LOUISIANA STATE LAW INSTITUTE
PAUL M. HEBERT LAW CENTER, ROOM W127
UNIVERSITY STATION
BATON ROUGE, LA 70803-1016

(225) 578-0200
FAX: (225) 578-0211
EMAIL: LAWINSTITUTE@LSLI.ORG
WWW.LSLI.ORG

February 21, 2022

Representative Clay Schexnayder
Speaker of the House of Representatives
P.O. Box 94062
Baton Rouge, Louisiana 70804

RE: HOUSE RESOLUTION NO. 108 OF THE 2021 REGULAR SESSION

Dear Mr. Speaker:

The Louisiana State Law Institute respectfully submits its report to the legislature relative to doxing.

Sincerely,

Guy Holdridge
Director

cc: Representative Charles Owen

email cc: David R. Poynter Legislative Research Library
drplibrary@legis.la.gov

Secretary of State, Mr. R. Kyle Ardoin
admin@sos.louisiana.gov

LOUISIANA STATE LAW INSTITUTE
TORTS AND INSURANCE COMMITTEE

REPORT TO THE LEGISLATURE IN RESPONSE TO HR NO. 108 OF THE 2021 REGULAR SESSION

Relative to "doxing"

Prepared for the
Louisiana Legislature on

February 21, 2022

Baton Rouge, Louisiana

LOUISIANA STATE LAW INSTITUTE
TORTS AND INSURANCE COMMITTEE

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ENROLLED

2021 Regular Session

HOUSE RESOLUTION NO. 108

BY REPRESENTATIVE CHARLES OWEN

A RESOLUTION

To urge and request the Louisiana State Law Institute to study provisions of law on civil liability for intentional dissemination of personally identifiable information, also known as doxing, and to report its findings to the House of Representatives no later than February 1, 2022.

WHEREAS, the intentional dissemination of personally identifiable information has become more commonplace and concerns information that would allow the person subject to the doxing to be located, contacted, harassed, threatened, or harmed; and

WHEREAS, the practice of doxing can lead to significant and reasonable fear of harm or actual harm, including death or serious bodily injury, to the person whose personally identifiable information is intentionally disseminated to the public; and

WHEREAS, the practice of doxing public safety officers, public officials, and minors has become more commonplace; and

WHEREAS, the practice of doxing public safety officers and public officials can cause a reasonable fear of harm or actual injury to the public safety officers and public officials, as well as interfere with and discourage public safety officers and public officials from conducting their duties; and

WHEREAS, the practice of doxing can be magnified for minors and can cause reasonable fear of harm or actual harm to the minors because of the vulnerability of youth; and

WHEREAS, the constitutions of the Untied States and the state of Louisiana protect personal privacy interests; and

WHEREAS, provisions in Louisiana law defining a cause of action for doxing could both deter persons from committing doxing and provide reasonable compensation to victims of doxing; and

WHEREAS, the constitutions of the United States and the state of Louisiana protect the right of free speech, the right of freedom of the press, the right of petitioning the government, and the right of confronting an accuser, and any prohibition of, penalty for, or remedy for doxing should avoid violating the legitimate exercise of those constitutional rights.

THEREFORE, BE IT RESOLVED that the House of Representatives of the Legislature of Louisiana urges and requests the Louisiana State Law Institute to study provisions of law on civil liability for intentional dissemination of personally identifiable information and to report its findings to the House of Representatives no later than February 1, 2022.

BE IT FURTHER RESOLVED that a copy of this Resolution be transmitted to the director of the Louisiana State Law Institute.

BE IT FURTHER RESOLVED that the Louisiana State Law Institute shall submit one print copy and one electronic copy of any report produced pursuant to this Resolution to the David R. Poynter Legislative Research Library as required by R.S. 24:772.

SPEAKER OF THE HOUSE OF REPRESENTATIVES

February 21, 2022

To: Representative Clay Schexnayder
Speaker of the House of Representatives
P.O. Box 94062
Baton Rouge, Louisiana

REPORT TO THE LEGISLATURE
IN RESPONSE TO HR NO. 108 OF THE 2021 REGULAR SESSION

House Resolution No. 108 of the 2021 Regular Session urged and requested the Louisiana State Law Institute to study and report on provisions of law regarding civil liability for intentional dissemination of personally identifiable information, also known as "doxing." In fulfillment of this request, the Law Institute assigned the project to its Torts and Insurance Committee, which operates under the leadership of Co-Chairs Harry J. "Skip" Philips and Donald W. Price and Co-Reporters Professors William R. Corbett and Thomas C. Galligan.

Prior to discussing House Resolution No. 108 with the whole of the Torts and Insurance Committee, the Committee leadership met with the resolution's author to get a sense of his thoughts on the topic and the concerns he wished to see addressed. The Committee leadership relayed these ideas to the Committee as it began its work with background discussions, contemplating a list of various legal issues potentially implicated by statutory restrictions on doxing. After conducting extensive research on these issues, the Committee considered each in turn, in concert with a compilation of various statutory efforts to address doxing in other jurisdictions. After thorough evaluation of the relevant legal principles and consideration of the intent behind the resolution, the Committee's findings are provided below.

Summary of Findings

A number of issues are implicated by a potential statutory proscription on doxing. First, any such proscription must necessarily comport with the First Amendment. In this context, that means that the proscribed speech must fall into one of two unprotected categories: "true threats" or incitement. Given the limited scope of these categories, it is unlikely that a statute that restricts only speech constituting a "true threat" or an incitement would capture the vast majority of doxing incidents. Second, in order for a court to exercise personal jurisdiction over a defendant, the defendant must have sufficient "minimum contacts" with the forum state. The limited jurisprudence in this area suggests that most incidents of doxing would be insufficient to create such "minimum contacts." Thus, even if a statutory cause of action for doxing were enacted that was both constitutionally valid and addressed behavior that would allow for the exercise of personal jurisdiction, this cause of action would be unlikely to capture most incidents of doxing. Moreover, the incidents that *would* be captured by such a statute would likely be actionable under one of several tort theories already present in current law.

For these reasons, the Law Institute recommends against the creation of a statutory cause of action for doxing. However, the Law Institute recognizes that doxing is a legitimate issue and understands that the Legislature may ultimately decide to address this issue. If the Legislature nevertheless decides to legislate on the issue of doxing, the Law Institute makes the following suggestions, *only* for such a scenario: (1) Any potential doxing legislation should be crafted such that the actionable conduct falls into one of the above-described exceptions to First Amendment protection; (2) any potential doxing legislation should contain some type of jurisdictional "hook;" and (3) the enactment of a criminal prohibition on doxing rather than a new civil cause of action should at least be considered. It should be emphasized once more that these are merely points of counsel in the event that the Legislature does decide to legislate on the issue of doxing. The Law Institute does not recommend the statutory proscription of doxing, whether civil or criminal.

I. What is "Doxing"?

Doxing is the disclosure or publication of an individual's private identifying information without consent. Originating from the internet slang "dropping docs" – which later became "dropping dox" and then simply "dox" – the "docs" could include any number of pieces of identifying personal information, such as an email address, telephone number, home address, place of work and superiors' email addresses and telephone numbers, social security number, social media profiles, and personal photographs. Doxing is often utilized as a method of retaliation or retribution against an individual for something the individual may have done or an occurrence with which the individual may have been involved. Notable examples include the (incorrect) doxing of a Michigan State student who was misidentified as the driver of the automobile that hit and killed a protestor in Charlottesville, Virginia in 2017 and the doxing of members of the Wayne County Board of Canvassers who briefly refused to certify the results of the 2020 presidential election. The goal of doxing is typically to create real life consequences for the party being doxed. Many high-profile instances of doxing have resulted in consistent, sustained harassment and numerous death threats. Notably, doxing does not necessarily require that the information shared be unavailable to the public. Often, people are doxed with semipublic information that can be found, with some effort, online. In that regard, it is more the identification of the individual associated with the information and the sharing of the information that is at issue. Further, although doxing often leads to harassment, the doxing itself typically involves the mere sharing of identifying information with no additional harassing commentary or instruction. It is worth noting that there is no generally accepted legal definition of "doxing". For the purposes of this report, "doxing" will simply refer to the public disclosure and sharing of any of the identifying information discussed above.

II. The First Amendment

Because the "act" of doxing can almost always be categorized as speech, any restriction on it must necessarily comport with the First Amendment. Although the First Amendment is not an absolute bar to restricting speech, the recognized classes of speech that may be proscribed without raising constitutional issues are recognized as "narrowly limited."[1] Among the several categories of speech that courts hold to be constitutionally unprotected, two in particular are relevant to any effort to draft doxing legislation: "true threats" and "incitement."

[1] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942).

A. The "true threats" exception

The Supreme Court has recognized that "the First Amendment [] permits a State to ban a 'true threat.'"[2] "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[3] Importantly, the "speaker need not actually intend to carry out the threat" – rather, a prohibition on true threats "protect[s] individuals from the *fear* of violence" and "from the disruption that fear engenders[.]"[4] Intimidation – "where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death" – also falls into this category.[5]

In determining whether speech constitutes a "true threat," the Supreme Court requires examination of the totality of the circumstances.[6] In undertaking such analysis, "a court should consider … not just the words in isolation."[7] Rather, the words should be "taken in context."[8] Examination of the totality of the circumstances further encompasses considerations such as "the reaction of the listeners" and "whether the threat was 'conditional[.]'"[9] Notably, there is disagreement among lower courts as to the level of intent necessary for a communication to represent a "true threat." Some state courts have interpreted Supreme Court precedent as requiring intent on the part of the speaker,[10] while others employ an objective standard based on the victim's point of view, instead asking whether "a reasonable person would interpret the speech as a serious threat."[11] Others still read Supreme Court precedent as "allow[ing] States to prohibit threats made with reckless disregard."[12] The Louisiana Supreme Court, for its part, has stated that "[p]roof of specific intent to cause fear is not essential when the threat is made such that a reasonable person might take it seriously under the circumstances and in the context in which the statement is made."[13] Justice Thomas has noted the "split regarding the mental state required by the First Amendment for these offenses" and warned that it "will only deepen with time[,]" potentially forcing the court to intervene.[14] In drafting any doxing legislation, the Legislature should carefully consider the full range of interpretations regarding the Supreme Court's "true threat" jurisprudence.

Further, it should be noted that doxing does not always carry with it language spelling out any explicit "threat;" indeed, doxing is frequently just the disclosure of an individual's personal information along with some identifying statement pointing out that the individual is, for whatever

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[2] *Virginia v. Black*, 538 U.S. 343, 359 (2003).
[3] *Id.*
[4] *Id.* at 359-360.
[5] *Id.* at 360.
[6] *U.S. v. Fullmer*, 584 F. 3d 132, 154 (3d Cir. 2009).
[7] *Id.*
[8] *Id.*
[9] *Id.* (quoting *Watts v. U.S.*, 394 U.S. 705, 708 (1969)).
[10] *Kansas v. Boettger*, 140 S.Ct. 1956 (2020) (dissenting from denial of writ) (citing *Kansas v. Boettger*, 310 Kan. 800 (Kan. 2019)).
[11] *Id.* (quoting *State v. Taupier*, 330 Conn. 149 (Conn. 2018))
[12] *Id.* (quoting *Major v. State*, 301 Ga. 147 (Ga. 2017)).
[13] *State ex rel. RT*, 781 So. 2d 1239 (La. 2001).
[14] *Boettger*, 140 S. Ct. at 1959.

reason, someone the speaker and his allies believe worthy of scorn. Although internet-savvy individuals who are familiar with doxing might nevertheless rightfully view such a post as a legitimate threat, given the purpose and intent behind doxing, it is somewhat unlikely that courts would consider such a post to be a threat at all, without at least some type of accompanying message to the effect that the victim will "get what's coming to them." Importantly, the Supreme Court has noted – or rather "footnoted," in its *Snyder v. Phelps* opinion – that "an Internet posting may raise distinct issues in th[e] context [of the tort intentional infliction of emotional distress]".[15] Thus, especially given the court's emphasis on the general nature of the speech at issue in *Snyder v. Phelps*,[16] it is possible that the court could find emotionally harmful speech unprotected where it is more specifically directed at an individual.[17] This nevertheless remains an uncertainty.

B. Incitement

The second category of speech that should be considered in this context is incitement. In *Brandenburg v. Ohio*, the Supreme Court clarified that speech can be proscribed where it is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[18] This directive is generally conceived of as either a two- or three-part test but is in the Committee's view more easily understood as having two steps or requirements: there must be "advocacy [that is] (1) directed to inciting or producing imminent lawless action and (2) is likely to incite or produce such action."[19] In later cases, the Supreme Court expanded on its *Brandenburg* precedent, explaining that this analysis should examine both to whom the words were directed (to determine whether there was advocacy of action) and the words themselves (to determine whether the speech was intended and/or likely to produce action).[20] The argument that doxing constitutes incitement relies on the context at issue – theoretically, one could argue that doxing is speech directed at like-minded Twitter (or other social media platform) followers that contains personal information and is likely to lead to harassment. However, many scholars argue that "*Brandenburg* requires explicit action words" and that "incitement cannot be implied."[21] If this is indeed the case, it represents another potential roadblock to drafting a prohibition on doxing that is both constitutionally palatable and effective, given the frequency of doxing incidents where the perpetrator merely posts identifying information and nothing more.

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[15] *Snyder v. Phelps*, 562 U.S. 443, 449 n.1 (2011).

[16] In this opinion, which centered on a suit brought against a Westboro Baptist Church leader after the Church picketed the funeral of a fallen United States soldier, the Court emphasized that Westboro's protest was conducted "on matters of public concern at a public place adjacent to a public street." *Id.* at 456.

[17] *See* Amy Gajda, The First Amendment Bubble: How Privacy and Paparazzi Threaten a Free Press 69 (2015) (stating that *Snyder* was properly viewed as a narrow opinion "that did not necessarily address claims based upon more directed, emotionally harmful speech."

[18] 395 U.S. 444 (1969)

[19] *Cf.* David Crump, *Camoflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test*, 29 GA. L. REV. at 12; Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 Stan. L. Rev. 719, 754 (1975). Note that courts in incitement cases have been sure to distinguish "mere advocacy" of lawless activity generally from speech specifically directed to incite such activity. *See Brandenburg*, 395 U.S. at 448-449. An example of "mere advocacy" might include a professor advocating political violence or civil disobedience in some hypothetical scenario. At least one constitutional law scholar has characterized the "factor" that distinguishes incitement from mere advocacy as a "call to action". *See* Crump, 29 GA. L. REV. at 67 (1994).

[20] *Hess v. Indiana*, 414 U.S. 105, 108-109 (1973).

[21] John P Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard*, 51 CATH. U. L. REV. 425, 457 (2002).

Ultimately, it would not be an impossible task to craft legislation proscribing only speech that falls into one of these two categories. Such a statute would be constitutional on its face. The issue, however, is whether such a statute could be constitutionally applied to instances where doxing occurs without any additional message in the way of a "call to action." Given the general dearth of both doxing jurisprudence and doxing commentary, this seems to be unlikely.

III. Jurisdictional Issues

Because doxing is an act that can be perpetrated by anyone on the internet, regardless of where they might be physically located, the susceptibility – or insusceptibility – of defendants to be haled into court becomes an important consideration when attempting to address the issue. Proscribing behavior of a person over whom the court cannot exercise personal jurisdiction is effectively a toothless proscription. A cause of action is useless to a plaintiff if a defendant cannot constitutionally be haled into court. Accordingly, it is important to understand the type of behavior that is sufficient to confer personal jurisdiction in this context. Unfortunately, there is minimal jurisprudence addressing the issue of doxing specifically, and related jurisprudence primarily serves to highlight how difficult determinations regarding the exercise of jurisdiction can be in this context.

As it relates to crafting doxing legislation, the relevant jurisdictional consideration is the question of whether defendants have such minimum contacts with the forum state that they could be said to have purposefully availed themselves of the protections and benefits of the forum state's laws. Among the four most prominent frameworks for making such a determination, the one relevant to the issue of doxing is the *Calder* "effects" test.[22] In determining whether a defendant purposely availed himself of a forum so as to warrant the exercise of personal jurisdiction in that forum, this test requires that the defendant have (1) committed an intentional act, (2) expressly aimed at the forum state, that (3) causes harm that the defendant knew was likely to be suffered in the forum state.[23] *Calder*, which was frequently used in defamation cases involving both traditional and internet media as well as in cases involving other intentional torts, was eventually clarified by the Supreme Court in *Walden v. Fiore*.[24] For our purposes, it is worth examining both of these cases in greater detail.

Calder centered on a defamation suit brought in a California federal district court by actress Shirley Jones against the author and editor – both based in Florida – of a National Enquirer article about Jones and her husband. Although the defendants did not travel to California while preparing the story, the author "frequently travele[d] to [California] on business, … reli[ed] on phone calls to sources in California for the information contained in the article," and called Jones's husband prior to publication so as to read him "a draft of the article so as to elicit his comments upon it."[25] Notably, the Enquirer's circulation was larger in California than in any other state.[26] Ultimately,

[22] *Calder v. Jones*, 465 U.S. 783 (1984).
[23] *See* Lee Goldman, *From Calder to Walden and Beyond: The Proper Application of the "Effects Test" in Personal Jurisdiction Cases*, 52 S.D. L. REV. 357, 359 (2015).
[24] 571 U.S. 277 (2014).
[25] *Calder*, 465 U.S. at 785-786.
[26] *Id.* at 785.

the Supreme Court found that both employees had sufficient contacts with California to establish personal jurisdiction. It emphasized that the defendants were "not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California."[27] To this end, the court noted that both individuals "knew [the article] would have a potentially devastating impact upon respondent[, and] that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation." The court highlighted several key facts – that the article "concerned the California activities of a California resident[,]" that "[t]he article was drawn from California sources[,]" and that "the brunt of the harm, in terms of both respondent's emotional distress and the injury to her professional reputation, was suffered in California"[28] – in ultimately concluding that "California [was] the focal point of both the story and of the harm suffered." Thus, the Supreme Court's holding was based on the effects that the defendants' conduct had in California.[29]

This decision was later clarified by the court in *Walden v. Fiore*, which involved a suit brought by a Nevada couple against Walden, a Georgia law enforcement officer who had encountered the couple in the Atlanta airport.[30] Walden, acting as a deputized DEA agent at the airport, seized $97,000 in cash from the couple's carry-on luggage. Despite the fact that the couple explained that they were professional gamblers and ultimately provided documentation for the money, Walden later filed an affidavit stating that he had probable cause to believe the money was drug-related and thus subject to forfeiture. The couple sued Walden in federal district court in Nevada, alleging that he violated their civil rights by his initial search and seizure and his later filing of a false affidavit. The Supreme Court ultimately reversed the Ninth Circuit, holding that the exercise of personal jurisdiction over Walden in Nevada was not appropriate.[31] In so doing, the court provided several key points of distinction regarding *Calder*: First, the "proper question [in the *Calder* analysis] is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way."[32] Second, the contacts giving rise to the claim at issue must be contacts "that the 'defendant *himself*' creates with the forum State."[33] And third, the "'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not [merely] the defendant's contacts with persons who reside there."[34]

The Supreme Court in *Walden* made one further distinction that is of particular relevance to the issue of doxing. Namely, the court distinguished the defamation tort at issue in *Calder* from other intentional torts. It stated: "The crux of *Calder* was that the reputation-based 'effects' of the alleged libel connected the defendants to California, not just to the plaintiff."[35] Emphasizing defamation's unique dependence on "*reputational* injury"[36] – that the injury caused was "to the plaintiff's reputation in the estimation of the California public" – and the fact that "publication to third persons is a necessary element of libel," the court ultimately concluded that "the [*Calder*]

[27] *Id.* at 789.
[28] *Id.*
[29] *Id.* at 788-89.
[30] *Walden*, 571 U.S. at 279-80.
[31] *Id.* at 291.
[32] *Id.* at 290.
[33] *Id.* at 277.
[34] *Id.* at 285.
[35] *Id.* at 287.
[36] *Id.*

defendants' intentional tort actually occurred in California."[37] Importantly, doxing does not necessarily carry with it this same type of reputational harm. Thus, the same type of connection to the forum state is not so easily made in the doxing context as it is with defamation-based actions. Although the ultimate injury resulting from doxing is foreseeably suffered by a forum resident, the *Walden* court clarified that "mere injury to a forum resident" – even if foreseeable – "is not a sufficient connection to the forum."[38]

The Fifth Circuit has subsequently added its own gloss to this jurisdictional analysis. In *Clemens v. McNamee* – another defamation case – the Fifth Circuit focused heavily on the content of the statements at issue.[39] In particular, it emphasized its own test as one that "require[s] the plaintiff to show that [*the forum state*] *was the focus* of the defamatory communication."[40] Ultimately holding that the alleged defamatory statements did not create sufficient contacts with the forum state of Texas, the court emphasized that "the statements did not concern activity in Texas; nor were they … directed to Texas residents any more than residents of any state."[41] Thus, to the extent that a doxing communication can be said to focus on the forum state, concern activity in the forum state, or be directed to residents of the forum state in particular, it may be possible to exercise personal jurisdiction over a defendant in such a case. However, the words "may be" are to be emphasized here, as courts have provided limited jurisdictional analysis on doxing and, even when they do, have been reluctant to find personal jurisdiction.

Vangheluwe v. Got News, LLC involved a defamation claim brought by an individual who was briefly misidentified by internet users as the driver who killed a protestor in Charlottesville, Virginia in 2017.[42] In the hours following the murder, internet users located records ostensibly listing Joel Vangheluwe – the former owner of the car involved in the killing – as the car's current owner. As a result, Vangheluwe's name and private information were shared repeatedly on social media, after which he and his family received "countless anonymous threats."[43] He ultimately sued several Facebook and Twitter users who had doxed him for defamation for misidentifying him as the killer, bringing the suit in Michigan. Three such defendants challenged the Michigan court's exercise of personal jurisdiction over them. Although each of these defendants tweeted about Vangheluwe or his father or shared online news stories identifying him as the killer, none had any other relevant contacts with Michigan. The court ultimately found that one of the three defendants could be haled into court based on the doxing. Comparing their cases is informative.

Of the two defendants over whom the court declined to exercise jurisdiction, neither's post went much further than simply identifying Vangheluwe as the driver. One of these was merely a tweet linking to an online news article claiming that Vangheluwe was the killer. The second defendant's post was a tweet identifying Vangheluwe as the "attacker" along with the info that he was from Romeo, Michigan and the car was a gray Dodge Charger with Ohio license plate # GVF 1111 and the hashtag #Charlottesville. As to the former, the court reasoned that it was "not fairly deemed doxing, as it did not provide [the Vangheluwes'] current whereabouts with any

[37] *Id.* at 288.
[38] *Id.* at 290.
[39] 615 F. 3d 374 (5th Cir. 2010).
[40] *Clemens*, 615 F. 3d at 379-380.
[41] *Id.* at 380.
[42] 365 F. Supp. 3d 850 (E.D. Mich. 2019).
[43] *Vangheluwe*, 365 F. Supp. 3d at 855.

specificity."[44] The court further highlighted the fact that the post was merely a linked article, emphasizing that this was "one step (or one hyperlink) removed from" the allegedly defamatory article. Regarding the latter defendant, the court explained that "[m]uch of what was just said can be applied [here]".[45] It highlighted that the only thing "that is 'Michigan' about the tweet is the statement that [Vangheluwe] is from Romeo, Michigan. But a reader of the tweet is immediately pulled from Michigan to Ohio (the license plate number) to Virginia ("#Charlottesville")."[46] Further, "nothing about the tweet suggests [the defendant] was targeting a Michigan audience."[47]

On this final point is where the court found the third defendant's case to be different. In particular, this defendant's tweet – which included the family's "home address (street number, street, city, state, and zip code)"[48] – did more than assert or imply that [Vangheluwe] was the Charlottesville driver. … Instead, [the defendant] took the further step of including the exact location of the Vangheluwe's house in Michigan."[49] For the court, it seemed to be this step that created the contacts necessary for the exercise of personal jurisdiction. This created the requisite connection with the forum state because it was Michiganders "who could most readily visit Vangheluwe's residence[.] … In other words, it is plausible that [the defendant] intended to pique Michiganders' interest with her tweet."[50] As the court put it:

> [U]nlike [the other defendants'] tweets, [this] tweet is fairly characterized as doxing. And it is the type of doxing that involved providing a physical location—in [the forum state]. Thus, it is reasonable to infer that [the] tweet was intended to cause some action in Michigan or catch the eye of those most able to make contact with the Vangheluwes, i.e., Michiganders. So [the] tweet was contact with Michigan that satisfies the constitutional minimum.[51]

Accordingly, we can discern that the deliberate inclusion of a specific physical address is an important factor in determining whether doxing suffices to satisfy constitutional minimum contacts analysis under the *Calder* "effects" test. This seems to jibe with the *McNamee* evaluation of the content of the message. However, the *Vangheluwe* court does not go so far as to say explicitly that this factor is sufficient on its own. Rather, "for [the defendant] to motivate readers of her tweet to take action against [Vangheluwe], it was important to identify [him] as the Charlottesville driver."[52] Importantly, the court does not address whether the falsity of this statement plays any role in this analysis. If Vangheluwe actually had committed some bad (or even arguably bad) act, would the act of identifying him as the perpetrator—taken together with the disclosure of his precise home address—still suffice to create constitutionally sufficient minimum contact? One might argue that the court's lack of discussion as to the falsity of that statement implies that its falsity does not affect the calculus. In other words, the disclosure of his actions

[44] *Id.* at 863.
[45] *Id.* at 864.
[46] *Id.*
[47] *Id.*
[48] *Id.* at 859.
[49] *Id.*
[50] *Id.* at 860.
[51] *Id.* at 861.
[52] *Id.*

along with his name and specific address could be seen as a call to action for forum state residents, thus creating minimum contacts, in any event.

It is also worth noting that the *Vangheluwe* court takes care to clarify that "[not] all doxing amounts to constitutionally minimum contacts with the forum state."[53] In this vein, the court lists several "facts [alleged] that cut against a finding of minimum contacts with Michigan." These include the following: (1) the defendant's statement that "[t]he post was intended as simple information," (2) the fact that "her tweet had no 'likes,' [and] was not re-tweeted," and (3) the defendant's statement that "she is not aware of any Twitter 'followers' or 'friends' in Michigan."[54] Further, the court references a Tenth Circuit case in which the court declined to exercise jurisdiction over a defendant who had posted an email about the plaintiff to an internet forum – finding that there was nothing to show that "the defamatory posting 'was directed specifically at a forum state audience or otherwise ma[d]e the forum state the focal point of the message.'"[55] The *Vangheluwe* court similarly draws a distinction between "disclosing a person's *online* information (e.g., their Facebook username) in the hope that others will engage in some sort of cyberattack" and disclosing their "physical, not virtual, address."[56] But *Vangheluwe* also discusses *Tamburo v. Dworkin*, a Seventh Circuit case in which the court did find sufficient contacts.[57] There, defendants had posted on their websites that the plaintiff had stolen data from them. In finding minimum contacts, the Seventh Circuit emphasized that the defendants' posts had encouraged readers to boycott the plaintiff's products, as well as providing his address and encouraging readers to "contact and harass him".[58] Importantly, it again appeared to be the apparent call to action in the forum state that formed the basis of the minimum contacts.

Other courts, however, have been less willing to find minimum contacts in similar scenarios. In *Young v. Maciora*, a Minnesota state court defamation case arising from the defendant posting the plaintiff's personal information on an internet forum and encouraging other posters to contact her, the Minnesota Court of Appeals found that minimum contacts were lacking.[59] There, the defendant made "many posts" about the plaintiff on the "iHub message board" that "revealed [plaintiff's] personal information[,]" while also making a handful of unsolicited attempts at contacting the plaintiff and her husband.[60] Included in that personal information was the plaintiff's home address. But the court held that "mentioning [plaintiff's] Minnesota address in some posts does not make Minnesota the focal point of [the] tortious conduct."[61] In reaching this determination, the court emphasized the fact that "the record does not establish[] that any Minnesota resident except [plaintiff] saw these posts."[62] Such data point recalls the *Vangheluwe* court's concession that "if [defendant's] tweet had a very small likelihood of reaching anyone in [the forum state], that would seem to be a jurisdictionally relevant fact."[63] The court there did,

[53] *Id.* at 860.
[54] *Id.* at 860-861.
[55] *Id.* at 857.
[56] *Id.* at 860.
[57] *Id.* at 861. *See Tamburo v. Dworkin*, 601 F. 3d 693 (7th Cir. 2010).
[58] *See Vangheluwe*, 365 F. Supp. 3d at 861.
[59] 940 N.W. 2d 509 (Ct. App. Minn. 2020).
[60] *Id.* at 520.
[61] *Id.* at 513.
[62] *Id.* at 516.
[63] *Vangheluwe*, 365 F. Supp. 3d at 861.

however, contrast this with the defendant's "admi[ssion] that her tweet was publicly accessible."[64] Nevertheless, it seems as though the audience reached by a particular post may weigh in a court's minimum contacts analysis.

Undoubtedly, the precise standard for finding personal jurisdiction in a doxing case is unclear. Louisiana courts have not considered the issue. But, at least to other courts, there do appear to be patterns in terms of important considerations. Certainly, the inclusion of a specific home address in the forum state weighs in favor of finding sufficient contacts for the exercise of jurisdiction. The demographics of the poster's "audience" seems to be similarly relevant – although, in the cases examined, this fact appears to have cut in the opposite direction. These issues and the others discussed above bear consideration, as they weigh against the potential for an effective legislative solution to doxing.

IV. Recommendation

Given the difficulties associated with creating a statutory cause of action for doxing, the Law Institute recommends that no such cause of action be created. Although it may be possible to draft a statute creating a cause of action for doxing that is both constitutionally palatable and adequately capable of haling out-of-state defendants into court in Louisiana, it is highly unlikely that such a cause of action would be effective in either curtailing or punishing the behavior that House Resolution No. 108 seeks to address. As noted above, the Supreme Court's jurisprudence in the "true threats" and incitement context indicates that some affirmative "threat" or some "explicit action words," respectively, must likely accompany the publication of private information in order for the speech at issue to fall within the scope of these exceptions to First Amendment protection. Likewise, some such accompanying message seems almost essential in order to create sufficient contacts for the exercise of personal jurisdiction over the perpetrator. Because doxing frequently includes no more than the plain listing of information – without any explicit threat, "call to action," or other similar statement – it is highly unlikely that a statutory cause of action designed to comport with jurisdictional minimum contacts analysis and fall within one of the aforementioned First Amendment exceptions would ultimately be applicable to the vast majority of doxing incidents. In other words, a constitutionally palatable statute could be drafted, but it would be ineffective in providing a remedy for most doxing. The fact that the doctrines discussed above have not been applied in the context of doxing and have been inconsistently applied in the context of the internet generally is even more reason to suspect that plain doxing, without more, would fall outside the reach of a constitutionally viable statute.

Beyond this, the types of cases that such a statute likely would capture – that is, cases where there is some message accompanying the personal information that brings the post within the scope of a true threat or incitement and provides sufficient jurisdictional contacts – are likely to be actionable already under various existing tort theories. For example, the victim of a doxing incident where "the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence" (i.e. a First Amendment "true threat") would have a strong claim for intentional infliction of emotional distress. After all, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders" – in other words, emotional

[64] *Id.*

distress. The Supreme Court has said as much itself.[65] And intentional infliction of emotional distress is also viable in the context of incitement, along with vicarious liability.[66] If individuals respond to the doxing by causing personal or property damage to the victim, the person who engaged in doxing could be held liable for assault, battery, conversion, trespass to chattels, or false imprisonment, based on inciting or setting the forces in motion that caused harm to the person or property. Additionally, the tort of invasion of privacy may provide a remedy. If all else fails, a victim can turn to Louisiana's general tort provision, Civil Code Article 2315, which sets out a cause of action and liability for "[e]very act whatever of a man that causes damage to another[.]" Importantly, the Louisiana Supreme Court has declared that tort liability can be imposed under Article 2315 without need for a specific label to be attached to the tort. Taken collectively, these various causes of action apply to virtually all conceivable doxing scenarios that could possibly be covered by a constitutionally valid statute. Although these causes of action do not obviate the personal jurisdiction issues discussed above, they do avoid the prospect of additional litigation over the constitutionality of a doxing statute.

Another factor that would very likely render a statutory doxing cause of action toothless is the sheer impracticability of bringing such an action. The first obstacle contributing to this impracticability is the extreme difficulty of identifying the defendant. Indeed, most doxing perpetrators do so behind at least one layer of anonymity – and oftentimes several more. Even if the doxing falls within the limited circumstances described above that renders it actionable, the existence of a civil cause of action brings the victim no closer to identifying who in particular should be sued. Without considerable computer savvy and connections allowing for the unmasking of anonymous accounts, an average citizen has almost no viable chance to discover the identity of the party who published their privately identifying information such that that party can be subjected to legal action. Beyond this, the innocent citizen who wishes to bring such an action – even if there is an actionable claim and even if the identity of the perpetrator can be discovered – will be forced to bear the significant cost of a lawsuit that is by no means a guaranteed success. That any such suit will inevitably require considerable time and effort spent arguing the constitutionality of the statute and its applicability to the present circumstances only serves to exacerbate this cost.

Ultimately, for these reasons, it is the opinion of the Torts and Insurance Committee that the costs and problems associated with creating a statutory cause of action for doxing outweigh the benefits. Nevertheless, the Law Institute does acknowledge that the publication of personally identifying information for the purposes of political or social retaliation or retribution is, in fact, an issue of growing concern. Given the Law Institute's understanding that this issue may ultimately be legislated upon in any event, it wishes to provide the Legislature with guidance for any such action. Thus, although the Law Institute does not recommend the passage of legislation creating a statutory cause of action for doxing, it nevertheless urges the Legislature to consider the following points of counsel:

1. Any potential doxing legislation should be crafted such that the actionable conduct falls within one of the above-described exceptions to First

[65] *See Snyder v. Phelps*, 562 U.S. 443, 449 n.1 (2011).
[66] *See, generally* Clay Calvert, *Troll Storms and Tort Liability for Speech Urging Action by Others: A First Amendment Analysis and an Initial Step Toward a Federal Rule*, 97 WASH. U. L. REV. 1303 (2020).

Amendment protection. In particular, the actionable conduct should constitute either a "true threat" or an incitement under applicable jurisprudence. Accordingly, any such statute should either (1) contain an intent element that requires that the perpetrator "means to communicate a serious expression of an intent to commit an act of unlawful violence"[67] such that the communication evinces "the intent [to] plac[e] the victim in fear of bodily harm or death[;]"[68] or (2) require that the communication at issue both (i) be "directed to inciting or producing imminent lawless action" and (ii) be "likely to incite or produce such action."[69] It is necessary that any prohibition on doxing apply only to communications that fall into these two categories. It should be noted, however, that the precise scope and applicability of this jurisprudence to circumstances involving the internet are uncertain at best.[70]

2. Any potential doxing legislation should be crafted so as to contain some type of jurisdictional "hook." In particular, the legislation should be made applicable only to conduct that serves to create constitutionally sufficient "contacts" with the state of Louisiana under the Fifth Circuit's *McNamee* gloss on the *Calder* "effects" test. Under this line of cases, the content of the communication at issue is relevant. Courts have implied that, in doxing cases, the communication's inclusion of a specific address in the forum state weighs in favor of finding contacts sufficient to establish personal jurisdiction. The same line of cases likewise suggests that the message must both be directed at and find some level of audience with forum residents. Further, some manner of "encouragement" or "call to action" has also seemed to lead courts toward finding the exercise of jurisdiction appropriate. Thus, the inclusion of some requirement that the communication contain a Louisiana address, be directed at and seen by Louisiana residents, and direct some type of behavior toward a forum resident would all serve the purpose of creating a jurisdictional hook. Once again, however, the Torts and Insurance Committee emphasizes that jurisprudence in this area is unsettled and inconsistent. Ultimately, the factor that seems to most reliably lead courts toward a finding that the exercise of jurisdiction is appropriate is the inclusion of some type of message on top of the "mere" listing of the personal information. Importantly, this "extra" behavior is also the type that makes more likely the availability of a tort remedy such as intentional infliction of emotional distress.

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[67] *See Virginia v. Black*, 538 U.S. 343, 359 (2003).
[68] *Id.* at 360.
[69] *See Brandenburg v. Ohio*, 395 U.S. 444 (1969). *Cf.* David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test*, 29 GA. L. REV. at 12; Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 754 (1975). Note that courts in incitement cases have been sure to distinguish "mere advocacy" of lawless activity generally from speech specifically directed to incite such activity. *See Brandenburg*, 395 U.S. at 448-449. An example of "mere advocacy" might include a professor advocating political violence or civil disobedience in some hypothetical scenario. At least one constitutional law scholar has characterized the "factor" that distinguishes incitement from mere advocacy as a "call to action". *See* Crump, 29 GA. L. REV. at 67 (1994).
[70] *See* Section II.

3. The enactment of a criminal prohibition of doxing rather than a new civil cause of action should be considered, if the issue of doxing is indeed to be the subject of legislation. Although the Torts and Insurance Committee does not recommend the enactment of any such statute, it believes that a criminal statute may be a more effective solution to the problems associated with doxing than a civil statutory cause of action. Three primary points underlie the Committee's suggestion in this regard: First, as discussed above, the conduct that would be covered by a statutory civil cause of action for doxing is likely already actionable under various tort theories. Second, criminal action does not carry with it the same difficulties associated with bringing and maintaining a civil action for doxing. Unlike a civil cause of action, a criminal statute empowers law enforcement to perform the investigatory function necessary to identify perpetrators of doxing. Law enforcement, far more than a private citizen, has both the means and expertise to look behind the curtains of anonymity associated with doxing and internet harassment. Further, criminal prosecution does not require a private citizen to foot the bill for an often prohibitively expensive lawsuit. Finally, the third factor that arguably makes a criminal statute a more effective avenue of action in this context is the fact that the criminal statute would itself serve to strengthen the already-existing civil causes of action. For example, a claim for intentional infliction of emotional distress requires the plaintiff to prove that the defendant engaged in "outrageous" behavior; the criminal prohibition of a particular category of behavior – here, doxing – renders it far more likely to be found by a court to suffice as "outrageous." Note, however, that the same First Amendment and jurisdictional issues associated with a statutory civil cause of action also apply to a criminal statute. Additionally, while the Torts and Insurance Committee considers the enactment of a criminal statute addressing doxing to be a potentially preferable course of action, the drafting of such a criminal statute is beyond the scope of the Committee's subject matter expertise. Thus, as is the case with the creation of a new statutory civil cause of action, the Law Institute does not recommend enacting a criminal statute.