he and his partner told their victim that they would kill or harm the victim and his family if he did not meet their demands. During Conley’s trial on charges including extortion and threatening communications under 18 U.S.C. § 875(b), the jury was instructed to determine whether he had the intent to extort.¹⁷² He argued on appeal that this was erroneous under *Elonis*, since the instruction allowed the jury to criminally convict him for mere negligence.¹⁷³ In an unpublished decision, the Sixth Circuit held that there was

¹⁶⁵ *U.S. v. Khan*, 2017 WL 2362572, at *19, 2017 U.S. Dist. LEXIS 82493, at *50 (N.D. Ill. 2017)

¹⁶⁶ *Id.* at *20, 2017 U.S. Dist. LEXIS 82493 at *50 (quoting *U.S. v. Sutcliffe*, 505 F.3d 944, 953-54 (9th Cir. 2007)).

¹⁶⁷ *U.S. v. Turk*, 2018 WL 4615960, at *3, 2018 U.S. Dist. LEXIS 163552, at *6 (E.D. Pa. Sept. 21, 2018)

¹⁶⁸ 2015 WL 5999834, at *5, 2015 U.S. Dist. LEXIS 140212, at *14 (N.D. Iowa 2015).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* (quoting *U.S. v. Ott*, 741 F.2d 226, 229 (8th Cir. 1984) (quoting *U.S. v. Wetzel*, 514 F.2d 175, 177 (8th Cir. 1975))).

¹⁷¹ *U.S. v. Conley*, Nos. 16-4274/4275, 2018 U.S. App. LEXIS 30075 (unpublished) (6th Cir. Oct. 24, 2018).

¹⁷² *Id.* at *8.

¹⁷³ *Id.* at *8-9.

“ample evidence from which the jury could have rationally found that he made true threats to [the victim],” and that the defendant’s mental state was relevant to this determination.¹⁷⁴

H. Third parties’ understanding of statement

In four cases (8.5 percent) defendants were convicted of issuing a “true threat” even though the threat was never communicated to the intended victim at all. In these cases, a third party either saw or heard the threat and felt it was intense or relevant enough to notify authorities. Thus the third-parties’ understanding of the alleged threat was paramount, leading to the possibility of biases and presumptions taking the place of the speakers’ and recipients’ perceptions in determining whether the speaker’s communication was punishable. In these cases, the courts examined whether communication could be penalized as a “true threat” based on a third parties’ interpretation, even though the statement was not directly expressed to the target of the threat.

For example, in *United States v. Schuller*, the defendant was indicted on three counts of using interstate commerce facilities in the commission of murder-for-hire.¹⁷⁵ Later, the government also charged Schuller with a single count of transmitting threats by interstate communication under section 875(c).¹⁷⁶ The defendant plead guilty to the latter charge in a plea agreement for dismissal of the other charges.¹⁷⁷ He then moved to withdraw his guilty plea, arguing that although he knowingly and intentionally spoke of his intention to inflict bodily injury on another person, his guilty plea could not stand because he did not intend for the statements to be threatening, and that his statements were not communicated to the intended victim, nor were they supposed to be.¹⁷⁸

The court denied the motion to withdraw the guilty plea, holding that “Defendant’s sworn admissions in front of this Court still establish that he at least knowingly, if not intentionally, communicated a threat,” even though it was heard only by a third party, and that the “[d]efendant also manifested his intent to threaten by his actions.”¹⁷⁹

I. Other

There were three other cases, 6.4 percent, in which courts used other factors to rule on arguments made regarding “true threats.” These factors included when defendants could argue whether *Elonis* applied to their cases,¹⁸⁰ particularly application of *Elonis* to similar statutes.¹⁸¹

VII. Conclusion: A Standard for “True Threats”

Since the *Elonis* ruling left the standard for determining whether a communication is a “true threats” so ambiguous, courts have had to determine on their own whether particular

¹⁷⁴ *Id.* at *9.

¹⁷⁵ 136 F. Supp. 3d 1074, 1076 (D. Minn. 2015).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1077.

¹⁷⁹ *Id.* at 1078.

¹⁸⁰ See *Censke v. Matevousian*, Civil No. 16-01424, 2017 WL 1198594, 2017 U.S. Dist. LEXIS 48109 (E.D. Cal. Mar. 30, 2017) (unpublished) (rejecting habeas corpus petition on the grounds that defendant could have made *Elonis* argument during trial), *certif. of appealability denied*, No. 17-16422, 2017 WL 6887306, 2017 U.S. App. LEXIS 25648 (9th Cir. Dec. 18, 2017).

¹⁸¹ See *U.S. v. Harper*, 869 F.3d 624 (8th Cir. 2017) (federal extortion statute); and *U.S. v. Rapert*, 75 M.J. 164 (C.A.A.F. 2016) (Uniform Code of Military Justice threat provision).

statements are “true threats.” Thus courts have used the various criteria shown in our results, including ones focused on the speaker, the hearer, the statement itself, or the circumstances in which the statement was made.

Using these criteria, courts across the country have interpreted *Elonis* in their own ways and convicted or acquitted defendants—or upheld or reversed such convictions—based on their own notions of what a “true threat” is. But the lack of a national standard and clear rationale for determining whether a particular statement is a “true threat” creates the risk of uneven and unfair application of the law, and possible due process violations due to vagueness of the applicable standard.¹⁸² A more precise definition of “true threat,” particularly the delineation of which criteria that should be used to make the determination of whether a statement is or is not a “true threat,” would resolve the ambiguity on this issue and help prosecutors, defendants, courts and jurors apply consistent standards in these cases.

Ideally, a practical solution would involve consideration of more than a single factor, since many times the various components of a communication, including the individuals involved, the words, the context, and other factors, work in conjunction to determine the intention, effect and criminality of a defendant’s words. But the focus of the entire “true threats” doctrine should be the impact of the threatening speech on the target of that speech, since it is the harm to that person that the law is trying to address. So that person’s perception of the speech—subject to a reasonableness standard to avoid oversensitivity—should be a paramount consideration in determining whether a statement does or does not constitute a “true threat.”

As noted above, this appears to be contrary to the result in *Elonis*.¹⁸³ Even though the majority in the case mentioned that the target of a statement may be harmed regardless of the speaker’s intentions,¹⁸⁴ in the end the court held that defendant’s intent had to be a primary factor because “[f]ederal criminal liability generally does not turn solely on the results of an act without considering the defendant’s mental state.”¹⁸⁵ Thus the majority held that an instruction to the jury “that that the Government need prove only that a reasonable person would regard *Elonis*’s communications as threats ... was error.”¹⁸⁶

But in making this statement the majority did not rule that the recipient’s reasonable understanding of a statement could not be a factor in determining whether the statement was a “true threat.” A careful reading of the *Elonis* majority reveals that the Supreme Court only held the recipient’s reasonable understanding cannot be the *only* factor used.¹⁸⁷ Thus a jury can be instructed to consider *both* the speaker’s intent *and* the recipient’s reasonable understanding of the statement. The first would be the *mens rea*, or mental state, element of the crime, while the second would be the *actus reus*, or conduct, element of the offense.

¹⁸² See Morrison, note 39, *supra*. See also *Connally v. General Construction Co.*, 269 U.S. 385, 391(1926) (“[T]he terms of a penal statute [...] must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement [...] and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.”). In cases involving speech, this principle includes the “overbreadth” doctrine, in which “a statute is facially invalid if it prohibits a substantial amount of protected speech.” *United States v. Williams*, 553 U.S. 285, 292 (2008).

¹⁸³ See text accompanying note 65, *supra*.

¹⁸⁴ See *Elonis*, 575 U.S. at ---, 135 S. Ct. at 2008, 192 L. Ed. 2d at 12 (“A victim who receives that letter in the mail has received a threat, even if the author believes [wrongly] that his message will be taken as a joke.”)

¹⁸⁵ *Id.*, 575 U.S. at ---, 135 S. Ct. at 2012, 192 L. Ed. 2d at 16.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

While the majority in *Elonis* did not choose a particular level of *mens rea* required in “true threat” prosecutions, three of the opinions held that some level of intent more than negligence is required:

The Chief Justice in [the] *United States v. Elonis* [majority opinion] purported not to address *Elonis*’s statements in the First Amendment’s light, despite granting *certiorari*, in part, on whether the First Amendment requires that the “defendant be aware of the threatening nature of the communication.” Justice Alito offered some guidance [in his partial concurrence], asserting that the First Amendment requires only the defendant’s recklessness in making a threat before exposing him to prosecution under § 875(c). Dissenting, Justice Thomas argued that applying a general intent standard to § 875(c) would be consistent with the First Amendment’s historical application. Accordingly, *United States v. Elonis*, which requires something more than a negligence standard as a matter of statutory construction, offers no guidance as to the First Amendment’s true-threat requirement.¹⁸⁸

Conduct has also been held to be “an essential element” of § 875(c): “It is an essential element of the crime charged in this count [under § 875(c)] that there be a communication by defendant containing a threat to injure the person of another.”¹⁸⁹ Thus while it is improper for the recipient’s reaction to a statement to be the only criterion used to determine whether a statement constitutes a “true threat,” it may be used as one factor in making this determination, with the speaker’s intent being another factor.

This was the approach recently taken by the Sixth Circuit Court of Appeals in a recent case applying *Elonis*. The Supreme Court’s decision in *Elonis*, the appeals court held, “rejected the ‘reasonable person-negligence’ standard for element two of § 875(c).”¹⁹⁰ The appeals court added:

Therefore, following *Elonis*, the elements of an § 875(c) violation should be understood largely in the same way as before that decision, with only the addition of defendant’s subjective intent requirement in element two: (1) the defendant sent a message in interstate commerce; (2) the defendant intended the message as a threat; and (3) a reasonable observer would view the message as a threat.¹⁹¹

For the sake of preventing confusion and uncertainty in future cases, including convictions based on an individual court’s esoteric interpretation and application of the vague standards left in the aftermath of the *Elonis* decision, hopefully the Supreme Court will soon take the opportunity to adopt such a dual-factor standard. But the court has declined to take cases after *Elonis* that would allow it to do so.¹⁹²

Even if the court were to choose a different standard, it is imperative that it remedy this situation by clarifying the law on this issue. As the world’s social channels become more and more

¹⁸⁸ U.S. v. Nissen, No. CR 19-0077 JB, 2020 WL 108488, at *10 (D.N.M. Jan. 9, 2020).

¹⁸⁹ U.S. v. Feudale, 271 F. Supp. 115, 118 (D. Conn. 1967). *Accord* U.S. v. Holder, 302 F. Supp. 296, 301 (D. Mont. 1969), *aff’d*, 427 F.2d 715 (9th Cir. 1970); and U.S. v. Ahmad, 329 F. Supp. 292, 299 (M.D. Pa. 1971).

¹⁹⁰ U.S. v. Howard, 947 F.3d 936, 946 (6th Cir. 2020) (citing *Elonis*, 575 U.S. at ---, 135 S. Ct. at 2012-13, 192 L. Ed. 2d at 12). Note that the trial court decision in *Howard* is not included in the statistics in this paper, nor is it listed in Table 1, because that case, a jury verdict, was not reported.

¹⁹¹ *Id.* (citations omitted).

¹⁹² See text accompanying notes 90-114, *supra*.

susceptible to threatening language, it is imperative to clarify the standards for determining whether a statement is a “true threat” and what criteria should be used to do so effectively.

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TABLE 1

Decision	Speaker intended communication to be viewed as a threat	Speaker knew that communication would be viewed as a threat	Speaker's background knowledge	Hearer's perception / effect on hearer	Speaker acted for the purpose of issuing a threat	Specific words used	Speaker's mental state	Third parties' understanding of statement	Other
1. Censke v. Matevousian, 2017 WL 1198594, 2017 U.S. Dist. LEXIS 48109 (E.D. Cal. 2017)									✓
2. Hillstrom v. United States, 2018 U.S. App. LEXIS 12826 (11th Cir. 2018)	✓								
3. Hillstrom v. United States, 2017 U.S. Dist. LEXIS 184423 (S.D. Fla. 2017)	✓								
4. Mabie v. United States, 2015 U.S. Dist. LEXIS 147370 (E.D. Mo. 2015)			✓			✓			
5. Muhammad v. United States, 2016 U.S. Dist. LEXIS 102758 (W.D. Pa. 2016)	✓								
6. Tomkins v. United States, 2018 WL 1911805, 2018 U.S. Dist. LEXIS 67665 (N.D. Ill. 2018)	✓								
7. United States v. Abdulkadir, 2016 WL 659711, 2016 U.S. Dist. LEXIS 20366 (D. Minn. 2016)	✓								
8. United States v. Carr, 314 F. Supp. 3d 272 (D.D.C. 2018)		✓	✓				✓		
9. United States v. Carrillo, 2020 WL 231055 2020 U.S. Dist. LEXIS 7628 (D.N.M. 2020)	✓								
10. United States v. Conley, 2018 U.S. App. LEXIS 30075 (6th Cir. 2018)							✓		
11. United States v. Cruz, 713 Fed. Appx. 82 (3d Cir. 2017)					✓				
12. United States v. Dierks, 2017 WL 4873067 2017 U.S. Dist. LEXIS 178380 (N.D. Iowa 2017)		✓			✓				
13. United States v. Elonis, 841 F.3d 589 (3d Cir. 2016) ¹	✓						✓		
14. United States v. Harper, 869 F.3d 624 (8th Cir. 2017)									✓
15. United States v. Houston, 2015 WL 6449519, 2015 U.S. Dist. LEXIS 145269 (E.D. Tenn. 2015)	✓		✓						

¹ This is the remand from the U.S. Supreme Court's ruling. *See* text accompanying notes 73-80, *supra*.

	Decision	Speaker intended communication to be viewed as a threat	Speaker knew that communication would be viewed as a threat	Speaker's background knowledge	Hearer's perception / effect on hearer	Speaker acted for the purpose of issuing a threat	Specific words used	Speaker's mental state	Third parties' understanding of statement	Other
16.	United States v. Howard, 947 F.3d 936 (6th Cir. 2020)	✓				✓				
17.	United States v. Ivers, 2019 WL 78940, 2019 U.S. Dist. LEXIS 358 (D. Minn. 2019)	✓	✓							
18.	United States v. Jordan, 2017 U.S. Dist. LEXIS 176115 (W.D.N.Y. 2017)	✓								
19.	United States v. Kabbaj, 2016 WL 11660082 2016 U.S. Dist. LEXIS 125226 (E.D. Pa. 2016)	✓			✓					
20.	United States v. Khan, 2017 WL 2362572, 2017 U.S. Dist. LEXIS 82493 (N.D. Ill. 2017)						✓			
21.	United States v. LaFontaine, 2015 WL 5999834, 2015 U.S. Dist. LEXIS 140212 (N.D. Iowa 2015)			✓				✓		
22.	United States v. Mabie, 862 F.3d 624 (7th Cir. 2017)		✓	✓						
23.	United States v. McNeil, 228 F. Supp. 3d 809 (N.D. Ohio 2017)	✓	✓			✓	✓			
24.	United States v. Moreland, 207 F. Supp. 3d 1222 (N.D. Okla. 2016)	✓						✓		
25.	United States v. Mundle, 700 Fed. Appx. 70 (2d Cir. 2017)	✓		✓	✓					
26.	United States v. Mundle, 2016 WL 1071035, 2016 U.S. Dist. LEXIS 34736 (S.D.N.Y. 2016)	✓		✓						
27.	United States v. Murphy, 2020 WL 1813247 2020 U.S. Dist. LEXIS 63020 (D. Or. 2020)	✓	✓							
28.	United States v. Nissen, 432 F.Supp.3d 1298 (D.N.M. 2020)	✓								
29.	United States v. Rapert, 75 M.J. 164 (C.A.A.F. 2016)									✓
30.	United States v. Saul, 2020 U.S. Dist. LEXIS 80887 (D. Neb. 2020) ²	✓	✓							

² These are two decisions in the same case. The earlier decision, 2020 U.S. Dist. LEXIS 80887 (D. Neb. Feb. 25, 2020), was the magistrate's ruling recommending that the defendant's motion to dismiss be denied, while the later decision, 2020 U.S. Dist. LEXIS 79353 (D. Neb. May 6, 2020), was the the trial judge's evaluation and acceptance of that recommendation.

	Decision	Speaker intended communication to be viewed as a threat	Speaker knew that communication would be viewed as a threat	Speaker's background knowledge	Hearer's perception / effect on hearer	Speaker acted for the purpose of issuing a threat	Specific words used	Speaker's mental state	Third parties' understanding of statement	Other
31.	United States v. Saul, 2020 WL 2124853, 2020 U.S. Dist. LEXIS 79353 (D. Neb. 2020) ²	✓	✓							
32.	United States v. Schuller, 136 F. Supp. 3d 1074 (D. Minn. 2015)	✓	✓						✓	
33.	United States v. Segura, 2016 U.S. Dist. LEXIS 54725 (W.D. Pa. 2016)	✓								
34.	United States v. Shepard, 2018 WL 2387946, 2018 U.S. Dist. LEXIS 88178 (D. Ariz. 2018)	✓							✓	
35.	United States v. Spear, 2020 U.S. Dist. LEXIS 95549 (D. Vt. 2020)	✓			✓					
36.	United States v. Stevens, 881 F.3d 1249 (10th Cir. 2018)	✓							✓	
37.	United States v. Stoner, 2017 WL 4883378, 2017 U.S. Dist. LEXIS 179095, (M.D. Pa. 2017)		✓			✓				
38.	United States v. Toltzis, 2016 WL 3479084, 2016 U.S. Dist. LEXIS 83302 (N.D. Cal. 2016)	✓			✓				✓	
39.	United States v. Turk, 2018 WL 4615960, 2018 U.S. Dist. LEXIS 163552 (E.D. Pa. 2018)	✓	✓			✓	✓			
40.	United States v. Twitty, 641 Fed. Appx. 801, 2016 U.S. App. LEXIS 1655 (10th Cir. 2016)	✓								
41.	United States v. Twitty, 689 Fed. Appx. 890 (10th Cir. 2017)	✓	✓							
42.	United States v. Twitty, 2019 WL 109348, 2019 U.S. Dist. LEXIS 1722 (D. Colo. 2019)						✓			
43.	United States v. White, 810 F.3d 212 (4th Cir. 2016)	✓	✓		✓		✓			
44.	United States v. Wight, 2017 WL 481412, 2017 U.S. Dist. LEXIS 17081 (D. Utah 2017)		✓							
45.	United States v. Yassin, 2017 U.S. Dist. LEXIS 53686 (W.D. Mo. 2017)	✓	✓							
46.	Voneida v. AG Pa., 738 Fed. Appx. 735 (3d Cir. 2018)				✓		✓			
47.	White v. True, 2020 WL 489429 2020 U.S. Dist. LEXIS 16108, (S.D. Ill. 2020)	✓								

Decision	Speaker intended communication to be viewed as a threat	Speaker knew that communication would be viewed as a threat	Speaker's background knowledge	Hearer's perception / effect on hearer	Speaker acted for the purpose of issuing a threat	Specific words used	Speaker's mental state	Third parties' understanding of statement	Other
TOTAL (47 cases)	32	15	7	6	6	5	5	4	3
percentage of all cases ³	68.1%	31.9%	14.9%	12.8%	12.8%	10.6%	10.6%	8.5%	6.4%

³ The percentages are rounded to the nearest tenth. They add up to more than 100 percent because individual rulings are counted once for each factor used, so that an individual ruling may be counted more than once.

Merely Window Dressing or Substantial Authoritarian Transparency? Twelve Years of Enforcing China's Version of Freedom of Information Law¹

Yong Tang*

China's version of a freedom of information law, Open Government Information Regulations (OGI Regulations), was enacted in January 2007 and took effect in May 2008. Since 2009, various levels of Chinese government agencies have consistently published annual OGI reports detailing how much government-held information was disclosed proactively and reactively in prior years via a multitude of communication channels. After analyzing OGI reports published in the last 12 years (2008 to 2019) by government agencies at central and provincial levels, this study identifies problems that hinder people from having more meaningful access to governmental information. When it comes to disclosure of information vital to public interest such as public health, China is still highly secretive, as exemplified by its initial mismanagement of the coronavirus epidemic that originated in Wuhan. It is also found that national defense and state security agencies in China operate in virtually complete darkness. In most cases, administrative reconsideration and judicial relief are ineffective in rectifying agency non-compliance. A disturbing trend is for courts and government agencies to make non-disclosure decisions for reasons not mentioned in the OGI Regulations and relevant laws, thus bypassing the legislation. Despite these egregious shortcomings, the Chinese government has established foundational freedom of information platforms, and its enforcement of proactive and reactive disclosure requirements under the law seems more forceful than many Western observers expected. However, unlike in liberal democracies where enactment of freedom of information (FOI) laws often leads to reduction of government secrecy, less corruption and stronger accountability, various rankings indicate that China fails to translate its hard-earned authoritarian transparency into accountability and better governance. Despite over a decade of rigorous enforcement of freedom of information law, China remains one of the most corrupt countries in the world.

¹ The manuscript is a revised chapter of the author's doctoral dissertation successfully defended at The Pennsylvania State University in 2012. The chapter relied upon datasets compiled by the author from annual reports published by various levels of Chinese government agencies from 2008 to 2011. The manuscript expanded original datasets to include government information disclosure activities from 2012 to 2019. A modified version of the manuscript was presented to the 66th International Communication Association annual conference, Fukuoka, Japan, March 2016. For the dissertation chapter, see Yong Tang, "Chinese Freedom of Information: An Evaluation of the Legislative History, Rationales, Significance and Efficacy of Regulations of the People's Republic of China on Open Government Information" (PhD diss., The Pennsylvania State University, 2012), pp. 292-352, accessed Aug. 4, 2020, <https://etda.libraries.psu.edu/catalog/16287>.

Keywords: China, *Open Government Information Regulations*, *OGI Regulations*, freedom of information law, FOI law, proactive and reactive disclosure of information, authoritarian transparency, law enforcement, coronavirus epidemic

I. Introduction

In response to a grave public health crisis that swept China in 2003, Chinese government passed *Open Government Information Regulations (OGI Regulations)* in 2007.² Under the country's first freedom of information (FOI) law that went into effect in 2008 and was amended in 2019, government agencies, for the first time in Chinese history, have legal obligations to proactively and reactively disseminate information held by them. Although the law was influenced by American and European freedom of information legislation,³ many Western observers view China's passage of the FOI legislation with perplexity and suspicion. They insist that FOI law can only survive and thrive in constitutional democracies. They predict that the law is likely to fail or at best serve merely as window dressing for the ruling Chinese Communist Party.⁴ As the COVID-19 is spreading around the world like wildfire in 2020,⁵ numerous Western media reports believe that it was lack of government transparency and initial cover-up that caused the early coronavirus outbreak in Wuhan, China.⁶

² *OGI Regulations (passed in 2007 and revised in 2019)*. For the full text of the law, visit Yale Law School China Law Center website, Central government of China website, and Peking University Lawinfochina.com, accessed Aug. 4, 2020, <https://law.yale.edu/sites/default/files/documents/pdf/china/ogi_regulations_eng_jph_rev_9-11.pdf> (2007 version in English); <http://www.gov.cn/zwgg/2007-04/24/content_592937.htm> (2007 version in Chinese); <http://www.gov.cn/zhengce/content/2019-04/15/content_5382991.htm> (2019 version in Chinese); <<http://www.lawinfochina.com/display.aspx?lib=law&id=6011&CGid>> (2019 version in both Chinese and English).

³ Hanhua Zhou, *Basic Considerations in Drafting of Open Government Information Regulations (Academic Version)*, 6 CHINESE JOURNAL OF LAW 57 (2002).

⁴ Rick Snell & Weibing Xiao, *Freedom of Information Returns to China*, 10 PUBLIC ADMINISTRATION TODAY 44 (2007); Lei Zheng, *Enacting and Implementing Open Government Information Regulations in China: Motivations and Barriers*, in proceedings of the 1st International Conference on Theory and Practice of Electronic Governance, Macao, China, Dec. 10-13 2007, at 117-20; David Caragliano, *China's Transparency Reform: Is It for Real?* THE ATLANTIC, Nov. 6, 2012, <<https://www.theatlantic.com/international/archive/2012/11/chinas-transparency-reform-is-it-for-real/264609/>> (last visited Aug. 4, 2020).

⁵ As of Aug. 4, 2020, 18,387,725 people in the world have been infected with the novel coronavirus and 696,586 people globally have died of the virus. COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University, <<https://gisanddata.maps.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6>> (last visited Aug. 4, 2020).

⁶ *Coronavirus: What Did China Do About Early Outbreak?* BBC NEWS, June 9, 2020, <<https://www.bbc.com/news/world-52573137>> (last visited Aug. 4, 2020); *China Didn't Warn Public of Likely Pandemic for 6 Key Days*, AP, Apr. 15, 2020, <<https://apnews.com/68a9e1b91de4ffc166acd6012d82c2f9>> (last visited Aug. 4, 2020); Nick Wadhams and Jennifer Jacobs, *China Concealed Extent of Virus Outbreak, U.S. Intelligence Says*, BLOOMBERG NEWS, Apr. 1, 2020, <<https://www.bloomberg.com/news/articles/2020-04-01/china-concealed-extent-of-virus-outbreak-u-s-intelligence-says>> (last visited Aug. 4, 2020); Josh Rogin, *Bill Gates Is Wrong. China's Coronavirus Coverup Is Not a "Distraction,"* WASH. POST, Apr. 30, 2020,

The purpose of this study is to examine implementation of *OGI Regulations* in the last 12 years to see if the law has been effectively enforced or just an act of showmanship, as many Western scholars believe, and news editors suggest. A database search finds some English-language scholarly materials on China's FOI law.⁷ Few Western researchers, however, have examined how well *OGI Regulations* have been enforced and what improvements can be made. This research seeks to fill this gap by compiling and analyzing annual OGI reports released from 2008 to 2019 by various levels of Chinese government agencies. Government agencies in Taiwan, Hong Kong and Macao are excluded from consideration as *OGI Regulations* do not apply to governments in the breakaway province and two special administrative regions.

All of those annual reports are downloads from official websites of corresponding governmental agencies. Based on the reports, the study produced four tables that reflect the total number of informational items proactively and reactively released by government agencies across the country in the last 12 years. Many research findings are drawn from these tables. The tables cover all levels of the people's government of China, from central, to provincial to county and township levels, because the data released by provincial people's governments are aggregate. Four additional tables are based on data provided by the World Bank and Transparency International, a Berlin-based non-profit organization focusing on fighting global corruption and promoting governmental transparency. These four tables are included in the paper with the intent to show whether more than a decade of enforcement of China's FOI law leads to lesser corruption and greater transparency in the government. All eight tables are placed at the end of this paper.

The data in the first four tables should be undertaken with caution due to four reasons. First, all the numbers do not arise from independent sources; instead, the data is from annual reports of OGI activities produced by official agencies. The numbers compiled from annual reports of OGI activities of central and provincial-level agencies (2008-2019) indicate that roughly 62.55 percent of OGI requests submitted to government agencies at all levels gained approval (*see Table 3*). The OGI request approval rate provided by research organizations and news media such as the China Academy of Social Science, Peking University, *Southern Weekend*, and *Southern Metropolis Daily* seems far lower. Those relatively independent sources obtained the approval rate by

<https://www.washingtonpost.com/opinions/global-opinions/bill-gates-is-wrong-chinas-coronavirus-coverup-is-not-a-distraction/2020/04/30/080c6986-8b11-11ea-9dfd-990f9dce71fc_story.html> (last visited Aug. 4, 2020); Nicholas Kristof, *Coronavirus Spreads, and the World Pays for China's Dictatorship*, N.Y. TIMES, Jan. 29, 2020, <<https://www.nytimes.com/2020/01/29/opinion/coronavirus-china-government.html?searchResultPosition=6>> (last visited Aug. 4, 2020).

⁷ Hanhua Zhou, *Open Government in China: Practice and Problems*, in THE RIGHT TO KNOW: TRANSPARENCY FOR AN OPEN WORLD, ed. Ann Florini and Joseph E. Stiglitz (2007); Weibing Xiao, FREEDOM OF INFORMATION REFORM IN CHINA: INFORMATION FLOW ANALYSIS (2011); Changhua Wu, *Improving the Legal and Policy Foundation for Public Access to Environmental Information in China*, 24 TEMPLE J. SCI., TECH. & ENVTL. L. 291 (2005); Suzanne J. Piotrowski, Yahong Zhang, Wenxuan Yu and Weiwei Lin, *Key Issues for Implementation of the Chinese Open Government Information Regulations*, 69 PUB. ADMIN. REV. (2009); Paul Hubbard, *China's Regulations on Open Government Information: Challenges of Nationwide Policy Implementation*, 4 OPEN GOV'T J. (2008).

sending staff to apply for information under the guise of ordinary requesters. Those rates are likely more reliable.⁸ On the contrary, officials at various levels might be tempted to gloss over their transparency failures by improving their numbers because their performance evaluations relate to OGI activities.

Second, a significant amount of information is not provided by agencies in their OGI annual reports, for whatever reasons, so numbers drawn from those reports are just a rough estimate of quantity of government information disclosure. Third, agencies may also make good-faith mistakes in reporting their activities for various reasons.⁹ Lastly, interpretation of annual reports of OGI activities may be prone to error due to ambiguity or vagueness in the wording of the materials involved.

Despite all the shortcomings of the data presented in these four tables, the current researcher believes that the datasets are useable because no other alternative dataset is as comprehensive and longitudinal as the data provided by the Chinese government at various levels. The government data are valuable in that they provide researchers a bird's-eye view of all Chinese OGI activities occurring at central and local levels from 2008 to 2019, unlike other datasets which at best offer sporadic, short-range and anecdotal evidence of OGI activities in China. The aggregate data are valuable also in that researchers can find problems and trends that government officials may wish to hide.

II. Implementation of Proactive Disclosure in China

When *OGI Regulations* became effective in May 2008, governmental agencies throughout the country began releasing information according to the “affirmative disclosure” provision of the law.

A. A Large Variety of Communication Channels

This study finds that governmental agencies throughout China affirmatively disseminate information through a variety of communications platforms, such as official

⁸ Hongqing Duan, *How Chinese Media Shall Push Forward Open Government Information*, 9 CHINA REFORM (2011); Xing Wang, *Experiment of OGI Applications for PM_{2.5} Data*, SOUTHERN METROPOLIS DAILY, Jan. 11, 2012, at AA33, <<http://www.ogichina.org/article/180/12880.html>> (last visited Aug. 4, 2020); Mingyan Wei & Shaofeng Guo, *OGI Regulations Still Encounter Implementation Bottlenecks Four Years After Enforcement*, BEIJING NEWS, May 15, 2012, <<http://www.bjnews.com.cn/news/2012/05/15/199113.html>> (last visited Aug. 4, 2020).

⁹ It was found that the two annual OGI work reports published by the Ministry of Human Resources and Social Security in 2009 and 2010 were identical. The annual OGI work reports published by the Dongguan Municipal Bureau of Statistics in Guangdong Province from 2008 to 2010 were also similar in every detail. Both agencies have corrected this stupid error. Baocheng Chen, *Ministry of Human Resources and Social Security Revises Its Annual OGI Work Reports*, SOUTHERN METROPOLIS DAILY, Mar. 30, 2011, at AA17, <<http://news.sina.com.cn/c/p/2011-03-29/062622198498.shtml>> (last visited Aug. 4, 2020); Weihua Chen, *Dongguan Statistics Bureau Published Almost Duplicate Annual OGI Work Reports in Last Three Years*, SOUTHERN METROPOLIS DAILY, Apr. 1, 2011, at AA03, <<http://news.gd.sina.com.cn/news/2011/04/01/1121766.html>> (last visited Aug. 4, 2020).

websites¹⁰ and gazettes,¹¹ OGI access facilities,¹² press conferences,¹³ “Government’s Sunshine Hotlines,”¹⁴ social networking sites and social media,¹⁵ media interviews,¹⁶ OGI annual reports and guides,¹⁷ declassified archives,¹⁸ OGI publications, and other OGI publicity activities.¹⁹

B. Wealth of Information Proactively Disseminated

The ministries, commissions and other organizations directly controlled by the State Council disclosed a total of 24,517,218 items containing official information in the years running from 2008 to 2019, making an average of roughly two million informational items available to the general public per year (see *Table 1*). Proactive disclosure reached its peak in 2009 when 7,132,207 informational items were released by various government agencies in the central level. The release of standard governmental information and information generated or obtained prior to May 2008, contributed to the explosive growth in number of informational items openly available. After 2009, the volume of official information proactively released annually by central agencies declined and fluctuated until reaching its nadir in 2019 when only 499,832 pieces of governmental information were released. Agencies, ranging from provincial to township levels, affirmatively publicized an approximate total of 533,748,140 items from 2008 to 2019

¹⁰ Visiting websites of all provincial-level governments, most ministries, and commissions within the State Council, this study finds that governmental websites have become the most important platform for distributing information. Apparently, most governmental websites investigated have special OGI columns, leaders’ mailboxes and chatroom capabilities. Chinese citizens can electronically search proactively disclosed information.

¹¹ In order to ensure maximum distribution of governmental gazettes, official agencies at various levels provide free electronic access to users. Websites’ visitors can search online gazettes easily. Relevant organizations and OGI access centers receive free and hard copies of gazettes.

¹² OGI access facilities exist throughout the country. Normally, governmental service centers, state and local archival institutions, and public libraries are their locations. Anyone can use these facilities to access proactively publicized information maintained in digital and physical forms.

¹³ For example, governmental agencies at various levels in Sichuan Province conducted 1,660 press conferences in 2011. In the same year, the Ministry of Foreign Affairs held 133 press conferences.

¹⁴ “Government’s Sunshine Hotlines” enable leaders of various agencies to appear on radio shows to chat, live, with listeners. Jointly established between radio stations and agencies, the Hotlines have wide acceptance for proactively disseminating official information of greatest concern to ordinary people.

¹⁵ Government’s websites, online forums, and blogs are popular among officials. Even more popular is microblogging and WeChat. While China blocks Twitter, agencies and officials at various levels use Twitter-like microblogging sites (Weibo) to disseminate information. WeChat, or Weixin as it is known in China, is definitely the most powerful mobile app in China today. Vast amount of government agencies across the country use their WeChat public accounts to reach ordinary citizens.

¹⁶ Many OGI annual reports list the number of media interviews officials arranged with journalists in the corresponding year. In general, many officials in China are more and more willing to accept interview requests from journalists of their own country.

¹⁷ Most agencies from central to township levels publish OGI annual reports, OGI guides, and OGI indexes in order to facilitate the people’s access to proactively released information.

¹⁸ Before enforcement of *OGI Regulations* in 2008, many official archives scheduled for declassification under *Archives Law 1988* remained sealed. Since enactment of *Regulations*, agencies have become increasingly progressive in opening archives to the public.

¹⁹ Many agencies often publish OGI leaflets and OGI whitepapers. They also arrange OGI Publicity Week or OGI Publicity Month to enhance public awareness of the law. During the publicity weeks or months, during OGI forums and training sessions, ordinary citizens receive invitations to attend many publicity activities.

(see Table 2). On average, government agencies at provincial level and below released 44 million pieces of information annually. The number of information items disclosed affirmatively by these agencies saw steady growth in the years running from 2008 to 2018. A sharp decline, however, was recorded in 2019 when only 22 million items of information were disseminated proactively by these agencies.

In sum, the Chinese government, at all levels, affirmatively released a total of 558,265,358 items of governmental information from 2008 to 2019 (see Table 3). Provincial and local government agencies released information 22 times as much as their central counterparts did. This is understandable from the Chinese context, because of the much smaller size of central agencies than their provincial and local equivalents, and the relative detachment of central agencies from ordinary people's daily lives. The sharp decrease in 2019 in the number of informational items disclosed by agencies at all levels was probably because a new State Council-recommended OGI report template began to be widely used in that year and the template narrowed the scope of government information suitable for proactive disclosure.

C. Categories of Information Publicized

Documents and records affirmatively disclosed by various levels of Chinese administrative organs in the last 12 years covered a large variety of areas and represented four categories: The first category constituted standard information of governments' and leaderships' activities, agencies' structures, functions, and working procedures required by proactive provisions of *OGI Regulations*. The second category of information that official agencies vigorously and proactively disclosed was information on rulemaking or decision-making, which expects public participation or at least familiarity.²⁰ The third category of information widely disclosed, affirmatively, were government-held records and files involving money collected and spent by public agencies. The last category of official information disseminated affirmatively involved man-made and/or natural disasters or anything bad for agencies.²¹

It seems flagrant violations of *OGI Regulations* in terms of proactive disclosure of first two categories of government information are on the decline. This study finds that the gap between the promises of *OGI Regulations* and delivery in practice in terms of proactive disclosure of such standard official information is clearly not as wide as many Western FOI scholars might expect. Government agencies, however, are much less willing to affirmatively disclose the last two categories of information because officials fear that disclosure of such information would likely bring them embarrassment, shame, demotion or even loss of their jobs. The most recent example was that various levels of Chinese government agencies involved failed to alert the public timely of a pending COVID-19 epidemic in late 2019 and early 2020.²²

²⁰ *OGI Regulations* (passed in 2007 and revised in 2019), Art.19 (2019) and Art.20 (2019); WEIBING XIAO, FREEDOM OF INFORMATION REFORM IN CHINA: INFORMATION FLOW ANALYSIS 99 (2011).

²¹ WEIBING XIAO, *supra* note 20, at 97-98.

²² Government agencies must emphasize proactive disclosure of government information involving public health, and disclosure must be timely and accurate. *OGI Regulations* (passed in 2007 and revised in 2019), Art. 20 (2019) and Art. 6 (2019). At the very beginning of the global COVID-19 pandemic, however, National

III. The Implementation of Reactive Disclosure in China

Since the institution of *OGI Regulations* in May 2008, citizens, legal persons, and other organizations throughout the country have begun to exercise the legal right of access to government-held information via submitting OGI requests. The interest in applying for governmental information via reactive disclosure provisions of the law was generally high.

For example, within the first two months after *OGI Regulations* went into effect, the Beijing municipal government received 520 disclosure applications.²³ In 2008, Jilin Province received 45,992 OGI filings.²⁴ People and organizations were not hesitant to seek administrative and judicial remedies upon denial of OGI petitions. For instance, in 2008, the superior administrative agencies in Shanghai received requests for reconsideration of 683 denied inquiries, and 258 denied OGI requests seeking judicial relief came before court in the same city. In the same year, 118 OGI requests, rejected by agencies in Jilin Province, were transferred to superior administrative agencies for reconsideration, and 34 similarly rejected requests sought judicial relief.²⁵

This study identifies various trends and patterns that dominate the landscape of reactive disclosure in the last 12 years. These trends and patterns emerge when the study examines data involving governmental agencies processing OGI requests, administrative organs handling reconsideration of information request denials, courts handling OGI litigations, geographic and bureaucratic imbalance in the use of reactive disclosure, and military and national security agencies that are still in the dark.

A. Governmental Agencies Processing OGI Requests

According to the data gathered from various OGI annual reports published from 2008 to 2019, the ministries, commissions, and other organizations under the State Council received a total number of 301,690 requests in the last 12 years (2008-2019), registering an average of 25,141 requests per year (see *Table 1*). With a few exceptions, there was a steady growth in the number of OGI petitions made and received and the number reached its peak in 2015 when 142,217 requests were recorded. Agencies at provincial, prefecture, city, county, and township levels received approximately 3,676,341

Health Commission, Hubei Provincial Health Commission, and Wuhan Health Commission all failed to tell the world, affirmatively, what was going on in Wuhan, the original epicenter of the coronavirus outbreak. Dali L. Yang, *Wuhan Officials Tried to Cover up Covid-19 — and Sent It Careening Outward*, WASH. POST, Mar. 10, 2020, <<https://www.washingtonpost.com/politics/2020/03/10/wuhan-officials-tried-cover-up-covid-19-sent-it-careening-outward/>> (last visited Aug. 4, 2020); China Didn't Warn Public of Likely Pandemic for 6 Key Days, AP, Apr. 15, 2020, <<https://apnews.com/68a9e1b91de4ffc166acd6012d82c2f9>> (last visited Aug. 4, 2020).

²³ Yongtong Su and Muzi Cai, *Initial Enforcement of OGI Regulations Face Obstacles*, SOUTHERN WEEKEND, July 10, 2008, <<http://www.infzm.com/content/14378>> (last visited Aug. 4, 2020).

²⁴ Huazhou Han, *Some Problems and Policy Suggestions Concerning the Implementation of OGI Regulations*, 7 CHINESE PUB. ADMIN. 11 (2009).

²⁵ *Id.*

applications in the years running from 2008 to 2019, registering an average of 306,362 submissions on a yearly basis (see *Table 2*). The number of OGI requests made to these agencies grew from 132,266 in 2008 to 415,955 in 2017 and then declined to 375,820 in 2019. In sum, the Chinese agencies at all levels received 3,978,031 applications for disclosure of government-held documents and files within the 12-year timeframe since institution of *OGI Regulations* in 2008 (see *Table 3*). Major findings concerning agencies processing OGI requests are:

1. Most requests were accepted for processing.

Apparently, most OGI requests gained acceptance for processing. Some requests remained unprocessed, either ignored by the receiving agencies or marked as invalid applications for procedural reasons (e.g., the request format was inappropriate, addressed the incorrect agency). According to the data for this study, central governmental agencies received 301,690 OGI requests from 2008 to 2019. Among all requests received, 296,041 gained acceptance for processing, an acceptance rate of 98.13 percent (see *Table 1*). In the same 12-year period, provincial and lower level agencies received a total of 3,676,341 OGI requests, among which 3,546,830 were acceptable as valid applications, with an acceptance rate of 96.48 percent (see *Table 2*). Although the acceptance rates are high, they are far from perfect. Under *OGI Regulations*, official agencies are to accept and process all requests, so, ideally the acceptance rate should be 100 percent. This requirement is clearly not enforced to the extent desired by the law, and thus ignoring or rejecting OGI requests before acceptance is disturbing.

2. Majority of OGI requests submitted to provincial and local agencies gained approval.

Irritation is the result upon rejection of OGI requests even before acceptance for processing, but the procedures of the lengthy OGI request-submission and relief-seeking process are surprisingly encouraging. The data show that the majority of OGI requests accepted at provincial and local levels in China gained approval by corresponding agencies while approval rate for OGI requests at the central level is much lower. According to gathered statistics, of all the OGI requests accepted for processing in the years running from 2008 to 2019 by ministries, commissions and other organizations of the State Council, 8.19 percent, 15.73 percent, 5.29 percent, 6.45 percent, 11.93 percent, 11.88 percent, 37.68 percent, 77.17 percent, 30.93 percent, 29.73 percent, 23.24 percent, and 28.65 percent gained acceptance respectively for each year, registering an average approval rate of 48.44 percent (see *Table 1*). On the contrary, the approval rate for the OGI requests processed by provincial and local agencies was 63 percent for 2008, 64.44 percent for 2009, 63.49 percent for 2010, 64.94 percent for 2011, 80.38 percent for 2012, 72.32 percent for 2013, 62.60 percent for 2014, 67.71 percent for 2015, 65.12 percent for 2016, 60.90 percent for 2017, 53.89 percent for 2018, and 54.33 percent for 2019, with an average approval rate of 63.73 percent (see *Table 2*). In sum, the Chinese bureaucracy at all levels approved 62.55 percent of OGI requests it had processed in the 12-year period from 2008 to 2019 (see *Table 3*).

The high approval rate for OGI requests especially at provincial and local levels is significant for official attention because the majority of OGI applications submitted, received, and accepted for processing in the country were for provincial and local agencies. As an indicator of effectiveness of reactive disclosure, the surprisingly high approval rate at provincial and local levels seems contradicting, to some degree, Western scholars' prophecies that the FOI system fails in authoritarian regimes like China.

However, caution is necessary when considering the common occurrence of agencies' consenting to applicants' disclosure requests for three reasons: First, the approval rates are based upon calculations from annual work reports produced by agencies with vested interest in OGI activities, not from independent sources. Second, the rates represent a relatively short period of time (2008-2019). A different outcome would be possible if the data had represented a much longer time span. Third, most of the information sought by applicants did not involve issues of public interest/concern. Instead, requested documents and records were closely related to immediate interests of requesters. FOI scholar Weibing Xiao identified several major categories for information Chinese citizens sought via OGI requests since 2008: State-owned enterprises' privatization and restructuring, house demolition, and land use, all of which aids determining violations of individuals' interests.²⁶ According to Xiao, other areas for inquiries include: Pending criminal and civil cases and other personal legal matters, official agencies' processing business transactions, historical records for matters, such as housing takeovers prior to and during the Cultural Revolution, and personnel files for claiming government-funded benefits.²⁷

When releasing these types of information, governmental officials have few concerns for any impact on their careers. The approval rate would precipitately drop if most information sought had involved the welfare or well-being of the general public, such as information pertaining to environmental pollution and public health crisis, financial records of high-ranking officials, and files about government corruption and officials' embezzlement. Release of such information would likely cause civil unrests, mass protests and resentment toward the ruling party.

3. Approval rates among governmental agencies were sharply uneven.

As identified in previous discussion, the average percentage of OGI requests approved by central governmental agencies (48.44 percent) is far lower than the average percentage of requests approved by agencies at provincial and lower levels (63.73 percent), with Beijing and Shanghai being two exceptions. As two provincial-level cities, Beijing (44.21 percent) and Shanghai (43.52 percent) recorded far lower approval rate than other provincial equivalents from 2012 to 2019. This finding is consistent with a previous study based on 245 annual OGI activity reports from 2008 to 2010.²⁸ The difference in approval ratings between central and local agencies may have explanation from the perspective of the special needs test.

²⁶ WEIBING XIAO, *supra* note 20, at 11.

²⁷ *Id.* at 119.

²⁸ Ming Xiao, *Analysis of State of Operation of OGI System According to 245 Annual OGI Work Reports from 2008 to 2010*, 10 LAW SCIENCE MONTHLY (2011).

Prior to *OGI Regulations*' amendment in 2019, the applicant had to provide evidence to prove existence of a special need for daily productivity, livelihood, or scientific research to substantiate the request.²⁹ Normally, the information sought via OGI requests submitted to provincial and lower level official agencies are related more closely to citizens' daily productivity and livelihoods than information pursued via OGI requests to central level agencies. Information requests sent to provincial and lower level governmental bodies are thus more likely to satisfy the special needs test. Ironically enough, in the last 12 years, official agencies at various levels in Beijing and Shanghai were more likely to deny disclosure requests than other provincial-level government entities because, on average, information sought in these two large cities had greater difficulty meeting the special needs test. In socially and economically developed areas, like Beijing and Shanghai, where a more mature civil society exists, people are more likely to apply for information of public interest.³⁰

4. Many OGI requests were denied on non-legal grounds.

Although the majority of OGI applications submitted from 2008 to 2019 to provincial and lower level agencies gained approval in China, a small number of requests were denied by agencies either on substantive/legal grounds³¹ or on non-legal/procedural grounds.³² According to annual OGI reports, at the central government's level, the total number of OGI denials on non-legal grounds was 101 for 2008, 837 for 2009, 665 for 2010, 1,006 for 2011, 935 for 2012, 987 for 2013, 2,618 for 2014, 10,338 for 2015, 12,639 for 2016, 8,759 for 2017, 8,545 for 2018, and 10,963 for 2019 (*see Table 1*). At the provincial and lower levels, the number of OGI requests rejected for non-legal reasons was 6,741 for 2008, 14,368 for 2009, 15,463 for 2010, 22,363 for 2011, 28,915 for 2012, 29,137 for 2013, 75,185 for 2014, 81,170 for 2015, 96,926 for 2016, 121,947 for 2017, 116,719 for 2018, and 145,511 for 2019 (*see Table 2*). In sum, the people's government at all levels rejected a total of 812,838 OGI requests for non-legal reasons in the 12-year

²⁹ *OGI Regulations (passed in 2007 and revised in 2019)*, Art. 13 (2007). The special needs test was abolished when *OGI Regulations* were revised in April 2019. The revised law went into effect in May 2019.

³⁰ Ming Xiao, *supra* note 28.

³¹ This study identifies denied OGI requests as "denied on substantive/legal grounds" in the tables when agencies' decisions assert: a) requested information involves state secrets; b) requested information involves commercial secrets; c) requested information involves personal privacy; d) requested information involves commercial secrets or personal privacy and the third party involved did not consent to disclosure; e) requested information might harm state security, public security, economic security, or social stability if disclosed; f) requested information appears in internal documents; g) requested information is internal management information or procedural information; h) requested information needs summarization, assembly, or reproduction; i) requested information is irrelevant to the applicant's special needs; j) information sought are files and documents involving administrative law enforcement; k) any other legal reasons specified by laws and regulations.

³² This study identifies denied OGI requests as "denied on non-legal/procedural grounds" in the tables when agencies' decisions assert: a) requested governmental information does not exist; b) requested information is not in the possession of the agency which received the request; c) the request is ambiguous and fails to conform to required format; d) requested information is not official information; e) requested information has been transferred to archival institutions; f) requested information is the subject of repeated requests; g) information sought are easily available publications; h) the OGI annual reports do not specify grounds for agencies' denying requests; i) government agency asks for correction or additional information; j) government agency asks information to be sought through other means; k) any other non-legal reasons.

period. The numbers listed indicate a continuous increase in OGI rejections for non-legal reasons.

Agencies have designed a variety of non-legal strategies to reject OGI requests. Since rejections are for non-legal reasons, the requirements of *OGI Regulations* allow bypassing. For example, as FOI scholar, Weibing Xiao, observed, official bodies set many unreasonable obstacles for access.³³ Some agencies require the applicants to provide file numbers of the documents sought.³⁴ Some administrative organs compel requesters to use government-provided application forms.³⁵ Some agencies ask for personal signatures on application forms.³⁶ Some agencies order the applicants to submit copies of their identifying documents in certain formats and even authenticity verification of those documents is needed.³⁷ Some agencies prohibit OGI requesters from photocopying the document sought.³⁸ Some agencies keep applicants from submitting applications online.³⁹ Many governmental bodies deny requests for information on the grounds that the information sought does not exist or is not governmental information.⁴⁰ Some

³³ WEIBING XIAO, *supra* note 20 at 111.

³⁴ A government agency in Beijing rejected Fuxiang Zhu's OGI request for this reason. Zongzhi He, Sijing Wang, & Ran Huang, *FOI Still Has a Long Way to Go*, 21ST CENTURY BUSINESS HERALD, July 8, 2008, <<http://finance.sina.com.cn/china/hgjj/20080708/02595065285.shtml>> (last visited Aug. 4, 2020).

³⁵ In May 2008, Beijing lawyer, Jinsong Hao, submitted an OGI request to the State Forestry Administration in Beijing. The administration rejected the application because he did not use the form designated by the agency. Kulei An, *Skills of Jinsong Hao*, 20 SOUTHERN PEOPLE WEEKLY 64 (2008).

³⁶ Yanbin Lv, *Review Third Anniversary of Implementation of OGI Regulations*, 5 CHINA REFORM (2011).

³⁷ *Id.* In December 2011, a journalist from the *Southern Metropolis Daily* submitted an OGI application to the Hubei Provincial Bureau of Environmental Protection for surveillance data concerning PM2.5. *The agency required a scanned copy of the applicant's photo ID by telefax and refused to accept a photo ID having certain formats.* Xing Wang, *Experiment of OGI Applications for PM2.5 Data*, SOUTHERN METROPOLIS DAILY, Jan. 11, 2012, at AA33, <<http://www.ogichina.org/article/180/12880.html>> (last visited Aug. 4, 2020).

³⁸ In November 2007, Linxing Xu and Yulai Yuan submitted an OGI request to the Shanghai Municipal Environmental Protection Bureau. The Bureau accepted the request but informed the applicants that the information sought was only accessible for reading or transcription by hand in the Bureau office. Although this incident occurred before enactment of *OGI Regulations*, similar incidents continued after institution of the law. For example, in 2012, Wei County Civil Affairs Bureau in Hebei Province asked an applicant to visit the agency office to examine, personally, the requested document, but without allowing him to photocopy it. Junxiu Wang, *Lawyer Discusses Various Strange Phenomena Regarding FOI*, CHINA YOUTH DAILY, May 10, 2008, at 3, <http://zqb.cyol.com/content/2008-05/10/content_2175261.htm> (last visited Aug. 4, 2020); Jing Wei, *Journalist Sues Wei County Civil Affairs Bureau in Hebei Province for Non-Compliance of OGI Regulations*, CHINA.COM.CN, May 17, 2012, <<http://www.ogichina.org/article/180/13954.html>> (last visited Aug. 4, 2020).

³⁹ In December 2011, a journalist from the *Southern Metropolis Daily* submitted an online OGI application to the official website of the Shānxī Provincial Bureau of Environmental Protection for the surveillance data concerning PM2.5. Unfortunately, the website declined to accept the electronic application. Xing Wang, *Experiment of OGI Applications for PM2.5 Data*, SOUTHERN METROPOLIS DAILY, Jan. 11, 2012, at AA33, <<http://www.ogichina.org/article/180/12880.html>> (last visited Aug. 4, 2020).

⁴⁰ Beijing lawyer, Jinsong Hao, lodged separate OGI applications in October 2008 to the Taiyuan Railway Public Security Bureau, the Shanghai Zhabei District People's Government, the Shanghai Public Security Department and the Shanghai Zhabei District Public Security Bureau for information of the criminal case of Jia Yang, a jobless youth executed in November 2008 for murdering six Shanghai police officers and injuring many others. All four agencies denied releasing the information sought, arguing that the

agencies archive the information sought immediately after receiving information requests.⁴¹

5. More and more OGI requests were denied on legal grounds.

Many OGI requests received rejection for legal reasons in the last 12 years. According to the gathered data, at the central level of government, the number of OGI denials for legal reasons was 27 in 2008, 51 in 2009, 185 in 2010, 64 in 2011, 136 in 2012, 91 in 2013, 357 in 2014, 18,516 in 2015, 1,530 in 2016, 2,127 in 2017, 10,972 in 2018, and 2,126 in 2019 (see Table 1). At provincial and lower levels, the number of OGI requests rejected for legal reasons was 1,853 in 2008, 2,530 in 2009, 2,470 in 2010, 4,306 in 2011, 4,091 in 2012, 2,995 in 2013, 9,831 in 2014, 33,740 in 2015, 21,600 in 2016, 27,277 in 2017, 26,650 in 2018, and 22,871 in 2019 (see Table 2). In sum, the people's government, at all levels, rejected a total of 196,396 OGI requests for legal reasons from 2008 to 2019. The numbers listed indicate some fluctuations in different years but overall there was clearly a steady increase in OGI applications denied by official agencies for reasons specified in *OGI Regulations*, and other relevant laws and regulations.

Official agencies have used a variety of legal strategies to block information access. In an effort to avoid compliance with *OGI Regulations*, agencies try to limit the coverage of the law such as excluding the General Office of the State Council from the reactive disclosure obligations,⁴² require purpose for access requests,⁴³ force applicants to document their special needs for the information sought and promise not to abuse special-needs data,⁴⁴ limit the scope of governmental information,⁴⁵ and use statutory

information did not comply with *OGI Regulations*' definition. *Famous Lawyer Jinsong Hao Requests Information Disclosure on Jia Yang Case*, JCRB.COM, October 20, 2008, <http://news.jcrb.com/lvshi/200810/t20081020_84260.html> (last visited Aug. 4, 2020); Zhuwang Jiao, *Shanghai Police Authority Responds to Jinsong Hao who Requested Information Disclosure on Jia Yang Case*, HSW.CN, Nov. 13, 2008, <http://www.hsw.cn/news/2008-11/13/content_10403312.htm> (last visited Aug. 4, 2020).

⁴¹ WEIBING XIAO, *supra* note 20 at 107.

⁴² Although the major responsibility of the General Office of the State Council is drafting, examining, verifying and circulating official documents, and should hold official information for public access, the General Office still issued a notice providing that it will not process any access request directly. *Opinions of the General Office of the State Council on Several Issues Concerning the Enforcement of Regulations of the People's Republic of China on the Disclosure of Government Information*, General Office of the State Council, Guo Ban Fa [2008] No. 36, effective date: Apr. 29, 2008; WEIBING XIAO, *supra* note 20 at 105-11.

⁴³ A survey conducted by the Chinese Academy of Social Sciences in 2010 showed that 48.8 percent of the 48 larger cities and 59.3 percent of the 59 official agencies under the State Council require information requesters to indicate and substantiate the purpose of applications. Failure to specify a purpose resulted in many rejections. Yanbin Lv, *supra* note 36.

⁴⁴ In December 2011, a journalist from *Southern Metropolis Daily* submitted an online OGI application to the Guangdong Provincial Bureau of Environmental Protection for the surveillance data concerning PM2.5. As a part of the online submission requirements, the agency website asked the applicant to document special needs for the surveillance data. The website also asked the applicant to sign an agreement to use the information "legally and reasonably." Xing Wang, *Experiment of OGI Applications for PM2.5 Data*, SOUTHERN METROPOLIS DAILY, Jan. 11, 2012, at AA33, <<http://www.ogichina.org/article/180/12880.html>> (last visited Aug. 4, 2020).

⁴⁵ According to legal scholar, Weibing Xiao, limiting the scope of Chinese governmental information is possible by many methods. First, agencies restrict the scope of information by adopting their own OGI Rules. Second, agencies exclude information involving functions of criminal enforcement or prosecution.

and non-statutory exemptions to control access.⁴⁶ Government agencies continued to use those strategies in March 2020, when the National Health Commission (NHC) rejected a lawyer's OGI application for information about how COVID-19 started in Wuhan, China, why the outbreak was initially out of control there, what three teams of NHC public health experts found out in Wuhan, what Chinese Center for Disease Control and Prevention suggested for outbreak control, and why daily release of epidemic information in the city stopped for a while. The commission reasoned that what the applicant requested were all pre-decisional materials written as part of the decision-making process in government agencies, citing the newly added deliberative privilege exemption in *OGI Regulations*.⁴⁷

6. Most OGI request denials were made for non-legal reasons.

Apparently, although the Chinese government seems less and less willing to reject requests for disclosure of information, a disturbing pattern is emerging for Chinese governmental bodies. Governmental agencies around the world normally base denials to FOI requests on legal grounds. China is clearly an exception.

The tables for this study show that, from 2008 to 2019, most OGI requests denied by Chinese government agencies were denied not on substantive or legal grounds, but on non-legal or procedural grounds. According to the data (*see Table 3*), in 2008, the Chinese government, at all levels, rejected 6,842 OGI applications on non-legal grounds. In the same year, it denied 1,880 applications on legal grounds. The more frequent use of non-legal reasons was also present in 2009, accounting for 15,205 OGI applications' rejection for non-legal reasons and 2,581 applications' rejection for legal reasons. In 2010 and 2011, the Chinese government denied 16,128 and 23,369 OGI requests, respectively, by citing non-legal reasons whereas it rejected 2,655 and 4,370 applications, respectively, in those two years for legal reasons.

The same pattern continued in the following years. In 2012, government agencies across the country rejected 29,850 requests on non-legal grounds while rejecting 4,227 requests for legal reasons. In 2013, 30,124 non-legal denials were made whereas only

Third, agencies narrowed the scope of official information to information generated or obtained after enactment of *OGI Regulations*. Fourth, agencies interpreted the definition of official information literally. WEIBING XIAO, *supra* note 20 at 106-07.

⁴⁶ One example of statutory and non-statutory exemptions is internal working documents. According to legal scholar, Weibing Xiao, agencies have used two broad and vague exemptions delineated in *OGI Regulations* to refuse access. First, before the deliberative privilege was added to *OGI Regulations* in 2019, many agencies added an exemption through a deliberative process to their OGI Rules, thus broadening the exemptions found in *OGI Regulations*. Second, some agencies interpreted the exemption for state secrets broadly to include information barely sensitive. Some agencies interpreted the exemption of trade secrets to include information on governments' procurement and other contracts to which the government is a party. Governmental bodies also used the privacy exemption to deny releasing information already disclosed. WEIBING XIAO, *supra* note 20 at 108-10. *OGI Regulations (passed in 2007 and revised in 2019)*, Art.16 (2019).

⁴⁷ Jiaxin Wang and Man Liu, *National Health Commission Denied a Lawyer's OGI Request on the Grounds of the Deliberative Privilege Exemption*, SOUTHERN METROPOLIS DAILY, Mar. 28, 2020, <https://www.sohu.com/a/383868171_161795> (last visited Aug. 4, 2020). The deliberative privilege exemption was added to *OGI Regulations* in 2019. *OGI Regulations (passed in 2007 and revised in 2019)*, Art. 16 (2019).

3,086 applications were rejected for legal reasons. In 2014, non-legal reasons were cited when rejecting 77,803 applications and 10,188 denials were made out of legal considerations in the same year. In 2015, 91,508 requests were rejected by agencies on non-legal grounds and in the same year 52,256 requests were rejected on legal grounds. In 2016, government agencies used non-legal reasons to deny 109,565 requests and they used legal reasons to deny 23,130 requests. In 2017, the total number of requests rejected on non-legal grounds was 130,706 whereas the total number of requests denied on legal grounds was 29,404. In 2018, governments withheld 125,264 pieces of information, citing non-legal reasons, and they withheld 37,622 pieces of information, citing *OGI Regulations* and relevant laws. In 2019, agencies across the country rejected 156,474 OGI requests, citing procedural rationales. In the same year, 24,997 OGI requests were denied on legal grounds. Of all the 1,009,234 OGI requests denied in the 12-year period by all levels of the Chinese government from 2008 to 2019, 80.54 percent of denials were for non-legal reasons and only 19.46 percent of denials were for legal reasons.

The explanation for the much more frequent use of non-legal or procedural reasons to justify denial of OGI applications for access arises from the significant discretionary power of governmental agencies in China. The lack of clear-cut legal rules contributes to willful determination of whether or not non-legal reasons cited by agencies are valid. The abusive use of non-legal grounds for denying OGI access is troubling. First, many non-legal reasons cited to support non-disclosure are clearly unreasonable. Second, OGI requesters whose rejections had non-legal bases have difficulty pursuing administrative and judicial remedies. Even if the applicants file for administrative reconsideration or institute court action against an agency, the chance of having a decision overturned is slim.⁴⁸

B. Governmental Agencies Handling Reconsideration of Information Request Denials

Under *OGI Regulations*, applicants for information have three legal mechanisms to rectify non-disclosure of official information. First, they may report the non-disclosure to a superior agency or agency in charge of OGI activities for corrections. Second, if denied OGI requests, applicants may appeal decisions to the administrative agencies for reconsideration. Third, they may file OGI lawsuits to seek judicial remedy.⁴⁹ This study does not examine enforcement of the first mechanism due to lack of relevant data.

Cases for OGI administrative reconsideration in China are many. The Chinese government at all levels received 554 OGI appeals for administrative reconsideration in 2008, 1,843 cases in 2009, 1,532 similar cases in 2010, 2,228 cases in 2011, 1,456 cases in 2012, 2,729 cases in 2013, 10,814 cases in 2014, 20,230 cases in 2015, 20,310 cases in 2016, 20,524 cases in 2017, 18,162 cases in 2018, and 18,611 cases for OGI administrative reconsideration in 2019 (see *Table 3*). In total, between May 2008 when *OGI Regulations* went into effect and December 2019 when most recent OGI datasets were available, 118,993 cases applied for administrative reconsideration of an agency's decision for requests for access submitted to all central and local governmental agencies. The

⁴⁸ Ming Xiao, *supra* note 28.

⁴⁹ *OGI Regulations* (passed in 2007 and revised in 2019), Art. 33 (2007) and Art. 51 (2019).

increasing numbers of applications for administrative reconsideration for OGI decisions indicate a growing consciousness of legal rights among Chinese citizens.

1. Reconsideration rulings included a small number of cases in favor of disclosure.

From 2008 to 2019, government agencies across the country ruled in favor of disclosure only for a small number of OGI cases filed for administrative reconsideration. Of the 3,417 cases received in the 12-year period by agencies for administrative reconsideration at the central level, only 268 cases gained favorable rulings for disclosure (see Table 1). Likewise, of the 115,576 cases for administrative reconsideration at provincial and lower levels, only 16,013 cases gained favorable rulings for disclosure (see Table 2). In sum, the Chinese agencies for administrative reconsideration at all levels only approved disclosure of information for 13.68 percent of cases they have received in the last 12 years (see Table 3).

For information requesters, cases winning administrative reconsideration were few and far between. Yaofang Xu and 67 other villagers in Zhejiang Province were among those. The villagers were unhappy with the decisions of the local government to expropriate their land without providing appropriate compensation. They lodged an application with the Yuyao municipal government on May 26, 2008, seeking detailed information of the land transfer. The Yuyao government asked the petitioners to provide additional identifying documentation and informed them to bring the case to the local land resources bureau.⁵⁰ Disappointed with the official strategy of shifting the responsibility, the villagers appealed to the higher-level, Ningbo municipal government on July 4, 2008 for administrative reconsideration. Three months later, the Ningbo government overruled the original administrative decision. The lower-level Yuyao government received orders to release the requested information within 30 days of the decision.⁵¹ A resident in the city of Tangshan, Hebei Province also used administrative reconsideration to force two agencies to change their original non-disclosure decisions.⁵²

2. Most administrative reconsideration rulings or determinations favored non-disclosure.

⁵⁰ Junxiu Wang, *Sixty-Eight Villagers of Yu Yao, Zhejiang Force Municipal Government to Change Its Original OGI Decision*, CHINA YOUTH DAILY, Oct. 10, 2008, <<http://www.chinanews.com.cn/sh/news/2008/10-10/1407244.shtml>> (last visited Aug. 4, 2020).

⁵¹ *Id.*

⁵² On February 25 and March 1, 2012, the Hebei resident filed an application to Tangshan Land and Resources Bureau and Tangshan Lunan District Development and Reform Bureau for official documents that approved demolition of her house. Both applications did not receive responses within legally designated 15 working days. On March 22 and March 28, 2012, the resident, Lan Xie (pseudonym), petitioned Hebei Province Land and Resources Bureau and Hebei Province Development and Reform Commission for reconsideration. In May 2012, two agencies for administrative reconsideration issued separate decisions, ruling that specific administrative actions of the two local agencies not releasing the information within the legal timeframe were illegal. Hongmei Du, *After Two Consecutive Victories in Administrative Reconsideration, House Demolition Documents Finally Released*, WQSHENG.COM, Beijing, June 1, 2012, <http://www.wqsheng.com/template/T_Content/wapindex.aspx?nodeid=23&itemid=1293> (last visited Aug. 4, 2020).

According to the data (*see Tables 1-3*), agencies for administrative reconsideration in China upheld most original administrative decisions. Of the 3,417 and 115,576 OGI cases received from 2008 to 2019 by agencies for administrative reconsideration, at the central level and local levels, 69.04 percent and 62.11 percent, respectively, resulted in rulings favoring non-disclosure. In sum, the Chinese agencies for administrative reconsideration at all levels rejected disclosure of information for 62.31 percent of cases they received.

In addition to rejecting requests for access in the rulings, agencies for administrative reconsideration in China used other strategies to create de facto denials of disclosure.⁵³ Of the 118,993 cases for reconsideration at various levels received in the 12-year period, 28,568 cases received no final rulings, many of which resulted in de facto denials of disclosure (*see Table 3*). Shuhuai Chen, in the city of Shenzhen, Guangdong Province, faced de facto denial of disclosure when he challenged an original administrative decision via administrative reconsideration. The Guangdong Provincial Land and Resources Bureau rejected Chen's request for information concerning a project to create farmland.⁵⁴ He received no response from the Ministry of Land and Resources after reporting the denial and requesting administrative reconsideration.⁵⁵

3. Administrative reconsideration for rectifying non-disclosure was basically ineffective.

The above analysis substantiates the international consensus that administrative reconsideration is not effective for rectifying agencies' non-compliance with legal requirements for reactive disclosure. As FOI scholars, David Banisar and Rick Snell, observed, administrative reconsideration as an internal review mechanism in the FOI legislation "tends to uphold the [FOI] denials and is used more by departments for delaying releases than enhancing access."⁵⁶ Around the world, internal review upholds more than 75 percent of original decisions.⁵⁷ China clearly has similar rates in this regard.

⁵³ Denials of disclosure listed in the tables were de facto as long as administrative reconsideration agencies did not rule formally, but the situations fell into the categories of: a) the requester's complaint was received but not accepted; b) the case was pending for an extended period of time; c) the case was closed but the ruling from the agency for reconsideration is not available. According to *Administrative Reconsideration Law 1999*, officials responsible for cases of administrative reconsideration incur administrative penalties if they fail to make decisions in the legally designated time frame and if they fail to give justifiable reasons for not considering and dismissing cases. However, despite existence of the law, delayed decisions are many. The same is true for rejection of cases and dismissal complaints without sufficient reasons.

⁵⁴ WEIBING XIAO, *supra* note 20 at 112-113.

⁵⁵ *Id.* Although the case occurred in 2007, similar de facto denials of disclosure of information by agencies for administrative reconsideration were far from disappearing since enforcement of *OGI Regulations* began in 2008.

⁵⁶ DAVID BANISAR, *EFFECTIVE OPEN GOVERNMENT: IMPROVING PUBLIC ACCESS TO GOVERNMENT INFORMATION 16* (report for Organization for Economic Co-operation and Development, 2005)

<[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/PGC/RD\(2005\)1&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/PGC/RD(2005)1&docLanguage=En)> (last visited Aug. 4, 2020).

⁵⁷ Rick Snell, *Administrative Compliance-Evaluating the Effectiveness of Freedom of Information*, 93 FREEDOM OF INFORMATION REV. 28 (2001).

The global trend that administrative review is becoming increasingly ineffective for rectifying FOI non-disclosure is not difficult to comprehend. Both governmental agencies making initial decisions and the corresponding superior agencies making decisions for reconsideration are different components of the same bureaucracy, unlike independent information commissions or ombudsman widely adopted in many FOI countries. Neither agencies can always resist the natural tendency to withhold information. In addition, officeholders normally do not wish to embarrass their bureaucratic colleagues. Accordingly, when handling FOI complaints, expecting agencies for administrative reconsideration to truly act with independent oversight is unrealistic.

However, notably, Chinese leaders are aware of the problems and are attempting to improve effectiveness of administrative reconsideration. In September 2008, the State Council began a pilot project for developing committees for administrative reconsideration in eight provinces and special municipalities to process applications.⁵⁸ Consisting of experts, scholars, and governmental officials, the expectation is that committees establish “a more centralized, professional and impartial administrative reconsideration mechanism.”⁵⁹ As of 2011, 19 provinces established committees for administrative reconsideration.⁶⁰ Apparently, at the present stage, those pilot committees only handle significant, complex, and confusing cases covering a wide range of areas including cases for requests to access information. Evaluating the effectiveness of committees’ handling OGI complaints is beyond the scope of this research.

C. Courts Handling OGI Litigations

Under *OGI Regulations*, applicants for information may bring governmental agencies to court for judicial relief when denied request according to OGI. OGI lawsuits in China are many. According to the data compiled from annual OGI work reports, Chinese courts throughout the country received a total of 305 OGI cases in 2008, 573 OGI cases in 2009, 1,025 OGI cases in 2010, 1,532 OGI cases in 2011, 1,050 cases in 2012, 1,039 OGI cases in 2013, 6,191 lawsuits in 2014, 13,081 cases in 2015, 16,467 cases in 2016, 15,795 cases in 2017, 17,147 cases in 2018, and 18,322 OGI cases in 2019, signifying an overall steady growth in the number of OGI lawsuits filed in the 12-year period. In sum, between May 2008 and December 2019, Chinese courts made decisions about a total of 91,478 OGI complaints filed by requesters for judicial review (*see Table 3*). The increasing number of OGI litigations reflect growing familiarity of Chinese citizens with *OGI Regulations* and people’s eagerness to use law to pry open Chinese bureaucracy for information vital to their daily lives.

1. A small number of cases granted access to information.

⁵⁸ WEIBING XIAO, *supra* note 20 at 101; *Notice on the Pilot Project for Developing the Administrative Reconsideration Committees in Several Provinces and Special Municipalities* [] No. 71 [2008] of the Legislative Affairs Office of the State Council.

⁵⁹ WEIBING XIAO, *supra* note 20 at 101.

⁶⁰ Yang Zhang & Changchun Cai, *Administrative Reconsideration Committees Established in 108 Government Agencies in 19 Provinces to Ensure Impartiality*, CHINA NEWS, Mar. 28, 2012, <<http://www.chinanews.com/fz/2012/03-28/3779138.shtml>> (last visited Aug. 4, 2020).

The datasets show that Chinese courts ruled in favor of complainants only in a very small number of OGI cases from 2008 to 2019. The number is small but praiseworthy, as Jamie Horsley, a leading scholar on China's freedom of information law, said, "Although many of those victories simply ordered the government to issue or reconsider its response, they were significant in the Chinese context because the courts were willing to rule against the government, a phenomenon that is becoming more commonplace."⁶¹

Of 91,478 OGI cases filed with Chinese courts in the last 12 years, only 8,119 gained rulings in favor of disclosure, with a rate of 8.88 percent disclosure-friendly cases (see Table 3). Specifically, in 2008, for the entire country, 305 OGI cases gained judicial review, and none ended with plaintiffs prevailing; of the 573 OGI cases in court in 2009 throughout the country, 1.92 percent ended in favor of plaintiffs; for all of China, 1,025 OGI cases had judicial review in 2010 with 3.41 percent favoring plaintiffs and in 2011, 1,532 OGI cases heard by courts resulted in only 5.29 percent having findings that favored plaintiffs. The percentage of cases in which courts ruled in favor of disclosure for the subsequent years are: 10.95 for 2012, 6.93 for 2013, 14.22 for 2014, 10.92 for 2015, 8.59 for 2016, 8.16 for 2017, 8.12 for 2018, 8.46 for 2019 (see Table 3).

The chance of prevailing in OGI lawsuits was so slim for information requesters that achieving judges' support in OGI complaints became a matter of pure luck. Hunan Province resident, Yan Li, was fortunate because he defeated the government in court for the defendant's failure to respond in time to the plaintiff's OGI request.⁶² The legal victory of Hubei resident, Jian'guo Xu, was far more significant. In October 2008, just five months after *OGI Regulations* became effective, Xu defeated a powerful governmental agency in an OGI lawsuit in a local court, indicating progressive potential for the court system in China to become more independent. This lawsuit is the first in the country's history in which an OGI case had public airing through regular court procedures and in which the plaintiff prevailed.⁶³ Another fortunate petitioner was the Shitou Dyestuff Company, a dye-making corporation in Shanghai. Among the 400 OGI complaints filed to courts from 2004 to 2008 in Shanghai,⁶⁴ this company's litigation was the only one in which the plaintiff prevailed.⁶⁵ Kai Li was more fortunate than the previous three plaintiffs. He won the litigation despite the fact that the information sought did not originate with the governmental agency.⁶⁶

2. Majority of lawsuits' rulings denied access to information.

According to the data gleaned from various government annual OGI reports (see Table 3), the majority of courts' rulings in China from 2008 to 2019 upheld administrative decisions. Of 305 OGI litigations received by Chinese courts in 2008, 8 cases' rulings

⁶¹ Jamie Horsley, *Open Government Developments in China: Implications for US Businesses*, CHINA BUSINESS REVIEW, para.33-36, July 1, 2019, <<https://www.chinabusinessreview.com/open-government-developments-in-china-implications-for-us-businesses/>> (last visited Aug. 4, 2020). Jamie Horsley is a visiting fellow at the Brookings Institution and works at Yale Law School as a senior fellow.

⁶² See Yan Li v. Jiyuan Municipal Bureau of Housing and Urban-Rural Construction (2010), *Beida Fabao*.

⁶³ See Jian'guo Xu v. Huangzhou District Transportation Bureau (2008), *Beida Fabao*.

⁶⁴ The *Shanghai Municipality OGI Provision* became enforceable in 2004 whereas the National *OGI Regulations* became enforceable in 2008.

⁶⁵ Shitou Dyestuff Company v. Shanghai Science and Technology Commission (2008), *Beida Fabao*.

⁶⁶ See Kai Li v. Sichuan Provincial Bureau of Education (2009), *Beida Fabao*.

avored non-disclosure. Of 573 OGI litigations received in 2009, Chinese courts rejected 224 for non-disclosure. This indicates the rates of denying disclosure in 2008 and 2009 were not too high, but clearly, many OGI lawsuits in these two years ended with no rulings but de facto denials of disclosure. Of 1,025 OGI litigations received by Chinese courts in 2010, 760 lawsuits gained rejection for non-disclosure. Of 1,532 OGI litigations in 2011, Chinese courts rejected 1211 for non-disclosure. Percentage of lawsuits in which courts ruled in favor of non-disclosure for the years running from 2012 to 2019 are: 86.76 for 2012, 91.53 for 2013, 65.38 for 2014, 59.45 for 2015, 62.03 for 2016, 62.87 for 2017, 66.36 for 2018, and 58.36 for 2019. In sum, Chinese courts throughout the country ruled against disclosure of information for 62.77 percent of cases they received from 2008 to 2019.

3. Some OGI litigations resulted in neither granting nor denying access.

The situation for information access becomes more uncertain when considering OGI litigation that neither granted nor denied access, indicated as “court decisions (other)” in the tables (1-3). In addition to the judicial rulings, either supporting or denying disclosure, a large number of “uncertain situations” remain in which the requester’s complaint did not receive acceptance, or remains in litigation, or the closed case did not appear in OGI annual reports with details of the ruling. Many of these “uncertain situations” involve de facto denials of access to information.

For example, the fact of non-acceptance of plaintiffs’ claims often indicates rejection of OGI complains prior to entering the judicial process. Guangyu Li, the deputy director of the administrative tribunal of the Supreme Court, said that more than one third of OGI plaintiffs in China failed to have complaints accepted by courts.⁶⁷

According to the data (*see Tables 1-3*), from 2008 to 2019, 406 cases of legal disputes regarding OGI requests submitted to central governmental agencies could have categorization as “other” or “uncertain situations,” constituting 20.88 percent of total filings against central agencies. Likewise, within the same period, 25,531 cases of legal disputes regarding OGI requests submitted to provincial and lower level agencies populate the category of “other” or “uncertain situations,” constituting 28.52 percent of total litigations filed against local agencies. In sum, in the 12-year period, 28.35 percent of OGI litigation actions filed against various levels of Chinese government agencies ended up with neither disclosure of information nor non-disclosure of information. Among such lawsuits, many constituted de facto denials for disclosure.

4. Information access was denied by courts for substantive and procedural reasons.

Similar to official agencies, courts in China rejected disclosure of information for both substantive and procedural reasons. The substantive reasons often cited by courts for denial were that the information sought concerns state secrets, commercial secrets, personal privacy, or endangerment of state security, public security, economic security,

⁶⁷ Guangyu Li, *Deputy Director of Supreme Court Administrative Tribunal: Stories Behind Judicial Interpretation of OGI Regulations*, Research Center of State Supervision and Anti-Corruption, China University of Political Science and Law, Nov. 23, 2011, <<http://fzfyjy.cupl.edu.cn/info/1223/4323.htm>> (last visited Aug. 4, 2020).

and social stability, thereby exempting the information from disclosure.⁶⁸ As legal scholar, Weibing Xiao, argued, courts in China use strategies of limiting the scope of administrative lawsuits,⁶⁹ imposing unreasonable burden of proof on plaintiffs,⁷⁰ and rejecting OGI lawsuits on the grounds that the requester has no legal interest in the information.⁷¹

As the Judicial Interpretation of *OGI Regulations* became effective in August 2011,⁷² those strategies no longer apply in the Chinese judicial system, since the interpretation provides that OGI lawsuits are within the scope of administrative lawsuits, OGI refusals are within the scope of administrative cases, information sought is within the scope of administrative lawsuits, requesters have legal interests in the information, and official agencies carry the predominant burden of proof.⁷³ However, courts retain the ability to rule in favor of officials for other substantive reasons.

As FOI expert Weibing Xiao observed, courts could literally explain the definition of official information⁷⁴ and examine purposes for access requests⁷⁵ in order to deny disclosure. Courts can also deny access to information on the ground that information

⁶⁸ State secrets, commercial secrets, personal privacy, state security, public security, economic security, and social stability all seem vital interests that warrant protection but none of those interests are clearly defined. Courts use those ill-defined terms to deny access. For example, the exemption for commercial secrets is often the basis for denying access to information. See Yousheng Lu v. Shanghai Municipal Bureau of Industry and Commerce (2009), *Beida Fabao*; Bingting Wang v. Shanghai Hongkou District People's Government (2009), *Beida Fabao*.

⁶⁹ According to Weibing Xiao, limiting the scope of administrative lawsuits employed three avenues: First, courts rejected an OGI lawsuit for the reason that it does not fall within the scope of administrative lawsuits. Second, courts held that an OGI refusal has no real impact on the complainant's right and duty, and places it outside the scope of administrative cases. Third, courts rejection of an FOI legal action can be on the basis that information is outside the scope of administrative lawsuits. WEIBING XIAO, *supra* note 20 at 113-14.

⁷⁰ FOI scholar Weibing Xiao said, "Courts have used the ambiguity of burden of proof to dismiss [OGI] legal actions, especially when reviewing [OGI] decisions in which officials claim that the information sought does not exist. Such claims create difficulties for courts, which must decide whether plaintiffs or defendants bear the burden of proof, and to what degree." WEIBING XIAO, *supra* note 20 at 117.

⁷¹ According to legal scholar, Weibing Xiao, under the Supreme Court's explanation of *Administrative Litigation Law 1989*, individuals, entitled to file an administrative lawsuit, are those who have a legal interest in administrative actions. This sets a limit on the qualification of a plaintiff. The *Supreme Court's Explanation on Several Questions Related to Implementation of the Administrative Litigation Law* (1989), Art. 12. WEIBING XIAO, *supra* note 20 at 116-17.

⁷² *Provisions of the Supreme People's Court on Issues concerning Trying Administrative Cases of Government Information Disclosure* [Fa Shi [2011] No.17, effective date: Aug. 13, 2011.

⁷³ *Id.*; Xianming Zhang, *Supreme Court Explains Judicial Interpretation of OGI Regulations*, PEOPLE'S COURT DAILY, Aug. 15, 2011, <<http://www.court.gov.cn/zixun-xiangqing-3024.html>> (last visited Aug. 4, 2020).

⁷⁴ Weibing Xiao found that Chinese courts could adopt a mechanical interpretation of the definition of governmental information to block access to information. For example, information compiled, rather than generated or acquired by a government agency, is not subject to disclosure; oral information is an exclusion for disclosure; information irrelevant to the exercise of official responsibilities is an exclusion for disclosure. WEIBING XIAO, *supra* note 20 at 116. See also Qiuqin Xu v. Shanghai Pudong District Construction and Transportation Commission (2009), *Beida Fabao*.

⁷⁵ Weibing Xiao argued that Chinese courts used the special purpose test to reject OGI legal actions with the rationale that examining the requester's purpose in OGI applications could prevent abusive use of rights to access. WEIBING XIAO, *supra* note 20 at 116. As the special needs test was removed from *OGI Regulations* when the law was revised in 2019, courts can no longer use this test to deny access.

sought is internal⁷⁶ or procedural.⁷⁷ Procedural reasons, often cited by courts, support judicial decisions in favor of official agencies. As legal scholar, Weibing Xiao observed, Chinese courts rejected OGI lawsuits by arguing that the requester sent a case to an incorrect jurisdiction⁷⁸ or by postponing acceptance.⁷⁹ The cases of six law professors,⁸⁰ five retired workers⁸¹ and six villagers in Hunan Province are examples of such denials.⁸² Courts once denied requests for access to information using reason that the information could not be determined and the plaintiff failed to provide additional materials to specify the information pursued.⁸³ Chinese courts rejected plaintiffs' petitions simply due to information's being non-governmental, and the courts did not provide any rationales for the decisions.⁸⁴

5. Effectiveness of judicial review in rectifying non-disclosure is questionable.

The previous analyses substantiate the international consensus that judicial review is not effective for rectifying non-compliance of official agencies with legal requirements of reactive disclosure according to freedom of information laws. As international FOI expert, David Banisar, observed, courts are not the most effective mechanisms to ensure governmental compliance with the FOI laws because judicial systems "have significant negative aspects," like being too expensive, time consuming, deferential to agencies, and having no expertise with practices of agencies like informational commissions or FOI ombudsmen.⁸⁵

The court system confronts additional obstacles in the Chinese context. Under the current Chinese judicial system, the communist party, the people's government, the people's congress, and many influential individuals are capable of exerting significant and undue influence on judges. Given the fear of possible retribution from officials and other influential stakeholders, most courts are unwilling to accept cases involving official information. Retribution can be withholding political appointments or cutting budgets for courts that show too much independence. For these reasons, courts are reluctant to hear OGI cases. Despite accepting those cases, few judges are willing to render decisions unfavorable to official agencies.⁸⁶

⁷⁶ See Jia Lei v. Shanghai Jing'an District People's Government (2010), *Beida Fabao*.

⁷⁷ Ronghua Zhang, et al. v. Zhengzhou Huiji District Human Resources and Social Security Bureau (2010), *Beida Fabao*.

⁷⁸ WEIBING XIAO, *supra* note 20 at 115.

⁷⁹ *Id.* at 115-16.

⁸⁰ See Five Xiangtan University Professors v. Hunan Province Xiangtan Municipal Government (2008), *Beida Fabao*.

⁸¹ Five Retired Workers v. Rucheng People's Government (2008), *Beida Fabao*.

⁸² Jianqiu Zhang, et al. v. Henan Province Chaling County Finance Bureau (2008), *Beida Fabao*.

⁸³ See Zhang, et al. v. Shanghai Bureau of Planning, Land and Resources (2010), *Beida Fabao*; Wang v. Shanghai Municipal Bureau of Human Resources and Social Security (2011), *Beida Fabao*.

⁸⁴ See Bao v. Shanghai Yangpu District Bureau of Housing (2010), *Beida Fabao*.

⁸⁵ DAVID BANISAR, *supra* note 56 at 17.

⁸⁶ Many Chinese judges refuse to work in the administrative divisions of the courts "because of the politically sensitive nature of the cases." RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 399 (2002).

D. Geographic and Agency Imbalance in the Use of Reactive Disclosure

Before concluding the analysis on the status of the Chinese FOI system for reactive disclosure, it is worthwhile to discuss the geographic and agency imbalance in reactive disclosure.

The geographic imbalance in terms of the number of OGI requests received by official agencies is astonishing. According to the data gathered from annual OGI reports for this study (*see Table 4*), Guangdong Province received the largest number of OGI requests among all provinces and other provincial-level regions/cities from 2012 to 2019, having an average number of 31,877 requests submitted per year. In a sharp contrast, Xinjiang Autonomous Region received the smallest number of OGI requests during the same period, recording an average of 343 requests per year.

The agency imbalance in terms of the number of OGI requests received and OGI reconsideration cases and litigations filed against different levels of governmental agencies is equally startling. According to the data (*see Tables 1-3*), from 2008 to 2019, cabinet-level central agencies received a total number of 301,690 OGI requests; findings for 3,417 OGI reconsideration cases and 1,944 OGI litigations against cabinet-level central governmental agencies under the direct jurisdiction of the State Council occurred. By comparison, the use of reactive disclosure was far more prevalent at the lower levels of the Chinese bureaucratic hierarchy. Within the same time period, provincial and lower level governmental agencies received filings for 3,676,341 OGI applications, 115,576 OGI reconsideration cases, and 89,534 OGI litigations against administrative agencies in provincial to the township levels.

The striking imbalance between central agencies and their provincial/local counterparts shows that, contrary to expectations among officials for abuse or overuse of *OGI Regulations*, in some regions and at some levels of the bureaucracy, use of the law is actually never or superficial. The reasons are at least threefold: First, a lack of understanding of the freedom of information law among some Chinese citizens forces them to believe that initiating OGI requests, reporting complaints to superior agencies for reconsideration, and suing official agencies for access to information are to be avoided at all cost. Citizens simply do not want to confront powerful officials. Many Chinese officials are hostile to OGI applicants. Officials often consider the information requester to be someone finding fault with the government. Some officials thus do not like people who request information, file administrative reconsideration complaints, or lawsuits. The low awareness of *OGI Regulations* and reluctance to exercise the right of access among many ordinary citizens contribute to the neglected state of the law in some regions.

Second, the low use of reactive disclosure at the central level is attributable to the fact that the public has much less interest in information made or obtained by central governmental agencies because most of that information has nothing to do with ordinary citizens' daily lives and immediate interests. Third, economic development does play a

role in promoting government transparency.⁸⁷ In the last 12 years, on average, wealthier and more developed provinces, cities and regions such as Guangdong, Beijing, Jiangsu, Shanghai, Shandong and Zhejiang saw far more OGI requests, far more cases for administrative reconsideration, and far more OGI-related lawsuits than poorer areas such as Xinjiang, Xizang, Ningxia, Hebei, Gansu, Qinghai and Guizhou (*see Table 4*). Actually, this finding is consistent with widely held assumptions among Western scholars that higher levels of socio-economic development promote freedom of information.⁸⁸

E. Lack of Proactive and Reactive Disclosure by National Defense and State Security Agencies

Both the Ministry of National Defense⁸⁹ and the Ministry of State Security are subject to *OGI Regulations*. However, both agencies have shown little to no willingness to comply with the proactive and reactive requirements for disclosure. The Ministry of National Defense has created an official website,⁹⁰ proactively released certain kinds of information regarding the Chinese military, and established spokesperson system to deal with Chinese and foreign journalists.⁹¹ This ministry trained an initial team of military communicators whose jobs include assisting foreign audiences' understanding of the Chinese military.⁹²

Unlike other cabinet-level executive departments in the State Council, the Ministry of National Defense has no OGI sections on its official website. Since 2008, the agency has not released any OGI annual activities' reports; no system exists to allow requesters to apply for information held by the agency. The Ministry of State Security is even more secretive, lacks an official website, has released no annual OGI activities' reports, and established no system to disclose information, proactively and reactively. When talking

⁸⁷ Xixin Wang, director of Peking University Center for Public Participation Studies and Supports, may disagree. He argued that the geographical imbalance in the implementation of *OGI Regulations* has nothing to do with economic development. Instead, it depends upon local leaders' truly valuing governmental transparency. Mingyan Wei and Shaofeng Guo, *OGI Regulations Still Encounter Implementation Bottlenecks After Four Years of Enforcement*, BEIJING NEWS, May 15, 2012, <<http://www.bjnews.com.cn/news/2012/05/15/199113.html>> (last visited Aug. 4, 2020).

⁸⁸ Research conducted by Western scholars found that the financial strength of a city's government in China determines the quality of the city's environmental transparency. In explaining the correlation, the scholars observed, "Establishing the institutions to collect, organize, and disseminate information is costly and remains a low priority for cash-strapped local governments." Peter Lorentzen, Pierre Landry & John Yasuda, *Transparent Authoritarianism? An Analysis of Political and Economic Barriers to Greater Government Transparency in China*, paper presented at the American Political Science Association annual meeting, Washington, D.C., Sept. 4, 2010, at 1..

⁸⁹ Unlike the U.S. Department of Defense and many similar agencies in the world, the Chinese Ministry of National Defense has no power to mobilize and command the armed forces. The power is in the hands of the party.

⁹⁰ The Ministry of National Defense is accessible through <<http://www.mod.gov.cn/>> (last visited Aug. 4, 2020).

⁹¹ Peng Wang, *Military Spokespersons Show off Chinese Military's Openness and Confidence*, CHINA YOUTH DAILY, Nov. 29, 2013, <http://zqb.cyol.com/html/2013-11/29/nw.D110000zgqnb_20131129_2-10.htm> (last visited August 4, 2020).

⁹² Jie Zheng, *Chinese Military Trains Its First Team of Experts in Foreign Publicity*, ORIENTAL MORNING POST, Mar. 23, 2009, <<http://mil.news.sina.com.cn/2009-03-23/0825546181.html>> (last visited Aug. 4, 2020).

about the mysterious agency, a *South China Morning Post* article said, “Intelligence agencies are by nature secretive, but China’s MSS [Ministry of State Security] seems to operate under a heavier veil of secrecy than most – unlike the CIA or MI6, it does not have an official website, any publicly listed contacts or spokesmen or women.”⁹³

Understandably, national defense and state security agencies are more secretive than other less sensitive official departments. This does not mean, however, that these agencies should be given blanket authority to deny disclosure of information. Certainly, not all information created or obtained by the Ministry of National Defense and the Ministry of State Security coincides with state secrets. According to law, any national defense and security information, not exempt from *OGI Regulations*, should have prompt release. Otherwise, no accountability accrues to national defense officers and national security officials. These two agencies need to exert stronger commitment to the Chinese people’s right to know.

IV. Summary and Conclusion

This study examines the implementation of *OGI Regulations* in the last 12 years (2008-2019) in terms of both proactive and reactive disclosure of governmental information in China.

The paper finds that the Chinese government has established a system of proactively disclosing standard official information since 2008. Four kinds of official records and files, from less sensitive ones to more sensitive ones, have had affirmative dissemination by agencies from central to township levels throughout the country from 2008 to 2019 via a large variety of communication channels such as official websites, press conferences, and facilities for OGI access. Various levels of agencies compiled OGI guides, OGI indexes, and OGI annual activities’ reports that facilitated proactive disclosure of information. It is reasonable to conclude that the Chinese government has been successful in enforcing the requirements for proactive disclosure requirements according to *OGI Regulations* when it comes to disclosure of information that is standard, routine and uncontroversial.

As for implementation of requirements for reactive disclosure, this paper finds that most OGI applications processed by official agencies at various levels have gained approval from 2008 to 2019. This is a significant achievement for the Chinese government because the Chinese FOI law is weak in statutory language for reactive disclosure of information.⁹⁴

This paper identifies several major weaknesses in the enforcement of distributing official information proactively and reactively. Government information is most likely to

⁹³ Nectar Gan, *What Do We Actually Know About China’s Mysterious Spy Agency?* SOUTH CHINA MORNING POST, Dec. 22, 2018, <<https://www.scmp.com/news/china/politics/article/2179179/what-do-we-actually-know-about-chinas-mysterious-spy-agency>> (last visited Aug. 4, 2020).

⁹⁴ For analysis of statutory language of *OGI Regulations*, see Yong Tang, *Feeling for Rocks While Crossing the River”: Analysis of the Statutory Language of China’s First Freedom of Information Law*, 4 J. INFO. POL’Y 342 (2014).

be withheld when it involves public interest and its disclosure may bring officials embarrassment, shame, demotion or even dismissal, as exemplified in various levels' Chinese government agencies' initial mismanagement and cover-up of the novel coronavirus crisis in Wuhan. The denial of OGI requests prior to processing is unacceptably frustrating. Approval rates for OGI requests among different official agencies are sharply uneven. The use of administrative and judicial remedies displays geographic and bureaucratic imbalance. The number of OGI requests denied for non-legal reasons is exceedingly high. Agencies for administrative reconsideration and courts are basically ineffective in correcting agencies' decisions and ensuring freer flow of information. Both the Ministry of National Defense and the Ministry of State Security are faltering in proactively and reactively releasing information.

In liberal democracies, reduction of government secrecy often leads to less corruption and stronger accountability/governance. In order to find out if similar correlation exists in authoritarian contexts such as China's, the study examines datasets compiled from China's ratings from 2008 to 2019 in Corruption Perception Index⁹⁵ (see Table 5), Control of Corruption Governance Metric (see Table 6),⁹⁶ Government Effectiveness Index (see Table 7),⁹⁷ and Transparency of Government Policymaking Index (see Table 8).⁹⁸ An analysis of those ratings indicates that the Chinese government has not made remarkable progress in accountability/governance since 2008 when *OGI Regulations* came into force. In some years, the country's bureaucracy became even more corrupt and less accountable than in previous years.

⁹⁵ The compiled table is according to the Corruption Perceptions Index provided by Transparency International. Since 1995, Transparency International publishes the Corruption Perceptions Index (CPI). As "the most widely used indicator of corruption worldwide," the index ranks countries annually by perceived levels of public sector-corruption determined by expert assessments and opinion surveys. The index generally defines corruption as "the misuse of public power for private benefit." The CPI ranks 180 countries and territories on a scale from 0 (highly corrupt) to 100 (very clean). *Corruption Perceptions Index*, Transparency International, Berlin, <<http://www.transparency.org/research/cpi/overview>> (last visited Aug. 4, 2020).

⁹⁶ The datasets are compiled from the World Bank-sponsored Worldwide Governance Indicators (WGI) project <<https://info.worldbank.org/governance/wgi/Home/Reports>> (last visited Aug. 4, 2020). The WGI cover over 200 countries and territories, measuring six dimensions of governance starting in 1996 and ending in 2018. Control of Corruption, one of WGI's indicators, captures perceptions of the extent to which public power is exercised for private gain, including both small and big forms of corruption, as well as control of the state by elites and private interests. Governance Score (-2.5 to +2.5) is an estimate of quality of governance measured on a scale from approximately -2.5 to +2.5. Higher values correspond to better governance. Percentile Rank (0-100) indicates rank of country among all the countries in the world. 0 corresponds to lowest rank and 100 corresponds to highest rank.

⁹⁷ Government Effectiveness is an indicator developed by the World Bank to estimate perceptions of the quality of public services, the quality of the civil service and the degree of its independence from political pressures, the quality of policy formulation and implementation, and the credibility of the government's commitment to such policies. Higher scores correspond to more government effectiveness. Percentile Rank (0-100) indicates rank of country among all the countries in the world. 0 corresponds to lowest rank and 100 corresponds to highest rank. The dataset is compiled from the World Bank website: <<https://rb.gy/wa14gu>> (last visited Aug. 4, 2020).

⁹⁸ The number "1" means least transparent and "7" indicates most transparent. The higher the percentile rank, the less transparency. This dataset covered 151 countries in the world from 2007 to 2017. The dataset is compiled from the World Bank website <<https://rb.gy/fa6m4v>> (last visited Aug. 4, 2020).

Unlike liberal democracies where transparency promotes accountability, it is clear that China fails to translate its hard-earned authoritarian transparency into greater accountability and better governance. With introduction and enforcement of an unprecedented freedom of information law over a decade to ensure greater transparency, China remains one of the most corrupt countries in the world. This finding is consistent with prior studies, as a Harvard University scholar said in his study on China's disclosure of environmental information, "[T]he relationship between transparency and accountability is not straightforward in the Chinese context. Contrary to popular expectations, increased transparency has not mapped directly onto improved accountability."⁹⁹

Overall, China deserves recognition for its determination and accomplishments in freedom of information. Unlike many countries, including democratic ones, such as the United States in which the federal *Freedom of Information Act* "was weak and rarely used" after initial enactment in 1966,¹⁰⁰ China has had prolific use of *OGI Regulations* since 2008 despite the country having a deeply embedded culture of secrecy. The system established for proactive disclosure become routinely deployed for most official agencies. Citizens, legal persons, and other organizations have actively sought official information via filing OGI requests. Most OGI requests gained approval. It is particularly significant in that all these accomplishments have been achieved in a decade when the country has abandoned liberalization and democratization and instead become more repressive and authoritarian. Jamie Horsley, long-time observer of China's freedom of information movement, said in a 2019 article, "The People's Republic of China continues to modernize the Chinese regulatory state through its open government project, even as the Chinese Communist Party (CCP) asserts comprehensive leadership and tightens political and social controls under General Secretary Xi Jinping."¹⁰¹

OGI Regulations have many inherent problems in statutory language, allowing very limited access to information. Given the law's inadequate promises, its actual delivery is surprising and encouraging. Of course, problems in implementation of *OGI Regulations* abound. All those problems discussed in this study must be addressed by the Chinese government in the years to come. If resolutions to those problems do not have serious vetting, the role of the freedom of information law in eradicating governmental corruption and encouraging public participation in decision-making will have significant limits.

In addition to those problems, an even bigger challenge is how to ensure that China's ruling Communist Party follows similar transparency requirements as people's government does, as the former holds far more important information than the latter. *OGI Regulations* apply only to the people's government, not to the Communist Party. Like the people's government, the party has its committees at various levels: Central, province, prefecture, county, township, and village. Since the party committee is far more powerful

⁹⁹ Yeling Tan, *Transparency Without Democracy: The Unexpected Effects of China's Environmental Disclosure Policy*, 27 GOVERNANCE: AN INTERNATIONAL JOURNAL OF POLICY, ADMINISTRATION, AND INSTITUTIONS 23 (2014), <<https://doi.org/10.1111/gove.12018>> (last visited Aug. 4, 2020).

¹⁰⁰ Robert Freeman, *Thirty Years of FOIL*, 11 GOV'T, L. & POL'Y J. 4 (2009).

¹⁰¹ Jamie Horsley, *supra* note 61.

and influential than its corresponding people's government, party transparency is far more important than government transparency.

In 2017, the party adopted a transparency code. Similar to *OGI Regulations*, the code requires “the CCP Central Committee — and other party organizations at all levels, including the anti-graft body that has led a wide-ranging anti-corruption campaign — to disclose certain information to party members and, in some circumstances, to the general public.”¹⁰² Unlike *OGI Regulations*, the code does not embrace reactive disclosure. Given that the party bureaucracy is far more secretive than government bureaucracy in China, it will be much harder to enforce the code than *OGI Regulations*. How this code has been enforced is beyond the scope of this study.

No governments in the world would become transparent and corruption-free overnight simply because of enactment and enforcement of freedom of information legislations. *OGI Regulations* are still new; China has more to accomplish.

¹⁰² Jamie P. Horsley, *The Chinese Communist Party's Experiment with Transparency: Unpacking the CCP's New Regulations on "Open Party Affairs,"* THE DIPLOMAT, para. 10-15, Feb. 1, 2018, <<https://thediplomat.com/2018/02/the-chinese-communist-partys-experiment-with-transparency/>> (last visited Aug. 4, 2020).

Table 1: Information Disclosure of All Central Government Agencies in China (2008-2019)

Disclos ure	200 8	200 9	201 0	201 1	201 2	201 3	201 4	201 5	201 6	201 7	201 8	201 9	Total
Proactive Disclosur e	400, 228	7,132 ,207	1,570 ,090	2,96 9,18 7	2,03 3,62 8	1,13 0,81 3	1,98 2,78 4	1,54 3,21 8	2,54 4,87 9	1,99 8,66 0	711, 692	499, 832	24,51 7,218
OGI Requests Received	4,83 0	9,88 4	10,07 8	10,9 64	9,28 4	12,2 18	11,4 64	142, 217	24,4 64	19,2 76	27,9 93	19,0 18	301,6 90
OGI Requests Accepted	4,82 2	9,84 4	9,98 3	10,9 39	8,98 5	11,9 78	11,17 7	141, 984	22,6 01	17,7 48	27,6 36	18,3 44	296,0 41
OGI Requests Approved	395	1,548	528	706	1,07 2	1,42 3	4,21 2	109, 567	6,99 1	5,27 7	6,42 3	5,25 5	143,3 97
OGI Requests Denied on Legal Grounds	27	51	185	64	136	91	357	18,5 16	1,53 0	2,12 7	10,9 72	2,12 6	36,18 2
OGI Requests Denied on Non- Legal Grounds	101	837	665	1,00 6	935	987	2,61 8	10,3 38	12,6 39	8,75 9	8,54 5	10,9 63	58,39 3
Administ rative Reconsid eration Decisions in Favor of Disclosur e	0	2	17	6	6	11	4	32	56	12	52	70	268
Administ rative Reconsid eration Decisions Against Disclosur e	8	14	52	129	60	343	184	102	237	383	486	361	2,359
Administ rative Reconsid	9	50	92	205	83	10	20	11	51	0	18	241	790

eration Decisions (Other)													
Court Decisions in Favor of Disclosur e	0	0	0	0	0	0	0	1	15	14	33	6	69
Court Decisions Against Disclosur e	0	1	1	0	1	24	6	73	174	443	375	371	1,469
Court Decisions (Other)	0	1	13	18	2	0	2	16	34	28	25	267	406

Table 2: Information Disclosure of All Provincial and Local Government Agencies in China (2008-2019)

Disclosu re	200 8	200 9	201 0	201 1	201 2	201 3	201 4	201 5	201 6	201 7	201 8	201 9	Total
Proactive Disclosure	10,0 28,7 80	24,8 74,7 66	31,2 56,1 56	30,9 99,2 81	43,6 14,6 87	56,6 39,5 57	52,0 79,8 95	55,9 33,0 78	64,2 66,7 84	70,0 12,6 32	71,2 58,3 96	22,7 84,1 28	533,74 8,140
OGI Requests Received	132, 266	393, 716	219, 162	215, 569	248, 675	232, 842	305, 812	400, 600	397, 501	415, 955	338, 423	375, 820	3,676, 341
OGI Requests Processed	129, 063	387, 033	213, 769	208, 809	239, 694	211, 372	302, 006	380, 394	367, 967	405, 430	332, 638	368, 655	3,546, 830
OGI Requests Approved	81,3 15	249, 385	135, 723	135, 602	192, 659	152, 864	189, 054	257, 554	239, 625	246, 891	179, 269	200, 273	2,260, 214
OGI Requests Denied on Legal Grounds	1,85 3	2,53 0	2,47 0	4,30 6	4,09 1	2,99 5	9,83 1	33,7 40	21,6 00	27,2 77	26,6 50	22,8 71	160,21 4
OGI Requests Denied on Non-Legal Grounds	6,74 1	14,3 68	15,4 63	22,3 63	28,9 15	29,1 37	75,1 85	81,1 70	96,9 26	121, 947	116, 719	145, 511	754,44 5

Administrative Reconsideration Decisions in Favor of Disclosure	48	231	61	86	103	204	1,154	2,424	2,935	3,106	2,476	3,185	16,013
Administrative Reconsideration Decisions Against Disclosure	444	757	675	636	1,165	2,086	7,427	14,130	11,993	11,888	10,828	9,756	71,785
Administrative Reconsideration Decisions (Other)	45	789	635	1,166	39	75	2,025	3,531	5,038	5,135	4,302	4,998	27,778
Court Decisions in Favor of Disclosure	0	11	35	81	115	72	731	1,427	1,399	1,275	1,360	1,544	8,050
Court Decisions Against Disclosure	8	223	759	1,211	910	927	3,356	7,704	10,041	9,488	11,004	10,322	55,953
Court Decisions (Other)	297	337	217	222	22	16	1,047	3,860	4,804	4,547	4,350	5,812	25,531

Table 3: Information Disclosure of All Government Agencies in China (2008-2019)

Disclosure	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	Total
Proactive Disclosure	10,429,008	32,006,973	32,826,246	33,968,468	45,648,315	57,770,370	54,062,679	57,476,296	66,811,663	72,011,292	71,970,088	23,283,960	558,265,358
OGI Requests Received	137,096	403,600	229,240	226,533	257,959	245,060	317,276	542,817	421,965	435,231	366,416	394,838	3,978,031
OGI Requests Processed	133,885	396,877	223,752	219,748	248,679	223,350	313,183	522,378	390,568	423,178	360,274	386,999	3,842,871

OGI Requests Approved	81,710	250,933	136,251	136,308	193,731	154,287	193,266	367,121	246,616	252,168	185,692	205,528	2,403,611
OGI Requests Denied on Legal Grounds	1,880	2,581	2,655	4,370	4,227	3,086	10,188	52,256	23,130	29,404	37,622	24,997	196,396
OGI Requests Denied on Non-Legal Grounds	6,842	15,205	16,128	23,369	29,850	30,124	77,803	91,508	109,565	130,706	125,264	156,474	812,838
Administrative Reconsideration Decisions in Favor of Disclosure	48	233	78	92	109	215	1,158	2,456	2,991	3,118	2,528	3,255	16,281
Administrative Reconsideration Decisions Against Disclosure	452	771	727	765	1,225	2,429	7,611	14,232	12,230	12,271	11,314	10,117	74,144
Administrative Reconsideration Decisions (Other)	54	839	727	1,371	122	85	2,045	3,542	5,089	5,135	4,320	5,239	28,568
Court Decisions in Favor of Disclosure	0	11	35	81	115	72	731	1,428	1,414	1,289	1,393	1,550	8,119
Court Decisions Against Disclosure	8	224	760	1,211	911	951	3,362	7,777	10,215	9,931	11,379	10,693	57,422
Court Decisions (Other)	297	338	230	240	24	16	1,049	3,876	4,838	4,575	4,375	6,079	25,937

Table 4: OGI Requests Received in All Provinces, Provincial-Level Cities and Autonomous Regions (2012-2019)

Provinces	2012	2013	2014	2015	2016	2017	2018	2019	Total
Anhui	2,236	4,110	7,013	9,205	8,564	9,035	11,428	11,064	62,655
Beijing	17,017	17,509	36,670	32,271	34,200	37,499	36,065	35,286	246,517
Chongqing	93	218	948	763	632	9,834	7,896	7,671	28,055
Fujian	2,897	4,519	5,874	7,930	9,473	9,108	8,386	9,295	57,482
Gansu	3,502	3,741	3,712	1,823	2,071	2,365	2,333	4,644	24,191
Guangdong	158	93	208	69,361	45,104	42,364	52,971	44,754	255,013
Guangxi	1,998	1,498	3,024	4,724	3,151	3,797	3,873	4,366	26,431
Guizhou	16,590	7,880	6,943	5,556	5,319	3,860	4,487	4,384	55,019
Hainan	1,105	74	268	1,135	992	1,315	1,594	2,908	9,391
Hebei	979	1,350	1,718	6,156	5230	0	0	8,428	23,861
Heilongjiang	6,842	3,567	18,441	6,495	21,489	5,964	5,250	5,737	73,785
Henan	18,411	20,131	20,613	18,342	18,441	20,962	23,623	22,059	162,582
Hubei	4,312	15,755	12,155	9,294	9,792	12,472	10,121	9,378	83,279
Hunan	6,638	0	10,760	7,953	9,048	0	0	16,570	50,969
Inner Mongolia	246	831	1,007	1,452	1,359	1,190	1,485	158	7,728
Jiangsu	103	19,616	31,909	30,846	29,410	32,224	31,127	31,418	206,653
Jiangxi	1,307	2,183	1,579	1,784	2,315	2,681	2,931	3,089	17,869
Jilin	14,403	21,096	26,284	31,176	68,047	71,250	3,804	3,169	239,229
Liaoning	3,271	4,049	4,588	5,023	6,484	11,718	11,849	6,665	53,647
Ningxia	2,031	2,257	13,617	680	886	1,608	750	1,257	23,086
Qinghai	5,696	3,148	1,041	1,111	671	435	387	643	13,132
Shandong	31,077	1,032	21,289	15,079	18,097	21,194	3,409	25,785	136,962
Shanghai	18,945	19,170	24,204	32,724	47,451	42,404	31,425	32,006	248,329
Shaanxi	3,627	3,302	5,261	7,066	8,126	6,526	10,832	11,372	56,112
Shanxi	8,437	2,344	2,021	1,432	1,151	1,695	2,365	2,963	22,408
Sichuan	7,092	6,624	9,553	10,288	12,534	15,498	17,846	19,863	99,298
Tianjin	3,726	5,146	0	0	0	13,044	14,819	16,185	52,920
Xinjiang	41	49	92	0	768	1,154	616	26	2,746
Xizang	31,418	22,070	1,724	1,430	0	202	520	1,245	58,609
Yunnan	26,213	29,534	10,029	11,351	2,542	2,582	3,605	2,775	88,631
Zhejiang	8,264	9,946	23,267	68,150	24,154	31,975	32,626	30,657	229,039

Table 5: China's Corruption Perception Index (2008-2019)

Year	CPI Score	Country Rank
2019	41/100	80/198
2018	39/100	87/198
2017	41/100	77/198
2016	40/100	79/198
2015	37/100	83/198
2014	36/100	100/198
2013	40/100	80/198

2012	39/100	80/198
2011	3.6/10	75/183
2010	3.5/10	78/178
2009	3.6/10	79/180
2008	3.6/10	72/180

Table 6: Control of Corruption Governance Metric (China, 2008-2018)

Year	Governance (-2.5 to +2.5)	Percentile Rank (0-100)
2018	-0.27	45.67
2017	-0.27	46.63
2016	-0.25	49.04
2015	-0.28	48.08
2014	-0.34	45.67
2013	-0.36	44.55
2012	-0.44	40.28
2011	-0.51	37.91
2010	-0.56	33.33
2009	-0.51	36.84
2008	-0.52	36.41

Table 7: Government Effectiveness Index (China, 2008-2018)

Year	Score	Percentile Rank
2018	0.48	69.71
2017	0.42	67.79
2016	0.35	66.83
2015	0.41	68.27
2014	0.32	64.90
2013	0	55.45
2012	0.02	57.82
2011	0.09	58.29
2010	0.09	57.89
2009	0.09	57.89
2008	0.15	58.74

Table 8: Transparency of Government Policymaking Index (China, 2008-2017)

Year	Score	Percentile Rank
2017	4.48	45
2016	4.58	40
2015	4.52	36
2014	4.49	33
2013	4.42	46
2012	4.48	51
2011	4.73	41

2010	4.76	38
2009	4.82	32
2008	4.49	46

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Free Expression or Protected Speech? Looking for the Concept of State Action in News

Christopher Terry, Jonathan Anderson, Sarah Kay Wiley, and Scott Memmel *

The terms free expression and protected speech are fundamentally different under the law. The constitutional guarantee of freedom of speech exists only in cases of state action. Considered one of the most important yet often least understood aspect of the First Amendment, the state action concept is pivotal in the age of the internet, where limits on speech have increasingly come from private entities instead of the government. Edge providers and social media platforms have taken to outright bans of online conduct and speech that would otherwise be protected from governmental intervention under the First Amendment. This article examines the extent to which the state action requirement is discussed in press coverage of the ban of the conservative media outlet Infowars and host Alex Jones from multiple social media and internet platforms. The study, which employs a content analysis of three national newspapers and one large metropolitan daily newspaper, finds that the concept of state action is rarely discussed in news and opinion coverage of Jones's removal from social media. This is true even in cases when sources—including Jones—falsely asserted that social media outlets were trammeling users' First Amendment rights. The findings have important implications for public understanding of the First Amendment, journalistic practice, and calls for governmental regulation of social media platforms.

Keywords: State action doctrine, First Amendment, Alex Jones, Infowars, social media, censorship, freedom of speech

I. Introduction

In response to being permanently banned by Twitter for violating the platform's terms against abusive speech, conspiracy theorist Alex Jones took to Capitol Hill in September 2018 to sit in on a Senate hearing about Russian influence and political bias on social media platforms.¹ "They are outright banning people, and they are blocking conservatives involved in their own First Amendment political speech," Jones lamented.² Underlying Jones's comment is the assertion that his right to free speech has been violated and that, certainly, legal liability must flow from the First Amendment to counter such apparent censorship. However, contrary to his claim—and the claims of others who have

¹ Kate Conger and Jack Nicas, *Twitter, Citing Harassment, Bars Agitator and His Website*, N.Y. TIMES, Sept. 7, 2018, at B1.

² *Id.*

been banned by social platforms³—the First Amendment and its protections do not apply to private actors such as Twitter and Facebook: such is the rule of the state action doctrine.

Perhaps among the most important aspects of a citizen's First Amendment rights, the concept of state action underlies any meaningful discussion of free speech in an age of digital media. Put simply, free expression and protected speech are fundamentally different things under the law; speakers are protected only from censorship by the government, not from suppression by a private entity. The constitutional guarantee for freedom of speech exists only in situations involving state action to suppress, restrain, compel, or punish citizens for engaging in protected speech.

As edge providers and social media platforms have taken to outright bans over online speech that would otherwise be impermissible by the government under the First Amendment—while also adopting measures to moderate user-generated content and stem the spread of misinformation⁴—advocates have argued that a new “digital media literacy” should include an instructional review of how the core values associated with free expression apply in a communication environment where the restrictions on speech are far more likely to come from a private entity than the government.

Research about online content regulation has focused heavily on legal and normative questions about internet governance and the role of the state action doctrine.⁵ Scholars have parsed court opinions, debated policy interventions, and proposed methods to regulate online content, and while such work helps illuminate the rules that govern or could govern internet speech, they reveal little about how internet governance issues are discussed and contemplated in the public sphere. Understanding public discourse—here,

³ See, e.g., Sarah Myers West, *Censored, suspended, shadowbanned: User interpretations of content moderation on social media platforms*, 20 NEW MEDIA & SOCIETY 4366-4383 (2018); Freedom Watch, Inc. v. Google Inc., No. 19-7030, 2020 WL 3096365 (D.C. Cir. May 27, 2020).

⁴ As of July 2020, Facebook and Instagram were planning to launch an oversight body that would review decisions about what content to remove and hear appeals of those decisions. See Catalina Botero-Marino, Jamal Greene, Michael W. McConnell and Helle Thorning-Schmidt, *We Are a New Board Overseeing Facebook. Here's What We'll Decide.*, N.Y. TIMES, May 6, 2020, <https://www.nytimes.com/2020/05/06/opinion/facebook-oversight-board.html>. In May 2020, after President Donald Trump tweeted false information about mail-in voting, Twitter for the first time appended a warning label to Trump's post that read “Get the facts about mail-in ballots”; clicking on the label directed users to a page that fact-checked Trump's claims. See Kate Conger and Davey Alba, *Twitter Refutes Inaccuracies in Trump's Tweets About Mail-In Voting*, N.Y. TIMES, May 26, 2020, <https://www.nytimes.com/2020/05/26/technology/twitter-trump-mail-in-ballots.html>. In June 2020, after President Donald Trump tweeted a doctored video, Twitter added a label to the post warning users that it violated the company's policies against manipulated media. Twitter later removed the video after getting a complaint that the material violated copyright. Facebook also removed the video for alleged copyright infringement. See Cat Zakrzewski, *Twitter labels Trump video tweet as manipulated media as it cracks down on misinformation*, WASH. POST, June 19, 2020, <https://www.washingtonpost.com/technology/2020/06/18/trump-tweet-label-video/>.

⁵ See, e.g., Joseph A. D'Antonio, *Whose Forum Is It Anyway: Individual Government Officials and Their Authority to Create Public Forums on Social Media*, 69 DUKE L.J. 701-734 (2019); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2017-2018); Tyler Lane, *The Public Forum Doctrine in the Modern Public Square*, 45 OHIO N.U. L. REV. 465 (2019); Dawn Carla Nunziato, *From Town Square to Twittersphere: The Public Forum Doctrine Goes Digital*, 25 B.U. J. SCI. & TECH. L. 1-59 (2019); Micah Telegen, *You Can't Say That!: Public Forum Doctrine and Viewpoint Discrimination in the Social Media Era*, 52 U. MICH. J. L. REFORM 235 (2018).

journalistic texts—matters because it may help scholars assess how well the public is being informed about internet governance developments and how that knowledge, or lack thereof, could be used to influence decisions by powerful actors like platforms and the government.

Specifically, this article examines the extent to which the state action requirement is discussed in press coverage of the ban of the conservative media outlet Infowars and host Alex Jones from multiple social media and internet platforms. Through a content analysis of news and opinion content from three national newspapers and one large metropolitan daily newspaper, the study finds that the concept of state action was rarely discussed, even in cases when sources—including Jones—falsely asserted that social media outlets were trammeling users’ First Amendment rights. Indeed, out of 116 stories analyzed, only six—or 5%—referred to the concept of the state action doctrine. It is this primary finding—the dearth of journalistic references to the state action doctrine—that has important implications for scholarship on the First Amendment and internet governance, as well as on journalistic education and practice and calls for governmental regulation of social media platforms.

II. Literature Review

A. State Action Doctrine

In deciding a line of civil rights cases in the 1880s, the Supreme Court of the United States stipulated that the federal government lacks the “power to regulate the policies and practices of private entities under Section 5 of the Fourteenth Amendment.”⁶ Thus, as required by this bright-line rule, a threshold question in determining if First Amendment protections and limitations apply is whether a government actor committed an alleged violation (the First Amendment’s language “Congress shall make no law. . .” expressly applies to the state).⁷ Put simply, private actors and entities are not subject to First Amendment claims regarding viewpoint censorship. This distinction—between public and private actors and the resulting effects on constitutional claims—is known as the state action doctrine.

Much to the chagrin of constitutional law scholars,⁸ the Supreme Court has highlighted multiple factors to consider in the public/private distinction, emphasizing that there is no singular fact that is a “necessary condition . . . for finding state action.”⁹ For example, the Supreme Court has found the conduct of a private actor to be state action where the private actor performs a traditional public function¹⁰ or where there is a

⁶ The Civil Rights Cases, 109 U.S. 3 (1883). *See also* United States v. Morrison, 529 U.S. 598 (2000) (“Careful adherence to the ‘state action’ requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power.”); *Developments in the Law: State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248 (2010).

⁷ The First Amendment’s language “Congress shall make no law. . .” expressly applies to the state. *See* U.S. Const. amend. I.

⁸ *See, e.g., State Action and the Public/Private Distinction*, *supra* note 5, at 1250–51 (calling the state action doctrine “one of the most complex and discordant doctrines in American Jurisprudence”); Charles L. Black, Jr., *The Supreme Court, 1966 Term—Forward: “State Action,” Equal Protection, and California’s Proposition 13*, 81 HARV. L. REV. 69, 95 (1976) (calling the doctrine a “conceptual disaster area”).

⁹ *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001).

¹⁰ *Marsh v. Alabama*, 326 U.S. 501 (1946). *See also* *Manhattan Community Access Corp. v. Halleck*, 139 U.S. 1921 (2019).

sufficiently “close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself.”¹¹

In distinguishing between public and private actors in First Amendment cases, however, the Supreme Court has often focused on the factor of ownership. The First Amendment is a check “on state action, not on action by the owner of private property used non-discriminatorily for private purposes only,” Justice Potter Stewart wrote for the majority in *Hudgens v. NLRB* (1976), a case in which the Court found the Constitutional guarantee of free expression “had no part to play” at a privately-owned shopping center.¹²

Indeed, several cases have found that a private property owner should not be considered a state actor merely because of the operation or ownership of a space where free expression is likely or encouraged to occur.¹³ Numerous lower courts have extended this reasoning to social media companies whose platforms allow speech to flourish.¹⁴ In deciding a 2019 case dealing with whether a public access television channel would qualify as a state actor, *Manhattan Community Access Corp. v. Halleck*, the Supreme Court gave a nod to social media companies in stressing that “a private entity who provides a forum for speech is not transformed by that fact alone into a state actor. ... In short, merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints.”¹⁵

With the growing prevalence of privately owned social media platforms governing so much of what we say, several commenters have argued for a reinterpretation of the state action doctrine to establish platforms as some sort of public forum where the First Amendment applies—meaning that private owners would be restricted from moderating or banning content and users based on viewpoint.¹⁶ While at first glance this may seem like an easy solution to the predicament encountered by the Alex Joneses of the world, it may make the Internet an even more hostile place for other users. As Justice Kavanaugh explained in *Halleck*: “if the rule were otherwise, all private property owners and private lessees who open their property for speech would be subject to First Amendment constraints and would lose the ability to exercise what they deem to be appropriate editorial discretion within that open forum. Private property owners and private lessees would face the unappetizing choice of allowing all comers or closing the platform altogether.”¹⁷ In other words, deeming social media as a public forum would mean they would have to allow expressions of hate—posts that Facebook currently deletes to the tune of 66,000 posts a month worldwide.¹⁸

B. ‘Deplatforming’ Alex Jones

¹¹ *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

¹² *Hudgens v. NLRB*, 424 U.S. 507, 519 (1976).

¹³ *See, e.g.*, *Fed. Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107 (N.D. Cal. 2020); *Prager Univ. v. Google LLC*, 951 F.3d 991 (9th Cir. 2020); *Name.Space, Inc. v. Network Sols., Inc.*, 202 F.3d 573 (2d Cir. 2000). *See also* Jonathan Peters, *The Sovereigns of Cyberspace and State Action: The First Amendment’s Application—Or Lack Thereof—To Third-Party Platforms*, 32 *BERKELEY TECH. L. J.* 989 (2017).

¹⁴ *See, e.g.*, *Prager Univ. v. Google LLC*, 951 F.3d 991 (9th Cir. 2020).

¹⁵ *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019).

¹⁶ *See supra* note 6.

¹⁷ *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930–31 (2019).

¹⁸ Richard Allan, *Hard Questions: Who Should Decide What Is Hate Speech in an Online Global Community?*, Facebook, June 27, 2017, <https://about.fb.com/news/2017/06/hard-questions-hate-speech/>.

Alex Jones is a right-wing conspiracy theorist who operates a popular website, Infowars.com, and hosts a nationally syndicated radio show, “The Alex Jones Show,” which airs on 135 stations around the United States.¹⁹ Jones makes his living through these productions, in addition to selling products that he markets on the website and radio program, including dietary supplements and survivalist consumer goods.²⁰

Jones is widely known for promoting conspiracy theories about national tragedies. He has asserted that the Oklahoma City bombing in 1995 and the Sept. 11, 2001, terror attacks were “inside jobs” by the “military industrial complex.”²¹ He has spread the idea that the government can control the weather and suggested that Hurricane Irma was “geoengineered” by the government.²² Jones opposes vaccines, which he claims are dangerous.²³ And Jones alleges that climate change is an effort by the World Bank to influence the global economy.²⁴ Perhaps most notably, Jones has alleged that some of the most horrific school shootings have been staged events designed to increase support for gun control, specifically claiming that the Sandy Hook and Stoneman Douglas shootings were so-called “false-flag operations.”²⁵

On July 24, 2018, YouTube removed four videos uploaded to Jones’s account because they violated policies related to child endangerment and hate speech.²⁶ The action also blocked Jones from live-streaming on YouTube for three months and served, pursuant to YouTube policy, served as a “strike” against him.²⁷ YouTube threatened to remove Jones’s account entirely if he got two more “strikes” within the three-month period.²⁸ Jones had upwards of 2.4 million subscribers on YouTube at the time.²⁹

Facebook in late July 2018 suspended Jones’ ability to post to his account for 30 days because of what the platform said were repeated policy violations.³⁰ The ban did not apply to the Infowars Facebook page, although Facebook also removed four videos that

¹⁹ Genesis Communications Network, AM & FM Affiliates By Show, <http://www.gcnlive.com/JW1D/index.php/affiliate-list> (last visited July 8, 2020).

²⁰ Jacey Fortin, *Infowars Must Turn Over Internal Documents to Sandy Hook Families, Judge Rules*, N.Y. TIMES, Jan. 12, 2019, <https://www.nytimes.com/2019/01/12/us/alex-jones-infowars-lawsuit.html>.

²¹ Liam Stack, *He Calls Hillary Clinton a ‘Demon.’ Who Is Alex Jones?*, N.Y. TIMES, Oct. 13, 2016, <https://www.nytimes.com/2016/10/14/us/politics/alex-jones.html>.

²² Dino Grandoni, *The Energy 202: Why climate change deniers mistrust hurricane forecasts too*, WASH. POST, Sept. 7, 2017, <https://www.washingtonpost.com/news/powerpost/paloma/the-energy-202/2017/09/07/the-energy-202-why-climate-change-deniers-mistrust-hurricane-forecasts-too/59b032be30fb04264c2a1d13/>.

²³ Julia Belluz, *I watched Alex Jones give his viewers health advice. Here’s what I learned.*, Vox, June 16, 2017, <https://www.vox.com/science-and-health/2017/4/6/15160486/alex-jones-vaccines-autism-gates-fungus-health-conspiracy-theories>.

²⁴ Nate Blakeslee, *Alex Jones Is About To Explode*, TEXAS MONTHLY, March 2010, <https://www.texasmonthly.com/politics/alex-jones-is-about-to-explode/>.

²⁵ Elizabeth Williamson, *Judge Rules Against Alex Jones and Infowars in Sandy Hook Lawsuit*, N.Y. TIMES, Aug. 30, 2018, <https://www.nytimes.com/2018/08/30/us/politics/alex-jones-infowars-sandy-hook-lawsuit.html>.

²⁶ Kevin Roose, *Facebook and YouTube Give Alex Jones a Wrist Slap*, N.Y. TIMES, July 27, 2018, <https://www.nytimes.com/2018/07/27/technology/alex-jones-facebook-youtube.html>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

both Jones and Infowars had posted.³¹ Jones' Facebook page had almost 1.7 million followers at the time of the suspension.³²

On August 6, 2018, Facebook, YouTube, Apple, and Spotify removed content produced by Jones and Infowars.³³ Apple wiped most the podcasts produced by Infowars from its Podcasts app.³⁴ Facebook took down multiple pages that Jones controlled because the content of the pages violated the company's content policies by "glorifying violence" and "using dehumanizing language to describe people who are transgender, Muslims, and immigrants," according to The New York Times.³⁵ YouTube took down Jones' channel because of violations of the site's hate speech prohibitions.³⁶ At the time, Jones had amassed billions of video views on the site.³⁷ Spotify similarly removed Jones' podcasts because of hate speech.³⁸ Jones subsequently tweeted: "The censorship of Infowars just vindicates everything we've been saying. Now, who will stand against Tyranny and who will stand for free speech? We're all Alex Jones now."³⁹

Some observers criticized Twitter for not taking any action against Jones. At the time, Twitter CEO Jack Dorsey said Jones had not violated any of the company's policies. "We're going to hold Jones to the same standard we hold to every account, not taking one-off actions to make us feel good in the short term, and adding fuel to new conspiracy theories," Dorsey tweeted.⁴⁰ News organizations later identified various tweets from Jones that were clear violations of Twitter's content policies, prompting the platform to order the identified tweets be removed.⁴¹

Twitter later suspended accounts belonging to Jones and Infowars for one week after they posted links to a video in which he urged viewers to take violent action against the media and other groups.⁴² Jones told supporters to prepare their "battle rifles" against journalists and others.⁴³ "@RealAlexJones is now in @Twitter prison!" the Infowars account tweeted shortly after Jones's account was suspended.⁴⁴ Twitter took the action in accordance to its policy that prohibits inciting violence.⁴⁵ Dorsey later told NBC News: "I

³¹ *Id.*

³² *Id.*

³³ Jack Nicas, *Alex Jones and Infowars Content Is Removed From Apple, Facebook and YouTube*, N.Y. TIMES, Aug. 6, 2018, <https://www.nytimes.com/2018/08/06/technology/infowars-alex-jones-apple-facebook-spotify.html>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Kate Conger and 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>.

⁴¹ Cecilia Kang and Kate Conger, *Twitter Suspends Alex Jones and Infowars for Seven Days*, N.Y. TIMES, Aug. 14, 2018, <https://www.nytimes.com/2018/08/14/technology/twitter-alex-jones-suspension.html>.

⁴² *Id.*

⁴³ Tony Romm, *Twitter has permanently banned Alex Jones and Infowars*, WASH. POST, Sept. 6, 2018, <https://www.washingtonpost.com/technology/2018/09/06/twitter-has-permanently-banned-alex-jones-infowars/>.

⁴⁴ Kang and Conger, *supra* note 42.

⁴⁵ *Id.*

feel any suspension, whether it be a permanent one or a temporary one, makes someone think about their actions and their behaviors.” He added: “Whether it works within this case to change some of those behaviors and some of those actions, I don’t know.”⁴⁶

On September 6, 2018, Twitter permanently suspended accounts used by Jones and Infowars.⁴⁷ The platform cited repeated violations of its abusive behavior policies that “prohibit direct threats of violence and some forms of hate speech but allow deception or misinformation.”⁴⁸ One day prior, Dorsey had testified before Congress about content moderation. Jones chased Dorsey before the hearing, argued with Sen. Marco Rubio, and surrounded CNN reporter Oliver Darcy, whom Jones called a “congenital liar,” “giant fraud,” and “charlatan.”⁴⁹ Twitter cited some of these incidents in its decision to kick Jones off the platform.⁵⁰ Jones has referred to his removal from social media as “deplatforming.”⁵¹

Apple’s App Store then removed the Infowars app because it contained content that was “offensive, insensitive, upsetting, intended to disgust or in exceptionally poor taste,” which was in violation of the company’s policies.⁵² Users could continue accessing Infowars through its app, but the move prevented additional users from downloading the app.⁵³

Jones has been sued repeatedly because of his conspiracy theories, namely his claims related to school shootings. At least eight families that lost loved ones in the Sandy Hook shooting, as well as an FBI agent who had worked the scene, alleged that Jones’ defamed them by claiming they were “crisis actors” and that the massacre was staged so as to bolster support for gun regulation.⁵⁴ Jones also has been sued by a man Jones falsely claimed was the shooter in the Parkland school shooting.⁵⁵

National news outlets covered the actions by social media platforms against Jones and Infowars, yet there has been no systematic analysis of this coverage in the context of the state action doctrine. Thus, the primary research question animating this study asks: To what extent did news organizations address the concept of state action in covering the expulsion of Alex Jones from social media platforms?

C. Press Coverage of Legal Affairs

In addition to the study’s subject matter focus on the state action doctrine and the removal of Alex Jones from social media, this paper is more broadly concerned with how the press covers legal affairs. Such coverage matters, in part, because there is some

⁴⁶ *Id.*

⁴⁷ Conger and Nicas, *supra* note 41.

⁴⁸ *Id.*

⁴⁹ Romm, *supra* note 44.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Nicas, *supra* note 34.

⁵³ *Id.*

⁵⁴ Aaron Katersky, *Families of Sandy Hook victims, FBI agent file defamation lawsuit against right-wing radio host Alex Jones*, ABC News, May 23, 2018, <https://abcnews.go.com/US/families-sandy-hook-victims-fbi-agent-file-%20defamation/story?id=55379036>.

⁵⁵ Jorge L. Ortiz, *Alex Jones denied in request for dismissal of defamation lawsuit against him*, USA TODAY, Aug. 30, 2018, <https://www.usatoday.com/story/news/2018/08/30/alex-jones-request-dismissal-defamation-lawsuit-denied/1150498002/>.

evidence that news is the primary way most people in the United States get information about legal issues and what happens in courtrooms.⁵⁶ Scholars have examined this coverage at virtually all levels of courts in the United States, from state trial courts to the United States Supreme Court, and using varied methods, including content analyses and surveys of journalists, attorneys, and judges. A review of the research indicates that much of it is dated to the 1980s and 1990s.

In a survey of Minnesota attorneys and trial court judges, Drechsel (1983) found that between one-third and one-quarter of respondents reported seeing inaccuracies in half or more of the news stories they saw involving their cases.⁵⁷ Another one-fifth of respondents said there were errors in one-quarter to one-half of stories. A similar survey of trial court judges in a northeastern state produced substantially similar results.⁵⁸ In a 1988 study, Drechsel found that 83 percent of Pennsylvania trial court judges and 69 percent of Wisconsin trial court judges reported “serious factual errors” in news coverage of their cases.⁵⁹

Several years later, Doppelt (1991) surveyed both trial and appellate judges and attorneys in Cook County, Illinois.⁶⁰ Doppelt found that the most oft-cited criticism of news reporting about courts was that stories were sensationalized and superficial, while inaccuracy was a lesser, though still recognized, problem.⁶¹ Such complaints are nothing new among those in the legal field; an 1884 article in the *American Law Review* lamented: The secular newspapers hardly ever attempt to report a judicial trial without making egregious blunders, unless they employ a stenographer and take down every word, including the dictum of the judge to the janitor to put some coal in the stove; and they hardly ever undertake to criticize a judicial trial without making the same spectacle of themselves.⁶²

Respondents in the Doppelt survey also complained that journalists covering courts lacked knowledge about how the judicial system works.⁶³ That perception is not uncommon—even among journalists. In one survey of newspaper reporters who cover courts, 80 percent of respondents indicated that court coverage made up less than half of their reporting duties, and 75 percent of respondents said they had not received any type of legal training.⁶⁴

All of which is to say that the body of research on press coverage of legal affairs, albeit limited, suggests journalists could do better when reporting on legal issues—or, perhaps more generously, that there is at least a difference of opinion about the accuracy and quality of legal affairs reporting between those formally trained in the law (attorneys

⁵⁶ National Center for State Courts, *How the Public Views the State Courts: A 1999 National Survey*, https://www.flcourts.org/content/download/217619/1971660/publicop_natl.pdf (May 14, 1999).

⁵⁷ ROBERT E. DRECHSEL, *NEWS MAKING IN THE TRIAL COURTS* (1983).

⁵⁸ Robert E. Drechsel, *Judicial Selection and Trial Judge-Journalist Interaction in Two States*, 10 JUSTICE SYST. J. 6-18 (1985).

⁵⁹ Robert E. Drechsel, *Dealing With Bad News: How Trial Judges Respond to Inaccurate and Critical Publicity*, 13 JUSTICE SYST. J. 308-322 (1988).

⁶⁰ Jack C. Doppelt, *Strained Relations: How Judges and Lawyers Perceive the Coverage of Legal Affairs*, 15 JUSTICE SYST. J. 419-444 (1991).

⁶¹ *Id.*

⁶² *Trial By Newspaper*, 18 AM. L. REV. 1019, 1038 (1884).

⁶³ *Id.*

⁶⁴ Drechsel, *supra* note 58.

and judges) and local journalists, who tend to lack such training. This study builds on the foregoing scholarship in two important ways. First, much of the research about press coverage of legal affairs is decades old, and this study provides a fresh look at how news organizations cover a legal issue. Second, this study examines content from mostly national news outlets, which might differ in their degree of focus on legal issues and reporters' level of training and knowledge on the law.

III. Method

Data for this study derived from content analyses of *The New York Times*, *The Washington Post*, *The Wall Street Journal*, and the *Chicago Tribune*. The authors selected the first three papers—*The Times*, *The Post*, and *The Journal*—because of their national scope; the *Tribune*, a large metropolitan daily, was chosen to have a balance in editorial ideology among the sources (the *Tribune* endorsed a Republican for Illinois governor in 2018 and 2014).⁶⁵ Thus, the sample consisted of content from two papers that lean left, *The Times* and *The Post*, and two papers that lean right, *The Journal* and the *Tribune*.

The study did not analyze other sources or forms of news, such as wire services or television outlets, for two key reasons. First, the national newspapers analyzed are relatively similar in terms of size and resources, thus allowing for comparison. Indeed, if any mainstream national news organizations are going to cover the deplatforming of Alex Jones and discuss the state action doctrine, they likely would be *The Times*, *The Journal*, and *The Post* given their reporting resources, sophistication, and audiences. Second, newspapers offer a way to control for potential ideological differences given the ideological tendencies of the papers' opinion sections.

Using the database ProQuest Global Newsstream, the authors conducted keyword searches of all original reporting in 2018, the year in which Jones was kicked off social media. The authors used the search string ["Alex Jones" and "Infowars"], read responsive stories, and then flagged stories in which a substantive element (and not just a passing reference) related to Alex Jones and/or Infowars and the suspension from social media platforms.

The authors coded flagged stories for three attributes. First, the authors coded for references to state action—namely the basic concept that private platforms, because they are not the government, are free to publish or exclude content as they see fit. References could be direct (e.g., using the words "state action" or describing the legal nature of the concept) or indirect (e.g., describing the function or effect of the state action doctrine or its essence in non-legal terms). Second, the authors coded whether the content was a news story (e.g., original reporting by a journalist employed by the news outlet) or an opinion piece (e.g., columns, editorials, letters to the editor). Last, the authors coded the social media platforms referenced in the content.

Stories that coders believed referenced the state action doctrine were then discussed among all co-authors of this article and a consensus was reached as to which stories contained references and which stories lacked references.

⁶⁵ Editorial Board, *Re-elect Gov. Bruce Rauner to give Illinois a fighting chance*, CHI. TRIB., Oct. 5, 2018, <https://www.chicagotribune.com/opinion/editorials/ct-edit-governor-rauner-pritzker-election-illinois-20180929-story.html>; Editorial Board, *For governor: The Tribune endorses Bruce Rauner, to revive Illinois*, CHI. TRIB., Oct. 10, 2014, <https://www.chicagotribune.com/opinion/editorials/ct-illinois-governor-quinn-rauner-endorse-edit-20141010-story.html>.

IV. Results

Table 1. Stories that Discussed and Lacked Discussion of State Action Doctrine

Outlet	Story Discussed State Action Doctrine		Story Lacked Discussion of State Action Doctrine
	News	Opinion	
The New York Times	1	2	51
The Washington Post	2	1	28
The Wall Street Journal	0	0	21
Chicago Tribune	0	0	11
Total	3	3	110

As Table 1 demonstrates, the content analysis identified 116 responsive stories to the keyword searches. *The New York Times* had the most coverage, followed by *The Washington Post*, *The Wall Street Journal*, and the *Chicago Tribune*. Most of the stories were news reports while a minority were opinion pieces. Coverage tended to focus on Facebook, Twitter, and YouTube the most, followed by iTunes, Spotify, and other social media platforms that were not the subject of coding.

Of the 116 responsive stories, only six (5%) discussed the concept of the state action doctrine in some way. Three of the stories were in *The Washington Post*, of which two were news reports and the third was an opinion column. The remaining three stories were in *The New York Times*; one was a news report and two were opinion.

The most explicit reference to the state action doctrine came from a direct quote by an academic. On Aug. 7, 2018, as part of a second-day story shedding context on moves by Facebook, Apple, and YouTube to delete Jones's content, *The Washington Post* quoted Alex Jones as saying that the removal of his content and material from Infowars amounted to "an assault against 'the First Amendment in this country as we know it.'"⁶⁶ The story then quotes Harvard Law Professor Jonathan Zittrain, who said: "While private platforms aren't bound by the restrictions of the First Amendment—generally only the government is—there's a question about how much discretion they should choose to exercise over what speech they allow to flow through them."⁶⁷ Zittrain is further quoted: "That question can't be wisely answered without noting how unfortunately central just a few intermediaries are—like Apple for podcasts, or YouTube, Facebook and Twitter for videos and links."⁶⁸

A conservative source, Brent Bozell of the Media Research Center, is quoted in *The Post* as disagreeing with Jones's banishment from social media, but he does not allege it was a violation of the First Amendment. "Conservatives are increasingly concerned that

⁶⁶ Craig Timberg, Elizabeth Dwoskin, and Hamza Shaban, *Jones's Infowars content is wiped, fanning debate over free speech*, WASH. POST, August 7, 2018, at A1.

⁶⁷ *Id.*

⁶⁸ *Id.*

Infowars is not the end point for those who want to ban speech. It's just the beginning," Bozell told *The Post*. "I don't support Alex Jones and what Infowars produces. He's not a conservative. However, banning him and his outlet is wrong. It's not just a slippery slope; it's a dangerous cliff that these social media companies are jumping off."⁶⁹

Some of the technology companies issued statements about their actions. YouTube's statement read: "When users violate these policies repeatedly, like our policies against hate speech and harassment or our terms prohibiting circumvention of our enforcement measures, we terminate their accounts."⁷⁰ Apple echoed with concern about hate speech: "Apple does not tolerate hate speech, and we have clear guidelines that creators and developers must follow to ensure we provide a safe environment for all of our users."⁷¹ Apple's statement added: "We believe in representing a wide range of views, so long as people are respectful to those with differing opinions."⁷² *The Post* also described Facebook's rationale, writing that "objectionable" material Jones had posted triggered the decision.⁷³

In an Aug. 9, 2018, column, *Washington Post* columnist Christine Emba praised the deplatforming of Jones and challenged assertions that the move was improper.⁷⁴ Emba quoted Jones's claim that the removal of his content was a precursor to a "move against the First Amendment in this country as we know it," and then lobbed this retort:

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech." That's it. It does not say that private companies are required to host your speech on their platforms, or that they must promote your content. You can say what you like, but no one else is obliged to help you get your message out. The fact that this simple concept remains so misunderstood reflects either a terrific ignorance or a willful misreading—most likely, it's a mix.⁷⁵

Emba made two notable points. She concisely hit on the practical significance of the state action doctrine—the First Amendment "does not say that private companies are required to host your speech on their platforms"—and underscored a conclusion of this paper, that the state action doctrine is often misunderstood.⁷⁶ "This move is an important step toward setting reasonable, and badly needed, precedent around free speech," Emba wrote.⁷⁷ "Companies don't have to defend the indefensible. Alex Jones can do that all on his own."⁷⁸

The third reference to the state action doctrine in *The Washington Post* came in a Sept. 6, 2018, article about the prospect of the government regulating social media and

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Christine Emba, *Alex Jones goes offline*, WASH. POST, Aug. 9, 2018, at A19.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

technology companies.⁷⁹ The story reported on a confluence of developments of government and political powers taking aim at Silicon Valley, including a Congressional hearing where Senators posed sharp questions at Facebook and Twitter executives, including questions about unfounded claims of a bias against conservatives, and a coordinated investigation by state attorneys general and the Justice Department that technology firms were hampering competition by “intentionally stifling the free exchange of ideas.”⁸⁰

Reporters Craig Timberg, Tony Romm, and Devlin Barrett cited several subject matter experts who questioned the constitutionality of government intervention in how social media firms and search engines handle content.⁸¹ The story states: “[L]egal experts say the First Amendment protects against the government’s directing tech companies in the dissemination of news or political opinions. They said Justice Department lawyers would struggle to mount a case that sought to limit such free-speech rights.”⁸²

As for coverage in *The New York Times*, the first reference to state action was in a column by Kara Swisher, who criticized Twitter’s initial decision not to ban Jones from its platform.⁸³ In an Aug. 8, 2018, column, Swisher questioned whether Twitter CEO Jack Dorsey had imbued the social media platform with values that can be applied when deciding how to curate content.⁸⁴ Swisher later discussed Twitter’s treatment of President Trump and recounted that the platform had essentially exempted Trump from content rules because he is the president.⁸⁵ She then wrote:

But by that measure, the rest of us plebes, including Mr. Jones, should probably get no protection if we err, no matter how much we rant that tweeting is a right under the First Amendment. It’s not, because Twitter is not the government and it can decide what and what not to host on its service. In any case, if you get kicked off Twitter, you can always unload your twisted mind on your very own website. And it cannot be said too many times that freedom of speech does not guarantee freedom from consequence.⁸⁶

This is a clear distillation of the concept of state action: because Twitter is not a state actor, it is generally free to pick and choose what content to allow and not allow on its platform, and users have recourse under the First Amendment to challenge such decisions.⁸⁷

⁷⁹ Craig Timberg, Tony Romm, and Devlin Barrett, *Warning to tech firms raises free-speech fears*, WASH. POST, Sept. 6, 2018, at A15.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ Kara Swisher, *Rules Won’t Save Twitter. Values Will*, N.Y. TIMES, Aug. 8, 2018, <https://www.nytimes.com/2018/08/08/opinion/twitter-alex-jones-jack-dorsey.html>.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

Also on Aug. 8, 2018, *Times* published a news article about Jones's removal from some platforms.⁸⁸ The lede said Jones had invoked the First Amendment and later quoted him describing the deplatforming as a "war on free speech."⁸⁹ Several paragraphs later, the story quotes Vera Eidelman of the American Civil Liberties Union, who said in a statement that while social media companies could remove Jones's material, such action may not be desirable.⁹⁰

While private companies can choose what to take down from their sites, the fact that social media platforms like Facebook have become indispensable platforms for the speech of billions means that they should resist calls to censor offensive speech. The recent decision by Facebook and YouTube to take down Alex Jones's content may have provided a quick solution to a challenging situation, but encouraging these companies to silence individuals in this way will backfire.⁹¹

The third reference to the state action doctrine in *The Times* came in an Aug. 10, 2020, letter to the editor from Jonathan A. Greenblatt, who was chief executive and national director of the Anti-Defamation League.⁹² In a letter responding to a *Times* story about the free expression implications of Jones's removal from social media, Greenblatt opined that Jones's history of bigotry and anti-Semitism should have led to Jones's removal "long ago." Greenblatt then wrote: "We, too, believe strongly in the First Amendment, but social media sites, which are not bound by the First Amendment, have a responsibility to provide safe, respectful and inclusive spaces for their broad community of users."⁹³

All remaining 110 stories lacked any discussion of the state action doctrine. This was true even when stories included false claims by Jones and others alleging or insinuating that social media platforms were violating users' First Amendment rights. For example, the quote from Jones in the introduction of this article—"They are outright banning people, and they are blocking conservatives involved in their own First Amendment political speech"—was printed in two *Times* stories, neither of which discussed the state action doctrine or quoted any other sources to correct Jones's claim.⁹⁴ In one of the stories, published Aug. 6, 2018, Jones is quoted again in which he expressed delight at causing a stir outside a Congressional hearing.⁹⁵ "It's kind of fun to get out of the studio," Jones is quoted as saying.⁹⁶ "Now when they have these hearings, I am going to show up."⁹⁷

V. Discussion

⁸⁸ Elizabeth Williamson, *'Feed Your Gladiator': Jones Urges Fans to Fight Back, and Send Money*, N.Y. Times, Aug. 8, 2018, at A16.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Jonathan A. Greenblatt, *Speech and Alex Jones*, N.Y. TIMES, Aug. 10, 2018, at A22.

⁹³ *Id.*

⁹⁴ Conger and Nicas, *supra* note 1, and Nicholas Fandos, *Fabulist Puts on a Show And Spars With a Senator*, N.Y. TIMES, Sept. 6, 2018, at A15.

⁹⁵ Fandos, *supra* note 95.

⁹⁶ *Id.*

⁹⁷ *Id.*

The concept of and legal requirement for state action in a dispute over protected expression should be at the center of any formal or informed discussions about online speech. The functional understanding that speech is only protected from the subsequent punishment and prior restraint by the government is at the core of contemporary disputes over the First Amendment. The reality of our communication system is that increasingly the open forum provided by the internet has become a metaphorical firehose stream full of competing viewpoints and outlets for news, information, and opinion. This is to be commended, for the value of systems that promote more speech should not be understated.

However, the difference between speech that is protected versus speech that is free is a core issue not only of the First Amendment, but of American government, society, and freedom as a whole. It is also, therefore, the starting block for understanding a second key lesson of free speech, namely that even protected speech is not without consequences. Although the government's ability to punish a person for speech after the fact is limited by the protections of the First Amendment, the same cannot be said about non-government entities, such as one's employer. This is also the case for online platforms and social media sites like Facebook, Twitter, Instagram, and more. Because they are not representatives of the government, they have every right to include or exclude content from their platforms, including by Alex Jones. Put simply, these companies did not violate the First Amendment rights of Jones by dropping him from their online platforms.

An understanding of how the First Amendment applies online is increasingly important given the stakes and journalists are positioned far better than law professors to convey this literacy. At every moment, there is so much communication, including political speech, flowing online and creating vast areas of expression. Social media and other edge providers permit a great deal of speech certainly, but absent state action, any platform, website, or other online provider can instantly become a gatekeeper for any news, information or viewpoints they choose at any time without legal consequences. For all the political speech one can find online, there remains an ever present, legally unreviewable threat looming over the top of that speech. Therefore, it needs to be clear what such platforms are allowing, and what is being taken away. Would the speech have been protected if it was removed by the government? And what if it was, but was taken down anyway? Without a strong understanding of what is taking place, and accountability for the companies deciding what speech to allow and what to remove, the environment increasingly becomes a lawless wild west rather than an enlightened zone where all ideas are welcome.

The chaos that is expression online is especially poignant when considering the attempts by Congress and President Trump to address Section 230 of the Communications Decency Act (CDA), arguments for a federal law encompassing data privacy online, and different discussions of regulating social media giants. Put simply, in an environment where private platforms are already deciding what speech is to be included or not, to add government oversight and regulation would only complicate the issue. And without understandings of key First Amendment concepts, it would become even harder to understand what speech is being protected and, more significantly, what ideas are being lost.

Thus, when Jones argued that Facebook, Twitter, and others violated his First Amendment rights by excluding him from their platforms, there needed to be reporting and understanding that this claim was, in fact, false and did not accurately reflect the state

action requirement. The problem is, highly respected journalists and publications in the vast majority of cases did not make this crucial observation despite multiple opportunities to do so. The result is that two separate institutions, as well as the American public, need to accept at least some of the fault and take appropriate steps to ensure it does not happen in the future, especially with government intervention in online communication looming.

First, and put simply, journalists who reported on Jones and his claims should have known better, but given the literature of press coverage of legal affairs, the results of this study are not surprising. The press in the United States has long been a beneficiary of the First Amendment's wide protections. As a result, the very professionals working in this industry should understand and be able to articulate the state action concept. The failure to include a discussion about how the First Amendment applies, and does not apply, to situations like the de-platforming of Jones is a disservice to the public on a critical issue dealing with a core constitutional right.

Second, it falls on the American education system, from elementary school through higher education at the college/university level, to make sure key concepts related to not only the First Amendment, but also America's freedoms in general, are being taught. Certainly, it is important that students going into journalism have a strong grasp of the First Amendment, as the results of this study's content analysis demonstrated. But it is something that all students should know and be taught. We are all surrounded by an ever-growing and ever more-complicated digital environment. Most of us participate in that online environment in some way. Though perhaps not always in a controversial way like Jones, everyone who posts to Facebook, Twitter, and other platforms are exercising their right to say what is on their mind. But if we allow ourselves to think that this would all be protected by the First Amendment, we are not fully understanding how our freedoms work. It falls on the press and our education system to make sure we have the knowledge we need. And when it comes to the First Amendment, that starts with state action.

Finally, no matter how strong and thorough reporting by journalists is or how meaningful the education provided, it still falls on the public to be receptive to learning more about American freedoms and protections. It falls on the public to care that their speech, or others' speech, is being allowed to stay online when other speech is not. And it falls on the public to understand the consequences of their expression, whether the First Amendment applies or not. Only with such knowledge can we move forward with a practical solution—one not plagued with unintended consequences.

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