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As I See It

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DISINFORMATION & THE JUSTICE SYSTEM

SUMMARY

Disinformation campaigns are a particularly insidious means of undermining systems, potentially including the U.S. justice system. Combatting disinformation is a tremendous challenge.

This article discusses disinformation (distinct from misinformation and other phenomena), the dangers it poses, and specifically how this all relates to the justice system. The author also focuses on how to combat disinformation that targets the justice system, and who--federal, state, or local officials, or others--is in the best position to do so.

***37 Lawyers and judges have an obligation to speak truth and combat disinformation that targets the justice system. Here are suggestions for how to do so.**

In recent years, disinformation has been used, and the concept of disinformation talked about, with increasing frequency. Disinformation campaigns are a particularly insidious means of undermining systems, potentially including the U.S. justice system. According to a May 2019 Center for Strategic & International Studies (CSIS) report, the potent nature of these campaigns derives from the fact that they can attack a country's, state's, or locality's systems cheaply and relentlessly and, at the same time, are difficult to trace back to their source.¹ As disinformation campaigns shape the way people see the world, it is also hard to counteract the long-term effects such campaigns have on a population once exposed.

In light of this danger, the American Bar Association (ABA), the CSIS, and the National Center for State Courts (NCSC) have urged justice system professionals to be proactive. Most recently, the Arizona Supreme Court has put together a plan of action to counter the effects of disinformation. The Wisconsin Legislature and Wisconsin courts and bar associations should take up several of the Arizona Supreme Court's suggestions forthwith.

In an October 2020 newsletter, the NCSC shared the following tweets:

“@Blactivists--Maybe the criminal justice system from start to finish is seriously racist? The government is blind and deaf.

@BleepThePolice--The American (in)justice system does not need a few tweaks, but it needs to be completely overhauled.”²

What's significant here is not the content of the tweets (many tweeters, rightly or wrongly, say such things or use such a tone on Twitter), but that the NCSC attributes these statements to the Internet Research Agency, an organization that spreads disinformation over social media and has been linked to Russian intelligence. A May 2019 CSIS report on the subject states:

“Via multi-platform disinformation operations, Kremlin-backed operatives work to exacerbate existent divisions within populations and increase overall mistrust and paranoia against democratic institutions. In the process, justice systems are portrayed as corrupt, inept, and hypocritical.”³

In this article, we first discuss disinformation (distinct from misinformation and other phenomena), the dangers it poses, and specifically how this all relates to the justice system. We then focus on what can be done to combat disinformation that targets the justice system, and who--federal, state, or local officials, or others--is in the best position to do so.

The Nature of the Imperative

The sharing of false information for nefarious purposes is nothing new. What is new is the way in which the internet, and social media in particular, have lowered barriers to entry, allowed for information to spread much more rapidly, and made the challenge of combatting disinformation considerably harder. Also, certain technologies have given disinformation campaigns the adaptability of a virus. The Brookings Institution mentions that those seeking to disinform have come up with new ways to make fake accounts seem legitimate, including artificial intelligence (AI)-generated profile pictures.⁴

Although deep fakes are not yet common,⁵ it is unsettling that technology now allows video editors to not only take words that people say out of context but also to literally put words *38 in peoples' mouths. The famous quote "a lie can travel halfway around the world while the truth is still putting on its shoes" has never been more true, and it does not take much imagination to think of all the ways in which disinformation will continue to evolve.

There is a growing catalog of ways these platforms and methods have been used in disinformation campaigns. According to the *Texas Tribune*, two sets of Facebook ads put up by foreign agents in 2017 resulted in two opposing protests confronting one another outside an Islamic center in Houston. "Russians managed to pit Texans against each other for the bargain price of \$200," the *Tribune* reported.⁶

The Technology and Social Change Project, a group of researchers from different fields headed by Harvard's Joan Donovan, has created *The Media Manipulation Casebook*,⁷ an online chronicle of the origins, tactics, and results of specific instances of media manipulation. The disinformation campaigns they report use a wide variety of tactics. In some cases, such as the Endless Mayfly incident,⁸ perpetrators engaged in typosquatting (posting articles with links to familiar looking websites--for example, *indepnehdent.hco* or *theatlatic.com*--intended to trick visitors into thinking the sources were The Independent and The Atlantic). In other situations, perpetrators recontextualize media. In India, a video of Muslims licking plates to promote a no-food-waste campaign a few years ago was presented as evidence of a Muslim effort to deliberately spread coronavirus in 2020.⁹

So what does this have to do with the U.S. justice system? In its 2019 report,¹⁰ the CSIS identified four major "frames" of disinformation campaigns targeting the U.S. justice system, namely claims that the justice system 1) covers up crimes perpetrated by immigrants, 2) effectuates a racist and corrupt police state, 3) facilitates corporate corruption, and 4) is controlled by the political elite. In sum, the goal of these campaigns is well beyond creating confusion; the goal is to make the citizenry lose faith in its justice system and other institutions.

Combatting Disinformation with Respect to the U.S. Justice System

Needless to say, combatting disinformation is a tremendous challenge. We have seen a few recent initiatives that are specific to the U.S. justice system. At the national level, the NCSC has been holding workshops on combatting disinformation campaigns for court professionals, and the CSIS report includes its own recommendations.

The American Bar Association's (ABA) Standing Committee on the American Judicial System produced a pamphlet for bar associations, titled "Rapid Response to Fake News, Misleading Statements, and Unjust Criticism of the Judiciary."¹¹ The authors suggest that a response to attempts to undermine public trust in judges must be coordinated among court professionals at the national, state, and local levels. In fact, many of the ABA's recommendations are aimed at state and local bar associations, as these institutions are "often most aware of criticism of a particular judge."¹²

The Arizona Supreme Court has taken the lead in crafting recommendations via a Task Force on Countering Disinformation (TFCD).¹³ Among other objectives, the TFCD was created to "[r]eview examples of disinformation and misleading campaigns targeting the U.S. and Arizona justice systems"¹⁴ and recommend responses based on its findings, with the following goal:

“promote free speech, the right of redress of grievances, and the ability to voice sincerely held differences of opinion, while acknowledging that groups exist whose intent is to monopolize and degrade the debate for their own purposes of eroding trust and confidence in courts and the judicial system.”¹⁵

In October 2020, the TFCD released its report.¹⁶ While some of the TFCD's nine recommendations are specific to Arizona, and others require a national effort, most of the recommendations can be implemented at state and local levels. Therefore, these guidelines could be readily adopted by the Wisconsin Legislature and courts and bar associations in Wisconsin. The following six TFCD recommendations deserve particular consideration.

Recommendation #1: Educate and Inform the Public

Defense against disinformation begins with an informed public. It should come as no surprise that we have much work to do in this regard. On the one hand, information is more widely available than ever before in history. On the other, a significant portion of the population has only a rudimentary understanding of civics. For many people, *39 perceptions of the justice system and government as a whole are reinforced by emotions rather than facts, yielding strong feelings about how the system does or does not work. Further, online information has been “democratized”—placing all facts and opinions on an equal plane and leaving it to the other elements (visual effects, pithy factoids or quotes, a speaker's charisma, or one's own preexisting biases) to carry the day. Social media and other web-based algorithms create echo chambers, given human beings' tendency to gravitate not toward truth but toward a confirmation of existing beliefs.

Against these headwinds, and recognizing the existence of certain building blocks (for example, schools, adult education, and civic organizations) already in place, the TFCD recommends enlisting liaisons to coordinate curriculum and other programming with existing entities. One such building block is iCivics. Retired U.S. Supreme Court Justice Sandra Day O'Connor founded iCivics more than 10 years ago, offering lesson plans, digital tools, and games regarding civics education.¹⁷ In this way, iCivics leverages all the technological tools available on a platform positioned to engage students nationwide. A community liaison could facilitate the use of iCivics and other online tools by social studies teachers, community groups, and others.

We propose that such programs be complemented with a curriculum in critical thinking and, more specifically, how to both seek out information (for example, internet search methods) and analyze information (that is, examining the veracity of information, testing for author bias, and uncovering evidence of disinformation). Librarians and informational and research professionals are well equipped to lead in this regard.

Recommendation #2: Establish Court Public Information Officer Positions

The TFCD recommends that local courts establish a public information officer position, with responsibilities including community outreach and public education. For example, local courts that maintain a social media presence (whether the court actually blogs or tweets) provide yet another reliable portal for official court information and allow for a quicker and better response to disinformation. Doing so widens the communicative reach of the court.

In Wisconsin, the entire Wisconsin court system shares one court information officer. Although it would be costly, and likely unnecessary, for every circuit court to have its own public information officer, it is hard to argue against expanding this role in, for example, Milwaukee and Dane counties.

Recommendation #3: Allow Judges and Third Parties to Respond to Attacks

The TFCD suggests amending the Arizona Code of Judicial Conduct to explicitly allow judges and third parties to *40 respond to “false, misleading, or unsubstantiated allegations or attacks upon the judge's reputation” and to do so “in writing, via social media or broadcast media or otherwise.”¹⁸ This amendment would be added to an existing rule that states that subject to some restrictions, “a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter.”¹⁹

While Wisconsin's Code of Judicial Conduct also does not explicitly allow or forbid a response to attacks on a judge's character, it seems unlikely that amending the Code of Judicial Conduct offers much in the way of a solution.²⁰ We believe it unlikely that judges desire to respond to disinformation (or that they, or our justice system in general, benefit from their doing so), even if authorized by rule. Rather than responding to unfounded attacks directly, judges might prefer to have a separate entity in place for this purpose, like the one contemplated by TFCD Recommendation #4.

Recommendation #4: Establish an Independent Rapid Response Team

In light of how rapidly disinformation can spread across communication platforms, the TFCD calls for the establishment of a rapid response team. Ideally, this team is made up of lawyers, members of the public, media members, and retired judges, such that the team is familiar with, but independent from, the court system. The team acts as a “centralized point of contact”²¹ with respect to the identification and resolution of active threats and particularly scenarios to which judges are unable to respond directly. While a social media presence provides an outlet, the rapid response team provides the means to respond, and strategize more generally, under such circumstances.

Should such a team be formulated, it would be crucial that it follow strict guidelines when identifying and responding to disinformation. As noted by the ABA Standing Committee on the American Judicial System's guidelines, individual judges who have been misrepresented must be consulted before a response is put out.²²

Sometimes a response is not appropriate. As the committee points out: “The matter presented may contain justified criticism, may be beyond the scope of the Association policy, or may be criticism of the merits of the case. The matter may be too political or create a conflict with the interests of the Association.”²³ Guidelines for when a response is inappropriate should be created and should be clear.

The TFCD does not include individuals with expertise in technology or information studies as rapid response team members. This highlights a challenge underlying much of TFCD's work: The U.S. justice system, under-resourced for years, is not in a strong position to respond to disinformation either from a staffing or a technological standpoint. Including an individual with technological expertise would be helpful in identifying the tactics at play and the range of possible responses. Including a librarian or information or research professional would be in line with the team's mission.

***41 Recommendation #5: Create a Disinformation Study Network**

The TFCD recognizes that its one-year study offers only a glimpse into disinformation campaigns, which continue to evolve. Accordingly, the TFCD advocates for the creation of a disinformation study network whereby all jurisdictions can catalog and share their experiences and knowledge. While developing a network takes considerable time and effort, there are ample examples from which to draw. This includes the Anti-Defamation League (ADL) antisemitism tracker²⁴ and its H.E.A.T and Hate Crime maps²⁵ and the Southern Poverty Law Center's Hate Watch and Hate map.²⁶

Recommendation #7: Stay Apprised of Technological Advancements

As the TFCD looks to the future, it advises that courts stay apprised of technological advancements that might assist in identifying and combatting disinformation. It also suggests that courts create an opt-in system that allows interested members of the public to receive information from the court.

On the one hand, both recommendations seem both simple and sensible. On the other, these recommendations illustrate some of the fundamental difficulties in the battle against disinformation. Though it is vital to stay up to date with the ever-evolving methods used to combat ever-evolving disinformation campaigns, the fact that these disinformation campaigns adapt so quickly means that those seeking to monitor them are destined to always be a few steps behind and must be adequately resourced.

Similarly, the opt-in communications system may be helpful to individuals who are most interested in the courts' operations; however, individuals who are most susceptible to disinformation are the same group that is also less likely to opt in to such

a program. So, while both technological awareness and opt-in communication systems make perfect sense, they must be implemented in conjunction with other measures.

Additional Recommendation: Court Accessibility

In its Roadmap to Justice Campaign 2020-2021 publication, the NCSC advocates for programs that create greater accessibility to justice for all members of the public, with special attention to socially and economically disadvantaged groups.²⁷ Improving access to justice is not only good in its own right but acts as a preventive measure against the mistrust resulting from disinformation campaigns. In short, U.S. courts must revisit the concept of customer service with the following in mind:

- All citizens are justice system “customers,” and courts must redouble efforts in this regard.
- Litigants are, by the nature of the situation, on edge. In almost every case, there will be at least one less-than-satisfied customer. Customer service *42 training must take the uniqueness of this predicament into account.
- Post-COVID-19, much will continue to be done online, so systems and processes must be further streamlined and simplified (for example, the current process for requesting an absentee ballot versus the process years ago).

There are already programs that seek to address the growing gap in accessing the justice system in Wisconsin. For instance, the Milwaukee Justice Center is a civil legal aid self-help center in the Milwaukee County Courthouse that offers volunteer-based programs to people who cannot afford a lawyer or who do not qualify for free representation to assist them in navigating the civil law process.

But the court system remains quite challenging for unrepresented individuals to navigate. The paperwork and filing processes for family law and temporary restraining order-injunction issues can be complicated and require visits to various parts of courthouses. There are additional steps to get fee waivers. When a significant portion of the public has a hard time obtaining justice, many will likely perceive the court system as something to battle with or through. Having programs to help litigants with even a part of the process has the potential to make the experience more positive. Expanding these programs could help generate trust, rather than frustration, in how the justice system is viewed.

Conclusion

The battle against disinformation likely is never ending and requires a variety of tactics. Disinformation is best neutralized with proactive interventions. Once exposed to disinformation, people may be harder to reach. And sometimes disinformation campaigns are not strictly counterfactual. The tweets cited by the NCSC prey on feelings that many Americans share and cannot be countered with a quick explanation. However, if members of the public know how to assess sources and have a better understanding of the justice system, they might be better equipped to deal with disinformation when they encounter it.

Those trying to ward off the effects of disinformation are fated to find themselves always playing catch up. But it is not a battle we can afford to sit out.

What is ‘Disinformation’?

Disinformation, as defined by Merriam Webster, is “false information deliberately and often covertly spread (as by the planting of rumors) in order to influence public opinion or obscure the truth.”²⁸

The Arizona Task Force offers a fuller definition:

“False, inaccurate or misleading information that is deliberately spread to the public with the intent to undermine the democratic process, sow discord, profit financially, or create distrust of government institutions or public officials. Disinformation should not be confused with misinformation, which is false information shared by those who do not recognize it as such, or with legitimate criticism, protest or censure of government actions, institutions or processes.”²⁹

Disinformation is different than misinformation or “fake news.” The distinction between disinformation and misinformation is often seen as one of intent. Misinformation, which can be spread by people who sincerely believe “incorrect or misleading information,”³⁰ poses a different set of issues (including a different set of First Amendment considerations). The discussion in this article is limited to disinformation.


Although free speech is protected by the First Amendment,³¹ disinformation stands at the outer fringes of First Amendment protection and, as such, should not be presumed to be protected speech. As noted in the Encyclopedia of the First Amendment, the First Amendment “may not protect individuals who engage in slander or libel, especially those who display actual malice by knowingly publishing false information or publishing information ‘with reckless disregard for the truth.’”³²

In *United States v. Alvarez*, the U.S. Supreme Court stated: “Even when considering some instances of defamation and fraud, moreover, the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood.”³³ In his concurrence, Justice Breyer indicates that areas of false speech that may be unprotected are generally limited “sometimes by requiring proof of specific harm to identifiable victims; sometimes by specifying that the lies be made in contexts in which a tangible harm to others is especially likely to occur; and sometimes by limiting the prohibited lies to those that are particularly likely to produce harm.”³⁴

Lawsuits recently filed by voting technology firms against Lou Dobbs, Rudy Giuliani, Sidney Powell, Maria Bartiromo, Jeanine Pirro, Fox News, and others over what they said on air about voting technology relative to November's election are bound to test these principles.³⁵



Recommendations: Arizona Supreme Court Task Force on Countering Disinformation

The Arizona Supreme Court's Task Force on Countering Disinformation issued its report in October 2020. The Task Force's report concludes with the following recommendations:

- 1) Redesign the Our Courts Arizona (OCA) interactive civics program, nominate a court liaison to Arizona's K-12 statewide educational program committee(s) and expand the judicial branch's community outreach.
- 2) Establish in-person and web-based court contacts and outreach to help the public and the media understand the role of the court and the function of the judicial branch, and to help counteract and respond to disinformation at the local level.
- 3) Modify the Arizona Code of Judicial Conduct to specifically address personal attacks against judges.
- 4) Establish a Rapid Response Team to address situations where disinformation targeting a judicial branch individual, a court, or a court system occurs and publish a comment to the Arizona Code of Judicial Conduct Rule 2.10 to provide guidance as to how and when such instances should be addressed.
- 5) Establish a Local/National Disinformation Study Network for further analysis.
- 6) Establish a national, centralized point of contact to assist in identifying disinformation and having it flagged or, if warranted, removed while respecting the expression of individual opinions and the exercise of First Amendment rights.
- 7) Monitor technology and resources that can identify disinformation campaigns early enough to counter them with accurate information and gather public contact information to improve courts' outreach and responsiveness.
- 8) Make federal public information available in Arizona regarding registrations as foreign agents under the Foreign Agents Registration Act,  [22 USCA § 611, et. seq. \(FARA\)](#).
- 9) Extend the term of the Task Force on Countering Disinformation through December 2021.

Footnotes

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The author thanks Adam Becker and Anna McDougall for their contributions to this article. Becker is a paralegal at Goldstein Law Group S.C. and McDougall is an intern at the firm.
- 1 Nat'l Ctr. for State Cts., *Combatting Disinformation Campaigns Against the Courts*, @ the Center, www.ncsc.org/newsroom/at-the-center/2020/combating-disinformation-campaigns-against-the-courts (last visited March 11, 2021).
- 2 *See id.*
- 3 Ctr. for Strategic & Int'l Studies, *Beyond the Ballot: How the Kremlin Works to Undermine the U.S. Justice System* (May 2019), https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/190430_RussiaUSJusticeSystem_v3_WEB_FULL.pdf.
- 4 Josh A. Goldstein & Shelby Grossman, *How Disinformation Evolved in 2020*, Brookings Inst. (Jan. 4, 2021), www.brookings.edu/techstream/how-disinformation-evolved-in-2020/.
- 5 Tim Mak & Dina Temple-Raston, *Where Are the Deepfakes in This Presidential Election?* NPR (Oct. 1, 2020), www.npr.org/2020/10/01/918223033/where-are-the-deepfakes-in-this-presidential-election.
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- 7 Media Manipulation Casebook, *Case Studies*, <https://mediamanipulation.org/case-studies> (last visited March 11, 2021).
- 8 *See id. Copycat Websites: The Endless Mayfly Network.*
- 9 *See id. Targeted Harassment: The Spread of #coronjihad.*
- 10 *See* Ctr. for Strategic & Int'l Studies, *supra* note 3.
- 11 *See* ABA, Standing Comm. on Am. Judicial Sys., *Rapid Response to Fake News, Misleading Statements, and Unjust Criticism of the Judiciary* (2018), www.americanbar.org/content/dam/aba/administrative/american-judicial-system/2018-rapid-response-to-fake-news.pdf.
- 12 *See id.* at 1.
- 13 *See* Supreme Court State of Ariz., Task Force on Countering Disinformation, *Report and Recommendations* (Oct. 1, 2020), www.azcourts.gov/Portals/74/DisinformationTF/CDTFReport%20FINAL2020.pdf (hereinafter TFCD Report).
- 14 *See id.* at 6.
- 15 *See id.*
- 16 *See id.*
- 17 *See* www.icivics.org/.
- 18 *See* TFCD Report, *supra* note 13, at 36.
- 19 *See* Ariz. Judicial Code § 2.10(E). Wisconsin's Judicial Code contains provisions similar to Arizona's in this regard (SCR 60.04.1(j), 60.06.3(b) and (c)), and is also silent on this precise issue.

- 20 See Wis. SCR ch. 60, www.wicourts.gov/sc/scrule/DisplayDocument.pdf?content=pdf&seqNo=269160.
- 21 See TFCD Report, *supra* note 13, at 40.
- 22 See ABA, *supra* note 11.
- 23 See *id.* at 5.
- 24 See ADL, *ADL Tracker of Antisemitic Incidents*, www.adl.org/education-and-resources/resource-knowledge-base/adl-tracker-of-antisemitic-incidents?field_incident_location_state_target_id=All&page=3.
- 25 See ADL, *ADL H.E.A.T. Map*, www.adl.org/education-and-resources/resource-knowledge-base/adl-heat-map; ADL, *ADL Hate Crime Map*, www.adl.org/adl-hate-crime-map.
- 26 See Southern Poverty Law Ctr., *Hatewatch*, www.splcenter.org/hatewatch; Southern Poverty Law Ctr., www.splcenter.org/hate-map.
- 27 See Nat'l Ctr. for State Cts., *Roadmap to Justice Campaign 2020-2021*, www.ncsc.org/_data/assets/pdf_file/0023/42908/NCSC-Roadmap-to-Justice-2020-21.pdf.
- 28 www.merriam-webster.com/dictionary/disinformation.
- 29 See TFCD Report, *supra* note 13.
- 30 www.merriam-webster.com/dictionary/misinformation.
- 31 See Erwin Chemerinsky, *False Speech and the First Amendment*, 71 Okla. L. Rev. 1 (2018); Daniela C. Manzi, *Managing the Misinformation Marketplace: The First Amendment and the Fight Against Fake News*, 87 Fordham L. Rev. 2623 (2019).
- 32 See *First Amendment Encyclopedia*, *False Speech*, www.mtsu.edu/first-amendment/article/1506/false-speech (last visited March 11, 2021).
- 33  *United States v. Alvarez*, 567 U.S. 709, 719 (2012).
- 34  *Id.* at 734 (Breyer, J. concurring).
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