

THE AUDIENCE PROBLEM IN ONLINE SPEECH CRIMES

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

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I. INTRODUCTION

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

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

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

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

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

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

³ See *id.* at 548–49.

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

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

⁶ See *id.* at 23, 28.

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

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

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

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

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

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

¹⁰ *Id.* at 698–97.

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

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

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

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

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

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

¹⁶ See, e.g., *id.*

¹⁷ See KOOPS, *supra* note 14.

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

B. An Interdisciplinary Approach to Understanding Audience as Context

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

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

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

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

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

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

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

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

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

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

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

II. THE EVOLVING AUDIENCE IN THE DIGITAL AGE

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

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

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

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

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

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

A. Audience Agency

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

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

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

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

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

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

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

²⁹ *See id.* at 43–44.

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

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

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

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

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

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

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

B. *Audience Obscurity*

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

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

Id.

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

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

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

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

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

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

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

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

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

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

Id. at 21.

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

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

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

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

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

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

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

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

⁴⁴ *Id.*

⁴⁵ *Id.*

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

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

⁴⁸ See Bell, *supra* note 23, at 159.

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

C. Audience Dislocation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. THE ELUSIVE AUDIENCE IN ONLINE LANGUAGE CRIMES

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

A. *Public Order Offenses*

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

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

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

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

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

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

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

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

⁶² 47 U.S.C.S. § 230.

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

⁶⁴ *Id.* at 845, 865.

⁶⁵ *Id.* at 855.

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

⁶⁷ *Id.*

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

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

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

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

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

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

⁷² *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁸⁵ *Id.*

⁸⁶ *Id.* at [17].

⁸⁷ *Id.*

⁸⁸ *Id.* at [22]–[24].

⁸⁹ *Id.* at [22].

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

⁹⁰ *Id.* at [17].

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

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

⁹³ *Id.* at [3].

⁹⁴ *Id.* at [4].

⁹⁵ *Id.*

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

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

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

⁹⁷ *Smith*, [2012] EWCA at [21]–[22].

⁹⁸ *Id.* at [20].

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

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

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

B. *Online Harassment and Stalking*

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

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

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

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

¹⁰² *Id.* at 79–80.

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

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

¹⁰³ 688 N.Y.S.2d 384 (1999).

¹⁰⁴ *Id.* at 385.

¹⁰⁵ *Id.*

¹⁰⁶ *See id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

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

¹¹⁰ N.Y. PENAL LAW § 240.30(1)(a).

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

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

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

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

¹¹² 392 N.Y.S.2d 968 (1977).

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

¹¹⁴ *Id.* at *6.

¹¹⁵ 770 S.E.2d 851 (Ga. 2015).

¹¹⁶ *Id.* at 852.

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

¹¹⁸ *Chan*, 770 S.E.2d at 854–55.

¹¹⁹ *Id.* at 855.

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

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

¹²⁰ *Id.*

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

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

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

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

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

¹²⁵ *Id.* at 989–90.

¹²⁶ *Id.* at 990.

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

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

¹²⁷ *Id.* at 987 n.7, 994.

¹²⁸ *Id.* at 989 n.19.

¹²⁹ *Id.* at 990.

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

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

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

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

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

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

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

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

¹³⁵ *Id.* at 138.

¹³⁶ *Id.* at 117–19.

¹³⁷ *Id.*

¹³⁸ *Id.* at 109.

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

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

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

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

¹⁴¹ *Id.* at 742–43.

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

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

C. Threat

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

¹⁴² *Id.* at 751.

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

¹⁴⁴ *See id.* at 582.

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

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

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

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

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

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

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

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 117.

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

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

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

¹⁵³ *Id.* at *1.

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

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

¹⁵⁶ *Id.* at *137.

¹⁵⁷ *Id.* at *164.

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

¹⁵⁹ *Id.* at *209.

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

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

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

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

¹⁶² 720 F.3d 411 (2d Cir. 2013).

¹⁶³ *Id.* at 414.

¹⁶⁴ *Id.*

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

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

¹⁶⁷ *Id.* at 423.

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

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

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

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

¹⁶⁸ *Id.* at 427.

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

¹⁷⁰ *Id.* at [12].

¹⁷¹ *Id.*

¹⁷² *Id.* at [13].

¹⁷³ *Id.* at [38].

¹⁷⁴ *Id.* at [24].

¹⁷⁵ *Id.* at [38].

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

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

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

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

Id. at [36].

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

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

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

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

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

¹⁷⁹ 431 F.2d 293 (4th Cir. 1970).

¹⁸⁰ *Id.* at 297–98.

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

¹⁸² See 53 CONG. REC. 9378 (1916).

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

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

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

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

Rogers, 422 U.S. at 44–46.

¹⁸⁴ 538 U.S. 343 (2003).

¹⁸⁵ 135 S. Ct. 2001 (2015).

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

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

¹⁸⁸ 776 F.3d 736 (10th Cir. 2015).

¹⁸⁹ *Id.* at 738.

¹⁹⁰ *Id.* at 739.

¹⁹¹ *Id.*

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

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

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

¹⁹² *Id.*

¹⁹³ *Id.*

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

¹⁹⁵ *Wheeler*, 776 F.3d at 741.

¹⁹⁶ *Id.* at 745–46.

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

¹⁹⁸ *Id.*

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

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

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

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

²⁰¹ *Id.* at 1887.

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

²⁰³ *Id.* at 1887.

²⁰⁴ *Id.* at 1887–88.

²⁰⁵ *Id.* at 1888.

²⁰⁶ *Id.* at 1891.

²⁰⁷ *Id.* at 1888.

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

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

IV. CONCLUSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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