Article 3

2022

Beyond True and False: Fake News and the Digital Epistemic Divide

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Recommended Citation

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ABSTRACT

The massive fact-checking, flagging, and content removal campaigns run by major digital platforms during the 2020 elections and the Covid-19 pandemic did some good. However, they failed to prevent substantial portions of the population from believing that the election was stolen or that vaccinations are dangerous.

In this Article, we argue that the reason for the ineffectiveness of truth-based solutions—such as fact-checking— is that they do not reach the heart of the problem. Both scholars and policymakers share the implicit or explicit belief that the rise of digital fake news is harmful mainly because it spreads false information, which lays a rotten groundwork for both individual decisions and collective policy making. While acknowledging the importance of accurate information, we argue that the main problem with fake news is not that it is false. Instead, what is distinctly threatening about digital misinformation is its ability to circumvent and undermine common knowledge-producing institutions including the sciences, courts, medical and other professions, and the media. The fundamental challenge is the fragmentation of our societies into separate epistemic communities. This shakes the factual common ground on which we stand. What does fact-checking matter if twenty percent of the population thinks that the fact-checkers are chronic liars? We call this new reality the Digital Epistemic Divide.

Epistemic fragmentation of society is both more fundamental and more dangerous than the harms of false information as such. It is more fundamental because once a society is epistemically fragmented, the lack of trust in common epistemic authorities will inevitably proliferate disagreement over factual beliefs. It is more dangerous because it can exacerbate political polarization. It is one thing to believe that the other side of a political issue holds wrong values and preferences; it is quite another to believe that they are either constantly lying or deeply manipulated.

> *To bridge the digital epistemic divide, we must go beyond truth-based solutions and implement policies to reconstitute societal trust in common epistemic authorities.*

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INTRODUCTION

Digital fake news[1] poses a threat to our democracies,[2] to public health,[3] and the environment.[4] It is clear that we must develop new tools to defeat this social crisis. What is less clear, however, is where exactly we should point our regulatory arrows. To know where to aim, we must understand the mechanisms through which digital fake news harms our societies and political systems. For most scholars, the answer to this question is obvious. They share the implicit or explicit belief that the rise of digital fake news is harmful mainly because it spreads false information, which lays a flawed groundwork for both individual decisions and collective policy making.[5] It follows from their position that truth-based responses,[6] such as making digital platforms do a better job of fact-checking, removing, and flagging false infor-

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1.   We use the term digital fake news interchangeably with fake news and misinformation. Much work has been done recently to identify different types of digitally spread false information, *see, e.g.*, Mark Verstraete, Jane R. Bambauer & Derek E. Bambauer, *Identifying and Countering Fake News*, 73 HASTINGS L. J. 73 (2021) (suggesting a useful taxonomy into satire, hoax, propaganda, and trolling); Although the term is debated and contested, for our purposes it suffices to understand it as referring to "a wide range of disinformation and misinformation circulating online and in the media." ALICE MARWICK & REBECCA LEWIS, DATA & SOC'Y INST., MEDIA MANIPULATION AND DISINFORMATION ONLINE 44 (2017); We attach the term digital to indicate that while false information has always been around, digitalization has exacerbated the challenge, *see e.g.*, Bente Kalsnes, *Fake News*, OXFORD RESEARCH ENCYCLOPEDIA OF COMMUNICATION, (Sept. 26, 2018), https://oxfordre.com/communication /view/10.1093/acrefore/9780190228613.001.0001/acrefore-9780190228613-e-809 ("Social and digital communication technologies such as social networks, blogs, and wikis are powerful tools for users to publish, distribute, and consume information—decentralized compared to previous mass media technologies. It thus seems easier for false or misleading information to enter the public sphere in many countries through digital, social media.").

2.   *See, e.g.*, CARME COLOMINA, HÉCTOR SÁNCHEZ MARGALEF & RICHARD YOUNGS, EUROPEAN PARLIAMENT, THE IMPACT OF DISINFORMATION ON DEMOCRATIC PROCESSES AND HUMAN RIGHTS IN THE WORLD https://www.europarl.europa.eu/RegData/etudes/STUD /2021/653635/EXPO_STU(2021)653635_EN.pdf; The actual long-term impact of fake news on democratic processes is still uncertain, *see* David M. J. Lazer, Matthew A. Baum, Yochai Benkler, Adam J. Berinsky, Kelly M. Greenhill, Filippo Menczer, Miriam J. Metzger, Brendan Nyhan, Gordon Pennycook, David Rothschild, Michael Schudson, Steven A. Sloman, Cass R. Sunstein, Emily A. Thorson, Duncan J. Watts & Jonathan L. Zittrain, *The Science of Fake News*, 359 SCIENCE 1094, 1095 (2018).

3.   *See, e.g.*, Ilaria Montagni et al., *Acceptance of a Covid-19 Vaccine is Associated with Ability to Detect Fake News and Health Literacy*, 43 J. PUB. HEALTH 695, 700 (2021) (showing that individuals that are unable to identify fake news are much more likely to reject the covid-19 vaccine).

4.   *See, e.g.*, Stephan Lewandowsky, *Climate Change Disinformation and How to Combat It*, 42 ANN. REV. PUB. HEALTH 1 (2021) (describing how climate change is more vulnerable to disinformation since it's implications are psychologically hard to deal with).

5.   *See infra* Pt. I.

6.   For a discussion of scholarly policy proposals, *see infra* Part III; for an overview of regulatory measures aimed at curbing digital fake news, most of which are clearly focusing on truth-based solutions, *see* Daniel Funke & Daniela Flamini, *A Guide to Anti-Misinformation Actions around the World*, POYNTER, https://www.poynter.org/ifcn/anti-misinformation-actions/.

mation, would appear to be the main solution to the misinformation problem. While we admit that truth-based solutions may help, we claim that they do not get to the heart of the issue. The aggressive fact-checking and content removal conducted by major social networks during the 2020 election season helped the situation.[7] But they did not prevent twenty-five percent of the U.S. population from believing that the election was stolen.[8] Similarly, the relative vigilance of social media platforms when it came to COVID-19 misinformation was not sufficient to contain the severe effects of anti-vax campaigns throughout the world. Fifteen percent of U.S. adults are not vaccinated against COVID-19 as of January 1, 2022, and even more avow they do not "trust" COVID vaccines.[9]

False information has always been, and likely always will be, a part of any public discourse.[10] The issue of falsity and political lies is not new. The question then should be what exactly makes contemporary lies, propaganda, and hoaxes more challenging than the falsities of pre-digital societies? Clearly, the answer cannot be that they are more untrue than their predecessors or that societies' overall knowledge base is less accurate than it used to be.

In this Article, we argue that the main problem with digital fake news is not that it is false. Instead, what is new and challenging about the spread of digital falsities is that they have developed the potential to divide our societies into separate epistemic communities. Digital fake news—different from that in pre-digital times—shakes the common factual ground we stand on: our very basis for all policy making and social cooperation. The trouble is not only that twenty-five percent of the U.S. population thinks the 2020

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7. Verstraete et al., *supra* note 1, at 856 ("Mainstream media sources and platforms undertook invigorated efforts to combat falsehoods: news organizations such as the Associated Press engaged in factchecking; Twitter labeled propaganda as suspect; Facebook initiated a wholesale block on QAnon content; and YouTube blocked uploads of videos falsely claiming that President Trump had defeated Biden. Although some of these interventions occurred relatively late during the electoral campaign, they have had at least an incremental effect, pushing some propaganda onto less popular platforms such as Telegram and Gab.").

8. *Most Republicans Still Believe 2020 Election Was Stolen from Trump – Poll*, THE GUARDIAN (May 24, 2021), http://www.theguardian.com/us-news/2021/may/24/republicans-2020-election-poll-trump-biden ("The 17-19 May national poll found that 53% of Republicans believe Trump, their party's nominee, is the 'true president' now, compared with 3% of Democrats and 25% of all Americans.").

9. Lindsay Monte, *Household Pulse Survey Shows Many Don't Trust COVID Vaccine, Worry About Side Effects*, U.S. CENSUS BUREAU https://www.census.gov/library/stories/2021/12/who-are-the-adults-not-vaccinated-against-covid.html (last visited Jan. 11, 2022).

10. *See* Joanna M. Burkhardt, *History of Fake News*, 53 LIBRARY TECHNOLOGY REPORTS 5 (2017) ("Fake news is nothing new. … Rumor and false stories have probably been around as long as humans have lived in groups where power matters."); for a famous essay on lies as a political tool, *see generally* HANNAH ARENDT, BETWEEN PAST AND FUTURE (2006).

election result[11]s were fraudulent; it is that they harbor deep mistrust of the epistemic institutions (scientific experts, professional communities, the intelligence community, the courts, the media) that are meant to provide them with truthful information.[12] In such a situation, twenty-five percent of the citizen body actively mistrusts the sources of information the other seventy-five percent trusts.[13] While a specific instance of untrue belief can be bad enough, the fracturing of society's epistemic norms is catastrophic. We call this the *digital epistemic divide*. While we acknowledge that truth-based solutions can be helpful, we argue that what is truly needed is a set of solutions designed to bolster societal trust in common epistemic authorities.

We develop our main argument through *five* successive steps.

First, we seek to establish that democratic states require common epistemic authorities and norms. Democratic decision-making depends on the ability to judge the quality of ideas and policies.[14] This is the demand of *democratic competence*.[15] To determine whether a climate policy proposal is good, it is not enough to determine whether it matches our interests, preferences, and values—it also must rely on solid factual groundings. The factual determinations required for democratic competence go far beyond easily ascertainable facts. To adopt a set of climate policies in line with reality, it is not enough to know what the average temperature was last year. We also

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11.   By epistemic communities, we mean groups that reach knowledge in a common way. For example, communities that read similarly situated newspapers.

12.   *See* Megan Brenan, *Americans' Trust in Media Dips to Second Lowest on Record*, GALLUP (Oct. 7, 2021), https://news.gallup.com/poll/355526/americans-trust-media-dips-second-lowest-record.aspx (describing how the mistrust in mainstream media in the US is at an almost all time low, with Democrats trusting the media much more than Independents and Republicans).

13.   The epistemic divide is quite clear; Republicans and Democrats in the U.S. mistrust each other's media sources, *see* Mark Jurkowitz, Amy Mitchell, Elisa Shearer & Mason Walker, *1. Democrats report much higher levels of trust in a number of news sources than Republicans*, PEW RSCH. CTR.: U.S. MEDIA POLARIZATION AND THE 2020 ELECTION: A NATION DIVIDED (Jan. 24, 2020), https://www.pewresearch.org/journalism/2020/01/24/democrats-report-much-higher-levels-of-trust-in-a-number-of-news-sources-than-republicans/; The level of trust in scientific institutions also varies quite dramatically in accordance to political affiliation, *see also* Cary Funk, Meg Hefferon, Brian Kennedy & Courtney Johnson, *Trust and Mistrust in Americans' Views of Scientific Experts,* PEW RSCH. CTR.: TRUST IN SCI. (Aug. 2, 2019) https://www.pewresearch.org/science/2019/08/02/trust-and-mistrust-in-americans-views-of-scientific-experts/ (More Democrats [43%] than Republicans [27%] have 'a great deal' of confidence in scientists – a difference of 16 percentage points."). For an explanation of the dynamics behind these divergences, *see generally* Dan M. Kahan, *Misconceptions, Misinformation, and the Logic of Identity-Protective Cognition* (Cultural Cognition Project, Working Paper No. 164, 2017).

14.   *See* ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 27-60, 34 (2017) ("Democratic competence refers to the cognitive empowerment of persons within public discourse, which in part depends on their access to disciplinary knowledge. Cognitive empowerment is necessary both for intelligent self-governance and for the value of democratic legitimation.")

15.   We adopt the term from *id.* .

need to endorse complex sets of causal and empirical knowledge. Modern societies delegate the task of establishing these complex factual determinations to epistemic authorities: the medical profession, the scientific community, etc. These knowledge-producing disciplines adopt procedures for reaching relatively uniform truths that they provide to decision-makers and citizens.[16] This uniformity is reached not by persuasion only but by disciplinary enforcement: by not publishing apostate scientists, by revoking medical licensing from heretic doctors, and by firing rogue engineers.[17] If they could not defer to these epistemic authorities on matters of complex facts, the governance ability of democratic regimes would be badly crippled.[18]

This deference to experts, however, is in tension with the other major goal and rationale of free democratic debate: to instill in all citizens the understanding that they are the authors of public policy and that they can engage in speech that will influence the policies affecting their lives. This demand for *democratic legitimacy* requires that citizens have an equal right to speak and be heard.[19] Formally giving some speakers higher priority than others—as occurs when deferring to epistemic authorities—runs against this major democratic demand.[20]

To make sense of this apparent paradox, the Article *in second step* goes on to claim that we should understand speech in democracies as occurring in two fundamentally different, though interdependent, spheres. In the realm of public discourse, we protect speech in a way that conforms to the demands of democratic legitimacy; in spheres of disciplinary knowledge production,

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16.   *See* KARIN KNORR CETINA, EPISTEMIC CULTURES: HOW THE SCIENCES MAKE KNOWLEDGE 1 (Harvard Univ. Press ed. 1999) (describing these practices as "[T]hose amalgams of arrangements and mechanisms—bonded through affinity, necessity, and historical coincidence—which, in a given field, make up how we know what we know.")..

17.   *See* POST, *supra* note 14 at 8. ("Scholarship requires not only a commitment to vigorous debate and critical freedom, but also and equally a commitment to enforcing standards of judgment and critical rigor. We rely on expert 'knowledge' precisely because it has been vetted and reviewed by those whose judgment we have reason to trust.").

18.   *See id.* ("If a marketplace of ideas model were to be imposed upon Nature or the American Economic Review or The Lancet, we would very rapidly lose track of whatever expertise we possess about the nature of the world.").

19.   This is the corner stone of Robert Post's canonical works on the First Amendment. *See* Robert Post, *The Constitutional Status of Commercial Speech, 48* UCLA L. REV. 1, 7 (2000) (Providing a concise iteration); for a similar position in the German debate see KONDRAD HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 48 (20th ed. 1999).

20.   Robert Post conceptualizes the relationship between democratic competence and legitimacy as paradoxical, *see* POST, *supra* note 14 at 34, ("Democratic *legitimation* requires that the speech of all persons be treated with toleration and equality. Democratic *competence*, by contrast, requires that speech be subject to a disciplinary authority that distinguishes good ideas from bad ones. Yet democratic competence is necessary for democratic legitimation. Democratic competence is thus both incompatible with democratic legitimation and required by it.").

we give the demands of democratic competence higher priority.[21] Because they create such a division, democracies can have their cake and eat it too. They can enjoy the fruits of democratic legitimacy by creating a space of free and equal speech (public discourse) while also engaging in the social division of labor and allowing knowledge-producing institutions to establish and enforce their specific truth norms and practices in their respective debates.

In a *third step*, we claim that the major harm of digital fake news is in its effect on public discourse. It is not that our epistemic institutions and professionalized processes have become specifically vulnerable to factual falsities. These institutions continue, by and large, to function as they did before. Instead, digital fake news is unprecedented in its potential to harm public discourse. It eats away at the tissue of common trust that links the participants in public discourse to the epistemic institutions and their respective disciplinary discourses.[22] Democratic competence, however, requires a certain level of trust in epistemic authorities by the participants in public debate (all of us).[23] This is true for two reasons: first, if citizens do not trust the knowledge produced by epistemic authorities, they are less likely to cooperate with policies based on such knowledge. Many of these policies, such as vaccination campaigns and recycling, however, require voluntary cooperation. Second, and more severely, if a minority distrusts epistemic authority and subscribes to fundamentally different epistemic norms, its members are likely to perceive majority decisions as fundamentally illegitimate.[24] In other words, epistemic distrust can severely undermine a sense of democratic legitimacy among large parts of society.

Having identified that the core of the issue is a lack of trust, not of truth, our *fourth step* is to show why trust in common epistemic authorities is specifically threatened under digitized speech conditions. In the pre-digital world, the unavoidable circulation of misinformation and disinformation in public discourse was counteracted by important societal forces that kept together the epistemic norms and fabric of society.[25] The most significant of these factors were civil society institutions, especially mass media gatekeepers. In the pre-digital era, the only way to reach wide audiences was to go through mass media organizations. Media elites, therefore, functioned as

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21.   *Id.* (Following the general thrust of Robert Post's argument showing that First Amendment doctrine follows this general division, protecting the egalitarian norm in public discourse and allowing for hierarchical speech norms in disciplinary knowledge spheres).

22.   *See infra* Sec. I.B. *See also* Peter Dahlgren, *Media, Knowledge and Trust: The Deepening Epistemic Crisis of Democracy*, 25 JAVNOST-THE PUBLIC 20, 26 (2018).

23.   *See id.* at 22; *see generally* MARK ANDREJEVIC, INFOGLUT: HOW TOO MUCH INFORMATION IS CHANGING THE WAY WE THINK AND KNOW (2013) (describing how the digital infoglut undermines shared knowledge which grounds political debate).

24.   This the reason why Post argues that democratic legitimacy requires democratic competence.

25.   *See infra* Section I.B.2.

effective–though not always beneficial–gatekeepers for the publishing and spread of information. This gave them the power to enforce certain epistemic norms.[26] They could maintain relatively common standards for verifying facts and widely shared trust in epistemic authorities.[27]

The advent of digital platforms has disrupted this power of civil society to limit the fragmentation of epistemic norms and its harmful effect, the unmitigated spread of false news.[28] Digitalization subverts the ability of media gatekeepers to control the distribution of information. While in a mass media ecosystem information is scarce and flows in one direction—from those who control the printing and broadcasting capacities—in the digital age, the ability to produce and distribute information has been democratized. In the digital age, it is not speech that is scarce, it is people's attention.[29] This effectively makes mass media actors just one of many voices in the communication sphere.

While the disruption of effective media gatekeeping enables the digital epistemic divide, the operating logic of digital platforms severely exacerbates this situation of epistemic fragmentation.[30] Crucial aspects of social communication have changed in the transition to the digital age. First, the logic of tailoring content undermines commonality of media experiences.[31] Digital platforms aim to personalize the media experience to each user through algorithmic gatekeeping and reinforcement loops.[32] Mass media, in contrast, created an experience of common information consumption.[33] If a country has three or four major newspapers, much of its population will be reading and engaging with the same pieces of news. Our Twitter and Facebook feeds, however, are tailored to us specifically and are programmed to

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26.   This is parallel to the way the state instills civility norms in citizens, *see generally* Gilad Abiri, *Moderating from Nowhere*, 47 B.Y.U. L. REV. 757, 763 (2021) (describing the ways in which the ability of the state to instill civility norms interacts with its free speech regime).

27.   *See infra* Pt. I.B.1.

28.   *See infra* Pt. I.B.2.

29.   Tim Wu, *Is the First Amendment Obsolete*, 117 MICH. L. REV. 547, 548 (2018) ("The most important change in the expressive environment can be boiled down to one idea: it is no longer speech itself that is scarce, but the attention of listeners.").Ulrike Klinger, *Mastering the Art of Social Media: Swiss Parties, the 2011 National Election and Digital Challenges*, 16 INFO., COMMC'N & SOC'Y 717, 722 (2013) (arguing that social media follows a "logic of virality").

30.   *See infra* Part I.B.2.e.

31.   *See* the discussion in *infra* note 142.

32.   Ulrike Klinger, *Mastering the Art of Social Media: Swiss Parties, the 2011 National Election and Digital Challenges*, 16 INFO., COMMC'N & SOC'Y 717, 722 (2013) (arguing that social media follows a "logic of virality").

33.   Robert C. Post, *Data Privacy and Dignitary Privacy: Google Spain, the Right to be Forgotten, and the Construction of the Public Sphere*, 67 DUKE L.J. 981, 1022 (2017) ("From a democratic point of view, the commercial success of newspapers was all to the good. It swept up the masses into the reading public and produced a sense of belonging that cannot be overemphasized").

cater to and reinforce existing preferences.[34] While the commonality of mass media kept us largely in the same epistemic community, the logic of tailoring divides us into ever-smaller social and epistemic subgroups. Second, the epistemic divide is made worse by social media's general goal to build and maintain social subcommunities and their tendency to privilege the emotive and identity-building effects of speech over its informative functions.[35] Social media platforms are designed to define, foster, and protect subcommunities (friendships, "follower-structures," groups, other personal links).[36] They are not built to create a digital public sphere of common concern. What is more, the technical makeup of social media services enables highly standardized forms of speech such as "liking" and "sharing." These standardized speech acts leave little room to bridge or question preexisting divides and differences of opinion, since they are poor in context, content, and communicative substance. If we no longer actually talk to and convey information to each other, there is not even the possibility of convergence.

Finally, in a *fifth* step, the article argues that we should target our policies at this digital epistemic divide rather than pursue truth-based solutions.[37] The proclivity of the digital media landscape and of digital fake news to create and deepen epistemic fragmentation is both more fundamental and more dangerous than the harms of false information. It is more *fundamental* because once it is accomplished, the lack of trust in common epistemic authorities will necessarily proliferate disagreement on a host of factual beliefs.[38] Since shared trust is what keeps us in relative agreement over complex factual questions, its fragmentation leads to increased disagreement. For this reason, we often find that individuals who think climate change is a fraud will also think that the 2020 election was stolen and that

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34.   *See e.g.*, CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA (2018) (describing the way social media creates echo chambers); ELI PARISER, THE FILTER BUBBLE: HOW THE NEW PERSONALIZED WEB IS CHANGING WHAT WE READ AND HOW WE THINK (2012) (describing how algorithmic personalization of internet news feeds creates "filter bubbles").

35.   Kasper Welbers & Michaël Opgenhaffen, *Presenting News on Social Media: Media Logic in the Communication Style of Newspapers on Facebook*, 7 DIGIT. JOURNALISM 45, 48 (2019) (observing a "subjectivity norm" in social media communication); Lars Kai Hansen, Adam Arvidsson, Fin Årup Nielsen, Elanor Colleoni & Michael Etter, *Good Friends, Bad News Affect and Virality in Twitter*, COMMC'N IN COMPUT. AND INFO. SCI. 34, 35 (2011). ("In a social media environment where social relations have effectively become a medium of communication, content that is more likely to activate such relations is also more likely to spread").

36.   Mark Zuckerberg, *Building Global Community*, FACEBOOK (May 5, 2021) https://www.facebook.com/notes/3707971095882612/ (describing Facebook groups as the central part of Facebook's mission).

37.   *See infra* Pt. II.

38.   *See infra* Pt. I.B.2.

COVID-19 vaccines are ineffective.[39] The epistemic divide is more *dangerous* because epistemic fragmentation can exacerbate political division to a point where it can no longer be bridged and productively used.[40] It is one thing to believe that the other side of a political issue holds wrong values and preferences; it is quite another to believe that they are either constantly lying or deeply manipulated. Such an opinion turns agonism into antagonism; it is bound to undermine belief in the legitimacy of the democratic process as such and threatens the very basis for social cooperation.

The Article proceeds in three parts. Part I lays down the core argument of the article, that the fundamental challenge of fake news is the digital epistemic divide and not the inaccuracy of information. Part II the examines the common approaches to the regulation of fake news through the lens of the digital epistemic divide and argues that we need to develop trust-based, rather than truth-based, solutions. Part III discusses solutions and conclusions.

I. THE HARM IN FAKE NEWS

A. *The common account and its limitations*

To propose effective and consistent legal responses to the crisis of digital fake news, what is needed is a more sophisticated and in-depth account of the social harms of digital misinformation. For this approach to work, it must go beyond the largely shared notion that factual falsehood somehow causes a host of problems and issues. This article therefore aims to contribute to answering and clarifying the question of the specific harm caused by widespread online misinformation. Only when that harm has been identified and delineated can legal systems fully and adequately respond to this issue.[41]

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39.   *See* Bastiaan T. Rutjens, Sander van der Linden & Romy van der Lee, *Science Skepticism in Times of COVID-19*, 24 GROUP PROCESSES & INTERGROUP RELS. 276, 276 (2021) ("It is likely that the antecedents of general COVID-19-related skepticism substantially overlap with the antecedents of climate change skepticism.").

40.   Hannah Arendt, *Truth and Politics*, *in* TRUTH: ENGAGEMENTS ACROSS PHILOSOPHICAL TRADITIONS 295, 313 (Jose Medina & David Wood eds., 2008) (refers to "facts" and factual conviction as the "ground on which we stand", expressing their fundamental character); Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149, 155 (2006) (showing how cognitions tend to align with cultural beliefs and allegiances, causing group polarization; this tendency to align goes both ways and would be unnecessary if factual convictions were not a strong motivational force.).

41.   *See Expert Opinion on Measures Against Disinformation Published*, LEIBNIZ-INSTITUTE FOR MEDIA RESEARCH | HANS-BREDOW-INSTITUT, https://leibniz-hbi.de/en/news/expert-opinion-on-measures-against-disinformation-published (last visited Aug. 18, 2022) (Representing a similar risk/harm-based approach).

1. The Harm of Misdirected Intentions

The ordinary view—implicit or explicit in most literature on fake news—locates the harm caused by fake news in such speech being factually false and thus conveying and causing false assumptions of fact.[42] Since we ground our desires, intentions, and actions on an appreciation of facts (what is the case), false factual assumptions, in misdirecting our intentions and actions, cause social disutility. What is more, factually untrue beliefs may lead to distorted/not thought-through normative conclusions.[43] Because I falsely believe an unpleasant event to be highly improbable, I delude myself into not taking the unpleasantness of the event quite as seriously.

This ordinary view, locating the harm in fake news in its potential to mislead human action, reverberates in important parts of many modern legal systems. In fact, based on this implicit view, factual truth is being ad-

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42.   In most accounts, the spread of inaccurate information is seen as the explicit harm of digital fake news, *see e.g.*, Verstraete et al., *supra* note 1, at 4 ("We are not alone in our concern over fakes news. Commentators voice unequivocal alarm over false yet popular information and the outcomes it helps generate. Falsehoods about vaccines … have created significant reluctance to be immunized in a range of countries."); Lili Levi, *Real Fake News and Fake Fake News*, 16 FIRST AMEND. L. REV. 232, 235 (2017) ("If public discourse is flooded with false information, at a minimum, voters will not know what to believe. Incompetence, demagoguery, and corruption in the public realm are a likely result. Moreover, as if this were not a sufficient threat to the democratic order, 'fake news' is also a threat, inter alia, to the stability of the financial markets as well, with the ability to disrupt markets "on an unprecedented scale."); Even those who mention the undermining of trust in epistemic institutions as a harm of digital fake news, see it as secondary and peripheral to the harm of falsity, *see e.g.*, Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 JOURNAL OF ECONOMIC PERSPECTIVES 211, 219 (2017) ("First, consumers who mistake a fake outlet for a legitimate one have less accurate beliefs and are worse off for that reason. Second, these less accurate beliefs may reduce positive social externalities, undermining the ability of the democratic process to select high-quality candidates. Third, consumers may also become more skeptical of legitimate news producers, to the extent that they become hard to distinguish from fake news producers. Fourth, these effects may be reinforced in equilibrium by supply-side responses: a reduced demand for high-precision, low-bias reporting will reduce the incentives to invest in accurate reporting and truthfully report signals."); Ari Ezra Waldman, *The Marketplace of Fake News*, 20 U. PA. J. CONST. L. 845, 851 (2017) ("Low-information voters, kept uninformed by falsehoods and narratives of false equivalencies, harden their political biases by selecting media that confirm their previous beliefs, regardless of whether those media report true or fake stories. This increases polarization, which both erodes trust in traditional reporting and further encourages selection of confirming media.").

43.   For a comprehensive literature review on hindsight bias and motivated reasoning, *see e.g.*, Kim A. Kamin and Jeffrey J. Rachlinski, Ex Post [not =] Ex Ante: Determining Liability in Hindsight, 19 L & HUMAN BEH. 89, 101 (1995) (showing the negligence finding of most participants to be heavily biased by their knowledge about the occurrence or non-occurrence of a given damaging event).; *see also* Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998); for a study on coherence bias, the tendency of human cognition to bring normative and factual beliefs in line with each other, *see* Dan Simon, Lien B. Pham, Quang A. Le & Keith J. Holyoak, *The Emergence of Coherence over the Course of Decision Making*, 27 J. OF EXPERIMENTAL PSYCH.: LEARNING, MEMORY, AND COGNITION 1250 (2001).

judicated on a daily basis in many legal contexts, such as in cases involving defamation, fraud, the false claiming of titles, and perjury.[44] In all these cases, statements of fact, if found to be false, are met with legal sanctions. The reason for these restrictions on speech is not falsehood as such[45] but its relevance to and negative effect on human decision-making processes (fraudulent statement causes legally cognizable harm such as a disadvantageous business decision;[46] defamatory statement causes other people to mistrust me and not interact or do business with me[47]) or on the functioning of a social institution (perjury erodes trust in and the effectiveness of court procedures;[48] false claiming of titles erodes the functioning of a positive award system[49]). In all these cases, false statements of fact are harmful because they actually or potentially prompt other people to act on false factual premises. The harm lies in the misdirecting of intentions and intentional action. Modern legal systems routinely regulate falsity insofar as it has an immediate relevance to the actions we take or to the extent it influences our dispositions. Adjudicating truth is far from unheard-of and can even be said to be one of the main functions of formal legal procedures (which serve not only to settle what ought to be done but also to determine—for the parties to the procedure—what is the case).

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44.   All of these contexts – except for the false claiming of titles – stay unchallenged even after United States v. Alvarez, 567 US 709, 723 (2012), ("Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment."); The same holds for other legal systems such as Germany, for example. *See* Strafgesetzbuch [StGB] [Penal Code], § 186, https://www.gesetze-im-internet.de/englisch_stgb /englisch_stgb.html (defamation); Strafgesetzbuch [StGB] [Penal Code], § 154-55, https:// www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html (perjury); Strafgesetzbuch [StGB] [Penal Code], § 267, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html (forgery); Strafgesetzbuch [StGB] [Penal Code], § 132a, https://www.gesetze-im-internet.de /englisch_stgb/englisch_stgb.html (false claiming of titles); Strafgesetzbuch [StGB] [Penal Code], § 132, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html (impersonation of government officials) and many more crimes make specific reference and criminalize categories and specific context of providing of false information.

45.   United States v. Alvarez, 567 U.S. 709, 709 (2012) (noting that falsity alone may not suffice to bring speech outside the First Amendment).

46.   *Id.* at 723. ("Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment.")

47.   *Cf.* Bryson Kern, *Reputational Injury Without a Reputational Attack: Addressing Negligence Claims for Pure Reputational Harm*, 83 FORDHAM L. REV. 253, 257 (2014) (explaining how "Damage to reputation lowers one's standing among one's peers and, at the extreme, may even destroy the ability to remain a part of the community itself. Damage to one's reputation may also endanger economic security, as it often impairs the ability to obtain or maintain employment, conduct business, or secure credit.").

48.   *Alvarez*, 567 U.S. at 720-21 (noting how perjury "undermines the function and province of the law and threatens the integrity of judgements that are the basis of the legal system.").

49.   *Alvarez*, 567 U.S. at 744 (Alito, J., dissenting) (noting how the proliferation of false claims harms the award system within the military).

However, most of these situations concern individual events and individual persons being negatively affected by decisions that they or someone else may make based on a piece of misinformation.[50] One could suggest that building on and extending the reach of these traditional legal tools would to a large extent address the crisis of fake news.[51] This could be done by stretching their applicability to new situations in which false statements of fact have a plausible connection to adversely affected decisions.[52] By creating new contexts in which the spreading of false factual information is more severely regulated (e.g., specific liability for information published by policy think tanks; for posts on social media; for information provided by lobbyists to members of the legislature), the common response could build on existing legal practice and speech regulations to tackle fake news.

2. The Limitations of the Common Account

There are, however, important obstacles to and limitations of the falsehood-harm approach to the issue of fake news. They are both theoretical and practical in nature. Truth-based approaches to regulating fake news are limited to statements of demonstrable fact, which rules out many candidates for legal regulation. Whenever statements do not relate to specific persons or singular, clearly identifiable events (e.g., Was an election rigged? How does climate change influence extreme weather conditions? Does immigration have an influence on public safety or crime? Which country provoked an armed conflict?) evaluative and factual elements become especially hard to separate and distinguish.[53] Regarding more general statements

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50.   *See also* Stephan Dryer et al., Disinformation: Risks, Regulatory Gaps and Countermeasures 35 (Landesanstalt Für Medien NRW 2021), https://www.hans-bredow-institut.de/uploads/media/default/cms/media/zb0k228_Leibnitz-Institute_LFMNRW_StudyDisinformation.pdf

51.   *See also* Johannes Buchheim, *Rechtlicher Richtigkeitsschutz*, 59 Der Staat 159, 165 (2020) (Ger.) (arguing that the existing torts and criminal prohibitions are united by their securing recipients' actions against manipulations through false information and suggesting that new – specific – legal instruments could be created along these lines for certain types of false collectively relevant disinformation); *See* Dryer, *supra* note 50, at 37 (noting that although existing legal frameworks pursue individual rights-related protection, there are legislative possibilities for safeguarding the basis of collective decision-making).

52.   *See, e.g.*, LOI n° 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information (last visited Feb. 11, 2022) (Fr.), https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000037847559 (noting an approach for specifically regulating the spread of factual falsehoods in the context of national elections due to their close proximity to the voting decision by specifically regulating the duties of online platforms and media outlets and the powers of the supervisory authorities in the three months before an election); *see also*, Conseil Constitutionnel, Decision N° 2018/773 § 23, 51, 91, https://www.conseil-constitutionnel.fr/decision/2018/2018773DC.htm (stressing the importance of the integrity of the voting process, the Constitutional Council has accepted these new restrictions under the condition that sanctions only apply to cases where the falsity of the information provided is manifest).

53.   *C.f.* Dryer, *supra* note 50, at 12 ("the simple interpretation of a relevant (untrue) statement as objectively false in- formation will regularly reach its limitations when assess-

and correlations, drawing the line between factual falsehood and evaluative disagreement—already a permanent and delicate issue in the adjudication of false claims regarding individual persons (defamation cases)—becomes an almost insurmountable difficulty. Judicial analysis and authoritative resolution of such disagreements on larger questions would overstretch the capabilities and proper limits of the judicial process.[54]

More importantly, falsehood-harm approaches to the regulation of collectively relevant fake news face significant normative and theoretical hurdles. Liberal and democratic legal regimes do not typically resolve disagreements on complex, collectively relevant issues through the judicial process.[55] This is so even if for some of these questions there is a truth of the matter, as we would claim for certain general, collectively relevant issues (e.g., Which of two countries caused a war? Does a country dispose of weapons of mass destruction? Does climate change exist? Did a genocide take place?). The adversarial character of proceedings highlighting the roles of the parties lends itself especially to disagreements to which the parties are specifically linked.[56] The important influence of the parties on the result of judicial proceedings (Which case is brought? Exactly which claims are made by the plaintiff? Which arguments are made? What is conceded by the defendant?) is plausible only under the assumption of a specific connection to the issue being litigated.[57] Without this link, third parties have little rea-

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ments and claims of facts are so intermingled that they can no longer stand on their own – which happens regularly").

54.   For a classical discussion of the limits of the judicial process, *see* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (claiming that adjudication – because of its specific form [proceeding through proofs and reasoned arguments presented by the parties before a disinterested third party] does not to lend itself to the solution of "polycentric" issues); our point here is similar, since it also assumes that there should be a specific link between the form (highlighting the parties' influence) and the substance of court proceedings, thus going against – already for a mere lack of information – the settling of general truths; *see also* Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1 (2009) (discussing how "legislative facts" and judicial deference turns on similar questions).

55.   The complex sets of disciplinary knowledge required to understand the mechanisms of climate change are exactly what Lon Fuller would have called "polycentric", spider-web-like issues, not well-suited for judicial settlement. Fuller, *supra* note 54, at 395 ("We may visualize this kind of situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole.").

56.   For a good exposition and justification of the dominating role of the parties and of adversary advocacy in judicial proceedings, *see* Daniel Markovits, *Adversary Advocacy and the Authority of Adjudication*, 75 FORDHAM L. REV. 1367, 1384 (2006) ("like democracy, the legal process legitimates the application of political power through the affective engagements it requires from the parties."); this affective engagement– at least in the eyes of third parties, however, presupposes some specific link of the parties to the matter being litigated.

57.   *C.f.* for this point the standing requirement derived from the Article 3 "cases" and "controversies" criterion. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("… our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" - an invasion of

son to accept the court's judgment or to perceive this mode of settling factual disagreements as legitimate. The alternative option of awarding the power to litigate collectively relevant factual claims to a select number of private actors would create important legal inequalities. Why should some citizens or legal units enjoy the power to litigate factual claims to which they have no better connection than any other legal actor? If the power to initiate such proceedings instead were granted to all citizens (citizen suit provisions), this issue would be replaced by the obvious factual inequalities in the ability to lead and finance such proceedings. Judicially fighting out collectively relevant truth would be a privilege enjoyed by only a few financially powerful social actors.[58]

The alternative of instituting a politically legitimized, public actor to initiate, lead, or implement such proceedings would call into question important values underlying free-speech doctrine in most liberal democracies. More and more collectively relevant issues would be authoritatively settled through formalized legal proceedings instead of open discussion.[59] Depending on where the line was drawn, this could lead to a highly formalized and official system of knowledge potentially at odds with the pluralist, open, and partially contradictory social mechanisms of knowledge production and distribution. In a liberal society, the law should provide mechanisms to resolve factual disagreements when they are legally relevant to the position and freedoms of individual persons as well as to the continuous functioning of democratic processes. But the law should not adjudicate and settle what counts as true for its own sake or where there is only a broad tendency of a statement to lead to misguided collective or individual action.[60]

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a legally protected interest which is (a) concrete and particularized, … and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" … Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . thee] result [of] the independent action of some third party not before the court." … By particularized, we mean that the injury must affect the plaintiff in a personal and individual way.").

58.   Similar problems and power imbalances come to bear when the "truth of the matter" is not fought out in court proceedings, but is instead left to private intermediaries to adjudicate; see for the already huge and problematic powers of digital speech intermediaries, *see* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1665 (2017) ("private platforms are increasingly making their own choices around content moderation that give preferential treatment to some users over others…. the main value we need protected within this private governance structure in order to maintain a democratic culture: fair opportunity to participate.").

59.   For the assumption that this would violate liberal free speech commitments, *see* United States v. Alvarez, 567 U.S. 709, 710) ("Permitting the government to decree this speech to be a criminal offense … would endorse government authority to compile a list of subjects about which false statements are punishable. … Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth. … there could be an endless list of subjects the National Government or the States could single out.")

60.   For the rejection of the "bad tendency-test" in US free speech doctrine, see Geoffrey R. Stone, *The Origins of the "Bad Tendency" Test: Free Speech in Wartime*, 2002 THE SUP.

Truth-focused regulation of misinformation would therefore have to be tailored to specific situations in which a close link can be established between a false statement and potentially or actually misled actions. This is not to disregard facts and the importance of factual assumptions for collective decision-making and social coordination. Like other forms of social coordination, liberal democracy rests on a sufficiently shared canon of factual knowledge.[61] However, belief in and abidance by this canon cannot directly be enforced through formalized legal procedures and sanctions without giving up the liberal commitments of the system.[62] Other *social* institutions, such as family, schools, universities, and mass media, are charged with constructing and conveying this canon.

B. *The main harm in fake news: epistemic divide and the erosion of epistemic norms*

The important limitations on fighting fake news and enforcing "truth" through formal legal processes, however, need not worry us too much. They are relevant and discouraging only if the core problem with the rapid and growing prevalence of online dis- and misinformation consists in such information being untrue and misleading. In this section, however, we argue that the main issue with fake news for modern democracies lies not with the un-truth and misleading character of individual pieces of information but with the overall epistemic divide they cause. The social media–propelled spread and prevalence of fake news in the digital realm seriously undermines epistemic common ground and common trust in epistemic institutions in society. Democratic decision-making, however, depends on sufficiently shared realities, commonality of epistemic norms, and trust in common epistemic institutions. The harm caused by online misinformation and its rapid spread through platform-type communication thus is similar to the societal harms caused by hate speech. While the latter undermines com-

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CT. REV. 411, 411 (The University of Chicago Press 2002) ("We have long recognized that the bad tendency test … was a misguided interpretation of the First Amendment"); For its rejection in German doctrine, see BVerfG, 1 BvR 2150/08, Nov. 4, 2009, https://www.bundesverfassungs gericht.de/SharedDocs/Entscheidungen/EN/2009/11/rs20091104_1bvr215008en.html ("The intention of preventing statements with content that is damaging or dangerous in their conceptual consequence rescinds the principle of freedom of opinion itself and is illegitimate").

61.   DRYER, *supra* note 50, at 36 ("A state deciding on what is true and what not is in conflict with the basic assumption that the negotiation of truth is a task that is in the hands of society itself. Truth is primarily negotiated and socially constructed through social discourse. Society also gives itself the rules of this negotiation process, which enables a shared basis of reality and thus societal knowledge, which is the basis for individual and collective action").

62.   *Cf.* ERNST-WOLFGANG BÖCKENFÖRDE, STATE, SOCIETY, AND LIBERTY: STUDIES IN POLITICAL THEORY AND CONSTITUTIONAL LAW 60 (J.A. Underwood trans., St. Martin's Press ed. 1991) (1976) ("The liberal secularized state lives by prerequisites which it cannot guarantee itself.").

monality of normative status among the citizen body,[63] the former under-mines commonality of the citizens' world. With less and less common ground to stand on, social coordination and cooperation among free and equal citizens is severely impaired. This basic fact is what should worry us about fake news. The drive toward extreme epistemic fragmentation is sub-stantially exacerbated by the operating logic of speech platforms.

1. The need for epistemic authorities and institutions

a. Why do democracies need common epistemic authorities?

Like any other type of human decision-making and action, democratic decision-making depends on the ability to judge the quality of ideas, to reach decisions, and to act based on such judgments. Environmental policies must be determined, economic sanctions against another country are adopt-ed or rejected, decisions on liability for certain harms must be reached. These decisions rely partly on factual questions. How do our emissions in-fluence climate change? Was there a violation of an ally's territory by a for-eign power? Was there a local spike in cancer cases caused by farmers' use of glyphosate? In all these matters of collective decision-making, some fac-tual calls must be made. Therefore, every democratic society must subject speech and competing ideas and claims "to a disciplinary authority that dis-tinguishes good ideas from bad ones."[64] This is the demand of democratic competence. Governing a modern state is a complex task. At any point in time many public issues including the effects of tax policies on economic growth, adequate vaccination policies, and investment in higher education require expert knowledge.[65] In the words of Robert Post, "[e]xpert knowledge is prerequisite for intelligent self-governance;"[66] this holds both for individuals and for people acting in concert. To address these issues, so-cieties require a set of trusted epistemic institutions whose speech on certain matters claims more authority than that of others.

If all that democratic competence required was a commitment to simple and easily observable factual truths (What is the temperature outside right now?) the demands of democratic competence would not be very controver-sial. As Hannah Arendt said, "freedom of opinion is a farce unless factual information is guaranteed and the facts themselves are not in dispute. . .

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63.   *See e.g.,* JEREMY WALDRON, THE HARM IN HATE SPEECH 39 (2012) (arguing that the main harm of hate speech is created "by visible, public, and semipermanent announce-ments to the effect that in the opinion of one group in the community, perhaps the majority, members of another group are not worthy of equal citizenship.").

64.   POST, *supra* note 14, at 34.

65.   *See generally* FRANK FISCHER, DEMOCRACY AND EXPERTISE: REORIENTING POLICY INQUIRY (2009) (defending the theory that the goal of institutional expertise is to assist citi-zens understand and discuss complex policy issues that influence them).

66.   POST, *supra* note 14, at 32.

Factual truth informs political thought."[67] However, judging the quality and factual grounding of ideas and proposals in public discourse is not a matter of simple factual truth. What democratic competence also demands is epistemic institutions that entail more than a commitment to brute and easily ascertainable fact. Instead, the policy competence of democratic states requires that we rely on complex sets of disciplinary knowledge.[68] Take the field of medicine. Medical knowledge "concerns far more than elementary matters of factual accuracy; [it] routinely turn[s] on complex questions of judgment."[69] When a malpractice suit is brought against a doctor, she must defend herself in accordance with the knowledge the medical profession presently avows.

We, as a society, rely on this ever-evolving body of complex knowledge to regulate ourselves and make decisions. That being said, it is clear that some of widely accepted medical knowledge is wrong in myriad unknown ways.[70] In this way, the law of malpractice puts state power behind a body of disciplinary knowledge even though we know this disciplinary knowledge to be partly incorrect and provisional.[71] In medicine, or in engineering, or in the legal process, the free play of opinions is routinely "consolidated into a singular determination of truth"[72] that grounds and guides the respective actions in question. When ideas and proposals materialize in concrete actions, competing claims to truth are necessarily set aside and have no claim to intersubjective bindingness. A need to settle for a set of established knowledge thus enters the stage whenever decisions on a course of action must be made. In a liberal society, such divergent practices are rightly tolerated to a degree, assuming there is full transparency to the patient and different doctors with different philosophies to choose from. However, for us to socially coordinate, in many other situations there is a need for intersubjective standards. We have to settle on what to teach in

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67. ARENDT, *supra* note 10, at 238.

68. POST, *supra* note 14, at 95 ("Expert knowledge is neither practical reason nor is it a collection of atomistic facts. Expert knowledge arises from the capacity to arrange experience in dependable and useful ways. It is produced through the application of complex disciplinary practices.").

69. Robert Post, *Truth and Disagreement*, *in* TRUTH AND DEMOCRACY 80 (2012).

70. This is similarly true for all forms of disciplinary knowledge production. This is the reason why some philosophers of science see refutability as the defining attribute of a scientific statement. *See generally* KARL POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY (2005) (developing the theory of falsificationism); the main difference is that in medicine the law of negligence and malpractice prevent unorthodox viewpoints from being applied in a clinical setting.

71. *See* POST, *supra* note 14, at 44 ("Just as commercial speech doctrine authorizes content discrimination to ensure that commercial information is not misleading, so malpractice law outside of public discourse rigorously polices the authority of disciplinary knowledge.")

72. *See* POST, *supra* note 69, at 80.

medical school, what to test on medical exams, what to assume as standard of care in malpractice suits, and so on.[73]

When making these decisions we do not throw the dice. Rather, we ground our judgment on trusted epistemic authorities: the medical profession, the engineering sciences, the "intelligence community."[74] Court procedures, like other procedures of authoritative knowledge determination, do not manufacture their own medical truths; they defer to the knowledge of the medical profession.[75] Someone wishing to build a bridge does not conduct an opinion poll on Main Street. Instead, he defers to the trained judgment of the construction engineer and her professional norms. In the process of doing so we routinely ascribe superior "expert knowledge" to certain institutions and actors while withholding this status from most other subjects and speakers.[76] In many circumstances we therefore formally (and naturally) privilege some speakers over others.

This need for epistemic authorities would be easy to accommodate if it did not clash with the other major goal of speech regimes in liberal democracies. This demand is that we allow people—regardless of rank, education, or any other measure—to speak freely to instill in the entire citizen body the understanding that they are able, if they choose, to affect public opinion and therefore public policy. This is the demand of *democratic legitimacy*.[77] It has a strong egalitarian component, suggesting that the right to speak and be heard, as a participatory right in public discourse,be distributed equally. Formally favoring some voices over others goes against this democratic legitimacy value.

We therefore find that the constitutional commitments and social conditions of speech in modern liberal democracies make seemingly paradoxical demands of our speech regimes.

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73.   *See* POST, *supra* note 14, at 44-5 ("[Malpractice…] underwrites the competence of experts. Doctors, dentists, lawyers, or architects who offer what authoritative professional standards would regard as incompetent advice to their clients face strict legal regulation. In such contexts, law stands as a surety for the disciplinary truth of expert pronouncements. By guaranteeing that clients can plan to rely on expert professional judgment, law endows such communication with the status of knowledge.").

74.   Although science is the modern knowledge producing institution par excellence, "all areas of social life" in modern societies are "run on expert processes and expert systems", *see* CETINA, *supra* note 16, at 1.

75.   *See, e.g.*, *Regents of Univ. of Mich. v. Ewing,* 474 U.S. 214 (1985) ("[w]hen judges are asked to review the substance of a genuinely academic decision… they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.").

76.   *See generally* Allen Buchanan, *Political Liberalism and Social Epistemology*, 32 PHILOSOPHY & PUBLIC AFFAIRS 95 (2004) (theorizing the epistemic division of labor between experts and citizens).

77.   *See supra* notes 19-20.

b. Making sense of seemingly contradictory speech norms:
public discourse vs. management

To make sense of these competing demands of our speech norms, it helps to group our normative intuitions about proper speech and belief practices into two separate, interrelated spheres.[78] While we structure public debate in a way that corresponds to the demands of democratic legitimacy, in "managerial" speech situations, our formal ascription of authority and belief follows the demands of democratic competence. In the terms of Robert Post, in the sphere of "public discourse," i.e., wherever we haven't defined the overall goals and functions of the respective speech situation,[79] all speech is equally protected so that diverse views can be fully expressed. Outside of public discourse, i.e., wherever the purpose of the respective speech situation is predefined and specified,[80] we defer questions of belief to our epistemic institutions, allowing them to "enforce their own distinct truth practices."[81] Discussion among several physicians in the operating room about how best to perform a heart transplant is not governed by public discourse speech norms. Instead, it is governed by the purpose of optimally treating the patient and structured by hierarchy and professional norms. Discussion will stop once the person responsible has made up her mind, and further speech will be formally excluded or irrelevant.

Similarly, in court procedures we do not follow egalitarian speech norms. In legal-normative issues, it is the judge who decides who speaks and when she has heard enough. We defer to the jury when it comes to determining the factual circumstances of a case (Who dunnit?).[82] When approaching issues of complex sets of scientific fact, we defer to the scientific community, as represented and introduced to the legal process by expert opinions.[83] When making these decisions of deferral, we do not apply a set

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78.   *See generally* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1986).

79.   *Id*. ("This suggests that underlying public forum doctrine lies the notion of public discourse and decision making which occurs without government purpose or design.").

80.   *See* ROBERT POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 4 (1995) ("Management arranges social life for the achievement of given objectives").

81.   Robert Post, *supra* note 69, at 81.

82.   It is clear, however, that juries are not better at determining facts, but rather that someone must do so. *See* Dale W. Broeder, *The Functions of the Jury Facts or Fictions*, 21 U. CHI. L. REV. 386, 389 (1953) ("In those cases where the jury is confined to passing on issues where "reasonable men may differ," therefore, the jury is to a considerable degree exercising a policy-declaring or law-making function. In such cases, the jury makes policy in the guise of "finding the facts.").

83.   *See* Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 55 (1901) ("Therefore, when any conflict between really contradictory propositions arises, or any reconciliation between seemingly contradictory propositions is necessary, the jury is not a competent tribunal. Moreover, there can be no competent tribunal, except one composed of those who have possessed themselves of the specialized

of egalitarian, public discourse–like speech norms; we simply defer to the epistemic institution's ways of reaching and settling for shared beliefs about the world. When deferring to scientific knowledge, we thus accept formalized differences in authority (a renowned professor's article in *Nature* counts more toward "scientific knowledge" than a PhD student's first term paper)[84] that we would not easily accept in public debate (imagine the same professor in the audience at a town hall meeting demanding to speak first and speak longer than a layperson in the audience because of her superior experience with the subject matter). If we defer certain factual questions to the intelligence community—e.g., bring them before the Foreign Intelligence Surveillance courts (FISC)[85]—we defer to an institution and a set of knowledge that is organized according to the logic of authority. ("Did the superior authorize disclosure of a piece of information before the court?") We do not allow free and unmitigated debate. When deferring our judgment of "who dunnit" to the jury, we accede to whatever constellation of power, influence, and authority is prevalent among the jurors. Our point is that in all these circumstances, the occasions for and weight of speech and speakers are distributed very unequally, according to the defined needs and contexts of the speech situations, the speech's quality in serving these needs, and the speech norms of the knowledge community in question. Such speech thus is entirely governed by the demand for democratic competence.

By subdividing speech practices into these two very different spheres, democracies can both have their cake and eat it too. They can preserve the demand of legitimacy in public discourse while formally subscribing to the authority of epistemic institutions—and the fruits of the social division of labor—in the managerial realm.

c. The locus of the challenge of fake news: public discourse

If we accept this theoretical picture, we can see more clearly where the current concern with fake news is located and where it is not. The social media–propelled distribution of fake news is not primarily a threat to the

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experience and the trained powers of observation necessary to bring to a valid test the truth of the various propositions offered.").

84.   *See* Wolfram W. Swoboda*, Disciplines and Interdisciplinarity: A Historical Perspective, in* INTERDISC. IN HIGHER EDUC. 49, 78–9 (Joseph J. Kockelmans Ed., 1979) ("The institutional structure of scholarly journals serves to reinforce disciplinary hierarchies: at the lowest level, the evaluator, reader, or reviewer is implicitly considered to be qualified to make judgments about a contribution at a level above that of the contributor himself. From there the hierarchy extends to the editorship, and the selection processes for filling the intervening positions evidently reinforce the hierarchizing and orthodoxy of the discipline in question.").

85.   *About the Foreign Intelligence Surveillance Court*, U.S. FOREIGN INTEL. SURVEILLANCE CT. (last visited Aug 18, 2022) https://www.fisc.uscourts.gov/about-foreign-intelligence-surveillance-court ("The Court entertains applications made by the United States Government for approval of electronic surveillance, physical search, and certain other forms of investigative actions for foreign intelligence purposes.").

functionality of knowledge-producing institutions.[86] These processes (found in the medical profession, engineering sciences, intelligence community, legislative process, court procedures, etc.) still function properly throughout liberal democracies and seem rather firmly insulated against a dissolution of their epistemic norms. The consensus among climatologists about the main mechanisms and drivers of climate change is probably greater than it has ever been.[87] Virology is fairly certain of the risks and virtues of COVID-19 vaccines, despite the amount of fake news circulated on this issue in general public discourse having never been greater.[88] Lawyers and judges are trained and socialized to accept only those propositions as (procedurally) true that have been introduced according to the rules of procedure. The formality and rationalizing logic of administrative procedures, in regulatory agencies such as the EPA, are organized such that they, as a matter of daily routine, defer to intersubjectively ascertainable, expert knowledge.[89] In any case, none of these knowledge-producing and knowledge-determining institutions have a particular vulnerability to digitally distributed fake news. Surely, the individuals within these institutions (administrators; doctors who are COVID deniers, etc.) seem to exhibit the same vulnerability to digital misinformation as does the general public.[90] However, the rather formalized and stratified epistemic procedures in place within these institutions seem to be sufficiently robust to enforce largely homogenous epistemic norms and thus shield their operative output from the influences of misinformation.[91] The ways in which democratic societies formally produce and provisionally

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86. This is evident by the ability of the scientific community to reach consensus on debates that are rife with disinformation, such as climate change and Covid-19. *See* Naomi Oreskes, *The Scientific Consensus on Climate Change*, 306 Science 1686 (2004); Francesco Pierri, Brea L. Perry, Matthew R. DeVerna, Kai-Cheng Yang, Alessandro Flammini, Filippo Mencer & John Bryden, *Online Misinformation is Linked to Early COVID-19 Vaccination Hesitancy and Refusal*. 5966 Sci. Reports 12 (2022) https://doi.org/10.1038/s41598-022-10070-w. These (and many other) instances of consensus among experts show that the ability of scientific disciplines to produce knowledge is relatively unhampered.

87. Orsekes, *supra* note 86, at 1686 ("But there is a scientific consensus on the reality of anthropogenic climate change. Climate scientists have repeatedly tried to make this clear. It is time for the rest of us to listen.").

88. *See* Pierri et al., *supra* note 86 (discussing the relationship between the prevalence of vaccine misinformation and refusal to get vaccinated).

89. *See* U.S. Environmental Protection Agency, Expert Elicitation Task Force White Paper (August 2011) https://meridian.allenpress.com/jfwm/article-supplement/210492/pdf/10_3996052017-jfwm-041_s7.

90. *See* Matt Motta & Timothy Callaghan, *The 1 in 10 U.S. Doctors with Reservations About Vaccines Could Be Undermining the Fights Against COVID-19*, The Conversation (Apr. 5, 2022 at 8:29 AM) https://theconversation.com/the-1-in-10-u-s-doctors-with-reservations-about-vaccines-could-be-undermining-the-fight-against-covid-19-179929 (discussing how 1 in 10 U.S. doctors with reservations about vaccines could be undermining the fight against COVID-19).

91. *See e.g.,* Pierri et al., *supra* note 88; U.S. Environmental Protection Agency, *supra* note 89.

settle on a set of directly action-relevant knowledge thus seem largely unaffected by any recent developments.[92]

The problem, instead, lies in fake news' broader and less direct effects on general public discourse.[93] For a society to govern itself, it is not sufficient that a multitude of social subsystems and their respective ways of knowledge production exist.[94] In every society, there also must exist a common and public sphere, where all these subsystems and their functions overlap, can be discussed, and may be recalibrated and intentionally redirected and organized. The many sub-threads of society must come together somewhere. This is where the public takes place.[95] To put it in simple terms, the knowledge produced in physics departments about the driving forces of climate change is of little value if it stays in the academic ivory tower. For this knowledge to be infused into public policy, there must be a certain awareness of these general mechanisms among the public, as transmitted to them by journalists, [96] public statements of scientists, and parliamentary or court proceedings. For public discourse to function properly we need some minimal degree of basic trust by the participants in public discourse (all of us) in our knowledge-producing institutions and procedures.[97] This need for

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92. This may well be part of the reasons why few studies have so far been able to demonstrate societal harms and factually false convictions to have been directly caused by online misinformation. *See* Andreas Jungherr & Ralph Schroeder, *Disinformation and the Structural Transformations of the Public Arena: Addressing the Actual Challenges to Democracy*, 7 SOCIAL MEDIA + SOCIETY 1 (Jan. 21, 2021) https://journals.sagepub.com/doi/full/10.1177/2056305121988928.

93. *Cf.* Jungherr *supra* note 92; STEPHAN DREYER ET AL., DISINFORMATION RISKS, REGULATORY GAPS AND ADEQUATE COUNTERMEASURES, https://www.hans-bredow-institut.de/uploads/media/default/cms/media/zb0k228_Leibnitz-Institute_LFMNRW_StudyDisinformation.pdf ("To date, no indications have been found that disinformation could lead to changes in actual opinion (in the table this would be on the effect level of persuasion). What could be shown, though, is that already existing views of individuals can potentially be reinforced as a result of disinformation (confirmation bias)").

94. *See generally,* NIKLAS LUHMANN, SOCIAL SYSTEMS (John Bednarz, Jr. & Dirk Baecker trans., Stanford University Press 1995*)* (1984) (showing that society is made out of a variety of social systems with distinct identities and operation logics*).*

95. For the canonical discussion on the idea of the public sphere and of its historical emergence, *see* CHARLES TAYLOR, *Liberal Politics and the Public Sphere*, *in* PHILOSOPHICAL ARGUMENTS 257–87 (1995);*see also* CARL SCHMITT, CONSTITUTIONAL THEORY 272 (2008) ("'People' is a concept that becomes present only in the public sphere. The people appear only in the public, and they first produce the public generally. People and public exist together; no people without public and no public without the people.").

96. For a crisis of trust in this regard *see* Gallup *supra* note 12.

97. Anthony Giddens describes this relationship of trust well when he says "[m]ost laypersons consult "professionals"—lawyers, architects, doctors, and so forth—only in a periodic or irregular fashion. But the systems in which the knowledge of experts is integrated influence many aspects of what we do in a continuous way.… I know very little about the codes of knowledge used by the architect and the builder in the design and construction of the home, but I nonetheless have "faith" in what they have done. My "faith" is not so much in them … as in the authenticity of the expert knowledge which they apply—something which I cannot

basic trust in epistemic institutions in public discourse corresponds with formal deference to epistemic authority in managerial discourse. It bridges the gap between the various knowledge-producing institutions and procedures in society, on the one hand, and the public at large, on the other hand. For effective and sustainable collective action and government responses to many phenomena (health crises; climate change; natural disasters), it is not enough for law to allow the medical field or the climate sciences to establish a body of disciplinary knowledge. It is also necessary for enough of the citizen body to trust the authority of these institutions. Without such basic trust among the public, the processes and output of social knowledge production, which are used and referred to in democratic decision-making, would be in complete disjunction from the democratic sovereign (located and active in public discourse).[98] In the long run, a lack of such trust threatens to alienate large parts of the population from the processes of social knowledge production and collective decision-making, thus threatening overall democratic legitimacy.[99]

What is more, in liberal societies, the implementation and effectiveness of public policies depend to a large degree on the cooperation of the citizenship at large.[100] This social cooperation is based on individual members of society sharing in the overall goals and factual assumptions of the policies to be implemented. A liberal state cannot impose or enforce its public policies against a relevant number of dissenters without giving up its liberal character.[101] There is no better example of this need for voluntary so-

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usually check exhaustively myself." It is this sense of "faith" that is challenged by digitalization. *See* ANTHONY GIDDENS, THE CONSEQUENCES OF MODERNITY 26 (2012).

98.   *See* James Madison, *Public Opinion,* NAT'L GAZETTE (Dec. 19, 1791), *in* 14 JAMES MADISON, THE PAPERS OF JAMES MADISON 170, 170 (Robert A. Rutland & Thomas A. Mason eds. 1977) https://founders.archives.gov/documents/Madison/01-14-02-0145 ("Public opinion sets bounds to every government, and is the real sovereign in every free one."). Even a thinker like Schmitt agrees on this point, *see* SCHMITT, *supra* note 95, at 257 (defining democracy as "the rule of public opinion" or "government by public opinion").

99.   If citizens do not believe the foundational epistemic norms that ground public discourse, it follows that they will not believe in their ability to influence public debate through speech. *See* Post, *supra* note 19, at 7 ("The basic idea is that democratic legitimacy depends upon citizens having the warranted belief that their government is responsive to their wishes. Public discourse consists of the various kinds of communicative action to which citizens must have unrestricted access if this belief is to be sustained.").

100.   *See* Charles Taylor, *Why Democracy Needs Patriotism*, FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM 119, 120 (Joshua Cohen Ed.., 1996) ("A citizen democracy can only work if most of its members are convinced that their political society is a common venture of considerable moment and believe it to be of such vital importance that they participate in the ways they must to keep it functioning as a democracy.").

101.   Ralf Poscher, *The Ultimate Force of Law: On the Essence and Precariousness of the Monopoly on Legitimate Force*, 27 RATIO JURIS 311, 316 (Aug. 9, 2016) ("Although physical force has the advantage of being universally applicable, it is also a commodity that must be handled with extreme care, since it is not only a limited resource, but also one that is both expensive to entertain and costly for those against whom it is used. What is more, exerting it has the potential to proliferate from one case to the other and can thus easily spiral out

cial cooperation than the slowing and halting vaccination campaigns in most Western democracies during the COVID-19 pandemic.[102] Widespread mistrust in epistemic institutions and norms among the populace severely threatens the policy competence of liberal states even when formalized knowledge production stays largely unaffected.

2. Digitalization and the Subversion of Epistemic Authorities

Given that liberal democracies depend on the existence of commonly trusted (and hopefully trustworthy) epistemic institutions, we must turn to asking whether and how digitalization shifts the social conditions of sufficiently widespread trust in common epistemic institutions. In all of this, we must bear in mind that misinformation and disinformation have always been a part of public discourse.[103] False claims are spread both earnestly by individuals and groups that believe them to be true and by those aiming to promote certain goals, be they political, commercial, or personal.[104] In an ideal type of modern society, a wide variety of institutions are counteracting the spread of socially harmful false information. Some areas of law, such as libel and defamation torts and the crimes of impersonation, are meant to deter certain types of harmful false speech. To a degree, the law, through its rules of procedure and evidence, through its choice and types of experts heard in court, thus establishes standards and procedures for ascertaining factual truth, i.e. epistemic norms.[105] However, in liberal states, the majority of the work to maintain trust in common epistemic institutions is done by civil society institutions, not legal ones.[106] In this section, we will describe how the ability of these social institutions to enforce epistemic norms and promote

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of control, as we can witness paradigmatically when protest rallies turn violent once the police uses force against some of the participants.”*see also* Bryan S. Turner, *Böckenförde Paradox*, *in* THE WILEY-BLACKWELL ENCYC. OF SOC. THEORY (Bryan S. Turner Ed., 2017) (Discussion the so-called Böckenförde paradox, which states that “the secular liberal state is based on prerequisites or values that it cannot guarantee itself”).

102.   *See* Pierri, *supra* note 86 (discussing the relationship between the prevalence of vaccine misinformation and refusal to get vaccinated).

103.   *See* Burkhardt, *supra* note 10, at 5 (“Fake news is nothing new”).

104.   This is the common distinction between misinformation and disinformation, *see* Don Fallis, *Mis-and Dis-Information*, *in* THE ROUTLEDGE HANDBOOK OF PHILOSOPHY OF INFORMATION 340 (Routledge 2016).

105.   This establishment of epistemic norms through the law is parallel to the way in which the state instills civility norms in its citizens. *See generally* Abiri, *supra* note 26, at 3 (describing the ways in which the ability of the state to instill civility norms interacts with its free speech regime).

106.   Stephan Dreyer, Elena Stanciu, Keno Christopher Potthast & Wolfgang Schulz, *Disinformation Risks, Regulatory Gaps and Adequate Countermeasures*, HANS-BREDOW-INSTITUT 36 (2021), https://www.hans-bredow-institut.de/uploads/media/default/cms/media/zb0k228_Leibnitz-Institute_LFMNRW_StudyDisinformation.pdf (“In the very moment that the state dictates what is true and what is false, freedom ends. For legislative activities in the area of the freedom of expression, this means that these can only be carried out selectively – if at all – and limited to specific hazards ….”).

widespread trust in common epistemic institutions is severely impaired by the rise of digital platforms. Specifically, we argue that the scale and speed of the spread of disinformation, the lack of effective gatekeeping and curating, and social media's drive toward emotive speech and ever-more-tailored experiences are game-changers and pose anew a seemingly old problem. The heart of this problem is a growing epistemic divide, not falsity.

a. From Gatekeeping to Gate Watching

Legal institutions such as courts, legislative bodies, and the rules that bind them, have a very limited ability to enforce epistemic norms. In the pre-digital era, the work of establishing and enforcing common epistemic standards and norms was to a great extent achieved by customs, norms, and institutions of civil society.[107] This happened in many ways, the most notable factor in this process being that media elites would exclude information inconsistent with their fact checking standards and other epistemic norms.[108] Imagine an anti-vax campaign without social media and messaging apps. The only way for anti-vaxxers to reach a mass audience would have been to go through mass media (editors, journalists, media owners). In this way, mass media institutions and their elite staff would serve as gatekeepers to control the information accessible to the general public.[109]

The type and manner of gatekeeping vary across time and different media ecosystems and has undergone fundamental changes with the advent of digital media. In the pre-digital mass media ecosystem the structure of

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107.   *See* Ashley A. Anderson, Dietram A. Scheufele, Dominique Brossard & Elizebeth A. Corley, *The Role of Media and Deference to Scientific Authority in Cultivating Trust in Sources of Information About Emerging Technologies*, 24 INT'L J. PUB. OP. RSCH. 225, 232 (2012) ("Our findings regarding media use and its role in cultivating trust in institutional sources of information may be due to the heavy dependence by the press on elite institutional sources in its reporting. The relationship between public affairs media use and trust in scientists and governmental agencies indicates that people develop trust in both types of institutions when they encounter elite sources in public affairs media."); Matthew C. Nisbetet al., *Knowledge, Reservations, or Promise? A Media Effects Model for Public Perceptions of Science and Technology*, 29 COMMC'N RSCH. 584, 604 (2002) (""Newspaper use and science television use decrease reservations [about science] directly.").

108.   *See* Peter Weingart & Lars Guenther, *Science Communication and the Issue of Trust*, 15 J. SCI. COMMC'N at 8, 9 (2016) ("To put it more generally: if the 'contemporary media environment' is characterized by the disappearance of trusted gatekeepers who used to have the task of quality control as well as by the "convergence of genres of information, particularly the blending of advertising and informational content" [Metzger et al., 2003, p. 295], neither trust in the medium nor credibility of the message is likely to occur. Credibility of communication and trust in the communicator are highly important in connection with science, arguably even more important than in any other area of social life.").

109.   Gatekeeping is the "process of culling and crafting countless bits of information into the limited number of messages that reach people each day . . . . People rely on mediators to transform information about billions of events into a manageable subset of media messages." PAMELA J. SHOEMAKER & TIMOTHY VOS, GATEKEEPING THEORY 1 (2009).

information power used to be "asymmetrical and unidirectional."[110] The ability to print or broadcast was scarce and heavily centralized, and what was printed or broadcast was sent out to the consumer ready-made. Due to the limitations and costs of broadcasting technology, the dissemination of information required significant capital investments and the centralized production of information, behind which typically stood high-level capital concentration (news networks, Hollywood studios, NPR).[111] Mass media therefore created a "technological bottleneck, and the people who control mass media are gatekeepers controlling its use."[112] Before the rise of digital media, this bottleneck enabled mass media actors to be the "main institutional vehicle for regulating and enabling expression within society."[113] Since the channels of communication were limited, the ability of mass media to function as regulative gatekeepers of public discourse was very significant. The gatekeepers (journalists, editors, owners) controlling the production processes in print and broadcast media decided on what topics were being discussed on a relevant scale and which content could be released to the audience.[114] These decisions were not made by laypeople but by media professionals who bore editorial responsibility for the contents distributed.

Due to this technological setup, edited news media played a central role in the regulation of speech in modern democracies. The journalists, editors, and owners of edited news media controlled the production and curation of "news." In such a media ecosystem traditional news media was one of the main tools through which civil society could and would promote and "enforce" the epistemic norms of the community. If a person or group wanted to reach a broad audience, the only path open to them was controlled by the gatekeepers. It followed that if media actors shared a broad understanding of what speech was likely to be false, which standards of fact-checking were adequate, and which institutions or speakers were to be trusted, then they could simply exclude from public discourse speech and speakers inconsistent with these standards.

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110.   *See* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 9 (2004)

111.   *See* Bernard Enjolras & Kari Steen-Johnson, *The Digital Transformation of the Political Public Sphere: A Sociological Perspective*, *in* INSTITUTIONAL CHANGE IN THE PUBLIC SPHERE: VIEWS ON THE NORDIC MODEL 99, 102 (Fredrik Engelstad et al. eds., 2017) ("Whereas mass media communication required centralized means of information production and large investments in physical capital…").

112.   Balkin, *supra* note 111, at 9.

113.   Enjolras & Steen-Johnsen, *supra* note 110, at 104-5.

114.   AXEL BRUNS, GATEWATCHING: COLLABORATIVE ONLINE NEWS PRODUCTION 11 (2005) ("[G]atekeeping simply refers to a regime of control over what content is allowed to emerge from the production processes in print and broadcast media; the controllers [journalists, editors, owners] of these media, in other words, control the gates through which content is released to their audiences.").

b. The Digital Media Ecosystem

With the advent of digitalization, the role of traditional media in society gradually transformed from "gatekeeping" to "gatewatching."[115] Compared with centralized mass media controlled by relatively few, internet-based media are highly decentralized and provide more comprehensive access to information production and distribution. This transformation can be boiled down to one idea: "it is no longer speech itself that is scarce, but the attention of listeners."[116] In a media ecosystem with a limited amount of speech, mass media could effectively function as gatekeepers. However, in the digital media ecosystem, speech is never scarce.[117] Through this process, the role of mass media is gradually demoted to mere gate watching. To gate watch is to not have control of the gate, but rather to rely more on the public as "selectors and filters of content."[118] Mass media become merely one set of voices (albeit an extremely important one) in what is being discussed and reaches the public.

The gatekeeping function of mass media has been undermined by digitalization in two ways. Firstly, on the surface, the business model of traditional mass media was severely hit by the shift of readers to digital platforms.[119] Secondly, on substance, traditional mass media's power to enforce the epistemic norms of speech is greatly diminished.[120]

c. The Parallel Rise of Hate Speech and Fake News

The weakening of civil society gatekeeping institutions unveils an interesting common thread between the issues of hate speech and fake news (or dis/misinformation): the explosion in the growth and impact of both phenomena[121] is related to the fact that digitalization has undermined the ability of civil society (in particular the mass media) to influence public dis-

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115.   *See generally* Enjolras & Steen-Johnsen, *supra* note 111, at 106-7; *See generally* BRUNS, *supra* note 113 (describing the new phenomenon of gate watching.).

116.   *See* Wu, *supra* note 29, at 549.

117.   *See id.*

118.   Enjolras & Steen-Johnsen, *supra* note 111, at 105.

119.   *See* Jack M. Balkin, *How to Regulate (And Not Regulate) Social Media*, 1 J. Free Speech L. 71, 79 (2021) ("one side effect of market incentives has been undermining other public sphere institutions—in particular, journalism—and the advertising-based business models that have traditionally sustained journalism.").

120.   *See supra* Part I.A.

121.   *See generally* Bertin Martins, Luis Aguilar, Estrella Gomez-Herrera & Frank Mueller-Langer, *The Digital Transformation of News Media and Rise of Disinformation and Fake News*, 14 (2018) ("Much of this evidence points a finger at social media sites, and online news distribution sites in general, as the main sources of rising concerns about fake news, false news and the quality of news."); *See generally* Matthew Williams, *Hatred Behind the Scenes: A Report on the Rise of Online Hate Speech* (2019) (describing the rise of online hate speech).

course.[122] While false speech has always been, and always will be, a major part of any public discourse, what is new due to digitalization is the inability of the old gatekeepers to resist its promulgation and spread. The same holds for the prevalence and growth of hate speech.

In the case of hate speech, what is at stake is the ability of civil society institutions to reinforce civility norms that maintain political communities by protecting against aggressive exclusion from the citizen body and the public eye.[123] In the case of fake news, what is diminished is mass media's and other gatekeepers' ability to instill what can be called epistemic norms:[124] that is, relatively common standards for verifying facts and trust in a common set of epistemic institutions.

Like civility norms, epistemic norms can be understood only from the internal point of view of a culture or community.[125] Individuals attain understanding of these norms through a process of socialization into a particular culture. Different communities in a particular polity often possess different (epistemic) norms, which may lead to clashes. The classic example is scientific vs. religious truth.[126] However, in the same way civil society and—to a lesser degree—the state, regulates and enforces basic civility norms among citizens, so do they form and enforce epistemic norms.[127] Most clearly this happens in the educational system, but on other levels at well. As children we learn from our parents in which circumstances it makes sense to ask "why" and at which point to stop the inquiry. As subjects of tort law, we're expected to exhibit a duty of care and are sanctioned if we didn't see coming events that were foreseeable.[128] These epistemic

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122.   *See generally* Abiri, *supra* note 26 (showing how the ability of civil society to enforce norms has been undermined by digitalization of media).

123.   *See generally id.*

124.   *See e.g.,* Pollock, *Epistemic Norms*, 71 Syntheses, 61 (1987) (describing epistemic norms).

125.   *See* Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 Wm. & Mary L. Rev. 267, 286 (1991) (We follow Post, who defines a community "as a social formation that inculcates norms into the very identities of its members. So far from being considered autonomous, persons within a community are understood to depend, for the very integrity and dignity of their personalities, upon the observance of these norms.").

126.   In simplified terms, science replaced established religion as the major source of knowledge in modern societies. *See* William Bristow, *Enlightenment*, in The Stanford Encyclopedia of Philosophy (Fall 2017 ed.), https://plato.stanford.edu/archives/fall2017/entries/enlightenment *(*"Enlightenment philosophy tends to stand in tension with established religion, insofar as the release from self-incurred immaturity in this age, daring to think for oneself, awakening one's intellectual powers, generally requires opposing the role of established religion in directing thought and action.").

127.   *See* Abiri, *supra* note 26, at 786–87 (describing the ways in which the state, directly through tort law and indirectly through public education, enforces civility norms.).

128.   LII / Legal Information Institute, *Negligence*, https://www.law.cornell.edu/wex/negligence (last visited Aug. 23, 2022) ("Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's

norms do not necessarily enable effective truth-finding, and they have no necessary relationship to modern scientific or humanistic institutions. In fact, in many societies today, the main epistemic norms enforced by civil society and the state are utter trust of the state (or the party) or other fundamental authorities.[129] However, in modern liberal democracies, the most common epistemic norms build on the trust of expertise produced by modern scientific and humanistic institutions, and are designed to be at least somewhat independent of the state and political power.[130] This builds on the hope that this deferential strategy will lead to better knowledge of the world than treating knowledge as an object of political fiat. Despite this underlying hope—that we in fact have epistemic norms up to the task and somewhat in line with reality—we, of course, can never be certain of the quality of our epistemic norms and epistemic institutions.

3. The Digital Epistemic Divide

This skeptical reminder leads us to our central—and somewhat counterintuitive—claim: the problem with fake news is less that it is false and more that it undermines epistemic community and common trust in epistemic institutions. This unveils a striking parallel to the harm caused by hate speech: just as hate speech threatens political community by aggressively excluding individual persons or entire groups from the public sphere (by denigrating them in the eyes of others; by withholding basic recognition of them as equal; by inciting hatred and violence by others; by destroying a sense of self), the digital proliferation of fake news seriously threatens epistemic community. As a result, more and more people lose the basic ability to exchange arguments and convene on a sufficiently shared reality, threatening their very ability to socially coordinate.[131] It is important to note that

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conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.").

129.   The most totalitarian of these regimes is North Korea, *See* Dean J. Ouellette, *Understanding the "Socialist Tourism" of North Korea Under Kim Jong Un*, NORTH KOREAN REV., Spring 2020, at 55, 58 (discussing the idea of Stalinist epistemic norms centralized on the infallibility of the leader.).

130.   For a discussion of why liberal regimes and full state control of knowledge production are antithetical, *See* POST, *supra* note 15, at 33 ("A state that controls our knowledge controls our minds. Because contemporary Western societies are in one sense or another ruled by knowledge and expertise, a state that can manipulate the production of disciplinary knowledge can set the terms of its own legitimacy. It can undermine the capacity of citizens to form autonomous and critical opinions. It can make a mockery of the obligation of democratic government to be responsive to the views of its citizens.").

131.   DREYER ET AL., *supra* note 106, at 7 (To that end it may make sense socially that pats of society develop their own practices of reality construction, so that for instance the actual absurd decision of a parliament to accept human-created climate change (whether it happens or not is of course not within the control of the parliament), holds an important function that marks a common understanding of reality and develop future action from that common ground.").

these harms unfold independently of the question of falsity and of which side is holding "the truth."[132]

Focusing on the issue of epistemic fragmentation offers important explanatory, analytical, and problem-solving advantages compared to the truth-based view. *First*, this way of approaching the issue helps explain why many people are worried and even angered by the prevalent spread of fake news[133] even when it has no immediate import for their own social realities and experiences. Deep-running epistemic divides within society are fundamentally disquieting since they threaten social cooperation. It is thus unsurprising that the concern with fake news goes far beyond those instances where our lives are immediately affected by falsehoods and the misled actions they cause.

Second, on an analytical level, fragmentation-based analysis of the problem is more straightforward and epistemically less demanding. Even when we don't know which side is correct, we can still analyze the dynamics of fake news unfolding. While it is a (likely) possibility that weakened gatekeeping negatively affects the overall distribution of true knowledge in society, we know for sure that it will lead to more epistemic fragmentation. As the role of gatekeepers vis-à-vis public debate, mass media are reduced in their power to shape public discourse and impose relatively common epistemic norms. Independently of whether the epistemic norms and standards formerly enforced by traditional media were justified and adequate (which we cannot know with certainty but would hope and suspect to be true), they were at least widely shared.[134] The disappearance of effective gatekeeping—no matter the quality of the gatekeeper and the information conveyed by it—thus leads to more fragmented and divided epistemic communities.

Third, our claim that the problem with fake news primarily lies not in its falsity but in its divisive potential can also be supported in light of the division of speech regimes into the realms of public discourse and managerial speech. ia, While it is true that the political heads of administrative agencies are deeply engaged in fake news dissemination and production,[135]

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132.   Even if a society holds epistemic norms that are not "modern", social coordination will suffer when epistemic norms are undermined. In a way, this is an apt description of the aftermath of the scientific revolution where traditional modes of knowledge production (religious or not) we undermined by the scientific worldview.

133.   *See Fake News is the Number One Worry for Internet Users Worldwide*, THE LLOYD'S REGISTER FOUNDATION WORLD RISK POLL, https://wrp.lrfoundation.org.uk /explore-the-poll/fake-news-is-the-number-one-worry-for-internet-users-worldwide (last visited Feb. 7, 2022).

134.   For an exposition of journalistic professional norms *cf.* W. Lance Bennett, *An Introduction to Journalism Norms and Representations of Politics*, 13 POLITICAL COMMC'N. 373, 373-85 (1996).

135.   *See e.g.*, Glenn Kessler, Salvador Rizzo & Meg Kelly, *Trump's false or misleading claims total 30,573 over 4 years*, WASHINGTON POST (Jan. 24, 2021, 3:00 AM), https:// www.washingtonpost.com/politics/2021/01/24/trumps-false-or-misleading-claims-total-30573-over-four-years.

there is little reason to think that existing epistemic authorities and institutions of social knowledge production are negatively affected in their immediate functioning by the digital spread and pervasiveness of fake news and alternative views of the world. Most of these knowledge-determining institutions and processes—not necessarily their individual members—are rather firmly insulated against the unchecked influences of online communication. They do not recruit their personnel at random, but according to standardized procedures and eligibility requirements.[136] They do not gather their knowledge from online platforms or other non-curated sources, but according to formalized procedures and rules.[137] Different sets of rules (rules of procedure; rules of tort law; state of the engineering art) rule out reliance on factual propositions on a mere hunch, but demand knowledge to be produced according to formalized standards. Social knowledge-producing processes in the managerial realm will therefore in all likelihood continue to function and produce the output they produced in the pre-digital era. Since the falsity of a belief can become socially detrimental only when actions are based on this belief, the insulation of epistemic institutions vis-à-vis online misinformation is an effective protection against any direct operational consequences of such misinformation. Problems with falsity as such would begin to arise only once a majority or substantial part of knowledge-producing institutions began to agree on these views and base their collective actions and decisions on them. As long as things stand as they are in this regard—and we are rather confident that they will do so for quite some time—fake news thus do not directly affect the functioning of social knowledge production and determination. It does, however, affect public discourse, undermining trust in common epistemic institutions and norms required in the long run for social knowledge production and sensible collective action.

The focus on the issue of epistemic fragmentation, *finally*, helps us understand why the spread of fake news is of particular concern to democratic societies. No matter what precisely is meant by this term, democracies

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136.   *See* FRITZ SAGER & CHRISTIAN ROSSER, *Weberian Bureaucracy*, *in* OXFORD RSCH. ENCYC., POLS. (2021), https://doi.org/10.1093/acrefore/9780190228637.013.166 ("In the purest type, the totality of the administrative staff is composed of individual officials [who] . . . are personally free and observe only substantive official obligations, are placed in a fixed official hierarchy, have defined official competences, are appointed by contract. . . and possess a specialized qualification. . . are appointed rather than elected, are remunerated in money by fixed salaries . . . .").

137.   *See e.g., History Taking - Overview*, OXFORD MEDICAL EDUCATION, https://oxford medicaleducation.com/history/medical-general/ (last visited Aug 23, 2022) (medicine); *See e.g.,* Dana Haugh, *Research Data*, HARVEY CUSHING/JOHN HAY WHITNEY MEDICAL LIBRARY, https://library.medicine.yale.edu/research-data (last visited Aug 23, 2022) (the natural sciences); *See e.g.,* Richard W. Slatta, *A Step-by-Step Guide to Doing Historical Research*, RICHARD W. SLATTA, PROFESSOR EMERITUS OF HISTORY, https://faculty.chass.ncsu.edu /slatta/hi216/HI598/histresguide.htm (last visited Aug 23, 2022) (history).

strive to base collective action on the consent and beliefs of the governed.[138] Therefore, the formalized political processes of democratic polities are, as a matter of conceptual necessity, particularly dependent on and vulnerable to fundamentally divided appreciations of fact among their population. Technocratic rule, autocracies, and theocracies may more easily arrange themselves with fundamental epistemic divides among their population because their guiding principles command no deference to, or specific concern with, the beliefs of the governed. If the problem with fake news were falsity and misguided intentions—i.e., missing the mark of reality—all political systems should be equally vulnerable to and concerned by fake news. At least when looking at current debates and legislative proposals regarding digital misinformation the concerns seem very unequally distributed across political systems, mainly focusing on liberal democracies.[139]

4. The Contribution of Platform Logic

Focusing our analysis of the harm in fake news on the issue of epistemic fragmentation sheds light on how the operating logic of platform communication and social media specifically contributes to the problem. For, according to our claim, the prevalence of digital fake news is not caused only by a lack of editing and effective gatekeeping. Instead, it is severely exacerbated by the functional logic of online speech platforms. As *social* networks, these systems of communication are built not for exchanging or debating ideas among the public but rather for creating and curating subcommunities, friendships, or other allegiances (followers).[140] Social net-

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138.		*See generally* Taylor, *supra* note 95, at 257–87; *see* Schmitt, *supra* note 95, at 268–71.

139.		The main locus of much of the new legislation is in Europe. *See e.g.* Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken [Netzwerkdurchsetzungsgesetz-NetzDG] [Network Enforcement Act], Sept. 1, 2017, Bundesgesetzblatt, Teil I [BGB1 I] at 3352 (Ger.), https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG engl.pdf?blob=publicationFile&v=2; for a general description and analysis, *see generally* Heidi Tworek & Paddy Leerssen, *An Analysis of Germany's NetzDG Law*, (Transatlantic High Level Working Grp. Content Moderation Online and Freedom of Expression Working Paper, 2019); for France, *see generally* Irène Couzigou, *The French Legislation Against Digital Information Manipulation in Electoral Campaigns: A Scope Limited by Freedom of Expression*, 20 ELECTION L. J. 98, 98–115 (2021); For an overview of EU laws, *see generally* *Tackling Online Disinformation*, *Shaping Europe's Digital Future*, EUROPEAN COMM'N., https://digital-strategy.ec.europa.eu/en/policies/online-disinformation (last visited Aug 23, 2022); Singapore is the one exception to the rule, *see* Shawn Goh & Carol Soon, *Singapore's Fake News Law: Countering Populists' Falsehoods and Truth-making*, *in* THE ROUTLEDGE COMPANION TO MEDIA DISINFORMATION AND POPULISM 459, 459–69 (Howard Tumber & Silvio Waisbord eds., 2021).

140.		For the particular logics of social media communication and the following, *see e.g.*, Kasper Welbers & Michaël Opgenhaffen, *Presenting News on Social Media*, DIGIT. JOURNALISM, Oct. 5, 2018, at 47, https://doi.org/10.1080/21670811.2018.1493939 (observing a "subjectivity norm" in social media communication); Lars Kai Hansen, Adam Arvidsson, Finn Aarup Nielsen, Elanor Colleoni & Michael Etter, *Good Friends, Bad News - Affect and*

works are designed to foster and strengthen identities[141] within subgroups of society and thus are necessarily seclusive and exclusive toward society at large.[142] Speech practices in social networks share in this overall divisive trajectory. They tend to be identity-supportive, identity-building, or at least identity-reflective (and potentially identity-threatening, as shown by the recently discussed negative influence of Instagram usage on teenage girls' sense of self).[143] This function of speech—to convey and create community and allegiance—is a property common to speech in traditional fora as well. However, certain properties of digital platform services highlight the emotive, identity-building function of speech and thereby exacerbate the problem of divisiveness and epistemic fragmentation.

One of these properties is the platforms' core logic of sharing. Sharing content on social networks is a mostly novel kind of speech practice.[144] The act of sharing (and that of liking or hash-tagging) is typically undefined in its meaning and poorer in context than most forms of speech. Does the person sharing a piece of content identify with it? Does she want to ridicule the content provider? Does she want to convey a piece of information? Does she want to animate her peers to respond? Does she want to please the content provider ("I have no idea why you posted today's dinner picture, but hey, I guess it will make you happy if I forward it")? The problem of the lack of context is made worse as the content travels further along the sharing chain.[145] The logic of sharing thus allows the rapid spread of

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Virality in Twitter, in FUTURE INFO. TECH., COMMC'NS COMPUT. INFO. SCI., 34, 35 (J.J. Park et al. eds., 2011) ("In a social media environment where social relations have effectively become a medium of communication, content that is more likely to activate such relations is also more likely to spread").

141.   *See, e.g.*, FACEBOOK, https://www.facebook.com ("Connect with friends and the world around you on Facebook").

142.   Although we are mentioning the community building capacity of social media as a part of the challenge of the digital epistemic divide, it also has clear political benefits, such as the rise of networked social movements challenging oppressive power structures and learning and communicating with each other. *See generally* MANUEL CASTELLS, NETWORKS OF OUTRAGE AND HOPE: SOCIAL MOVEMENTS IN THE INTERNET AGE (2d ed. 2015) (detailing the rise of such movements in Spain, the Middle East, and the U.S.). For example, many point to the centrality of social media in the rise of the Black Lives Matter movement. *See, e.g.*, Nikita Carney, *All Lives Matter, but so Does Race: Black Lives Matter and the Evolving Role of Social Media*, 40 HUMAN. & SOC'Y 181, 181–84 (2016); *See generally* Marcia Mundt, Karen Ross & Charla M. Burnett, *Scaling Social Movements Through Social Media: The Case of Black Lives Matter*, SOC. MEDIA + SOC'Y, Oct.–Dec. 2018, at 1 (exploring the role of social media in scaling up Black Lives Matter).

143.   *See, e.g.*, Paolo Gerbaudo, *Social Media and Populism: An Elective Affinity?*, 40 MEDIA, CULTURE & SOC'Y 745, 750-51 (2018) (describing how the aggregative capacities of social media lead to the creation of online crowds).

144.   *See generally* Emanuele Arielli, *Sharing as Speech Act*, 47 VERSUS 243 (2018) (analyzing the properties of "sharing" as a unique speech act)

145.   *See generally, e.g.*, danah boyd, Scott Golder & Gilad Lotan, *Tweet, Tweet, Retweet: Conversational Aspects of Retweeting on Twitter*, PROCEEDINGS 43RD HAWAII INT'L. CONF. ON SYS. SCIS. 1 (2010) (analyzing retweeting as a conversational practice); studies

chunks of content that are almost bare of social context and social meaning. It is a type of speech that in most cases does not serve to convey a distinct piece of information. Rather, it is the act of sharing, the allegiance or antipathy expressed by it, that stands as the focus of such speech acts. The entire business model of social networks rests on the act of sharing and the social mechanisms of allegiance expressed through them. If pieces of information are distributed through this mechanism, the informational content is pushed to the background and becomes mostly irrelevant to the speed and breadth of distribution. The distribution instead follows the logic of allegiance and identity. Entirely unreliable (fake news) and uninteresting (cat pictures) pieces of information that under formerly normal speech conditions would not have traveled very far thus may be distributed quickly and broadly through "sharing logic."[146] At the same time, speech that usually has both an emotive/performative and an informative/content–communicative side is stripped of its informative function, thereby deepening and consolidating existing social divides and allegiances. Speech across such divides about matters of common concern and common reality becomes background noise.

Another of the properties of social media exacerbating the problem of fragmentation is the logic of tailored or personalized experiences.[147] As with the logic of sharing, the tendency to tailor our world and our experiences to our own liking and likeness is part of the human condition. We recognize more easily what we find pleasant and tend to ignore what does not fit with our views about the world (confirmation bias[148] and coherence

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have found that while much of online fake news is spread by bots, most of the retweeting of fake news is done by humans, *see* Chengcheng Shao, Giovanni Luca Ciampaglia, Onur Varol, Kaicheng Yang, Alessandro Flammini & Filippo Menczer, *The Spread of Low-Credibility Content by Social Bots*, ARXIV (2018) at 10–11, https://arxiv.org/pdf/1707.07592v4.pdf.

146.   Ulrike Klinger, *Mastering the Art of Social Media: Swiss Parties, the 2011 National Election and Digital Challenges*, 16 INFO., COMMC'N & SOC'Y 717, 722 (arguing that social media follows a "logic of virality").7

147.   *See* Efrat Nechushtai & Seth C. Lewis, *What Kind of News Gatekeepers Do We Want Machines to Be? Filter Bubbles, Fragmentation, and the Normative Dimensions of Algorithmic Recommendations*, 90 COMPUTS. IN HUM. BEHAV. 298, 300. The literature touches the different locations of personalization. *See* Aniko Hannak, Balachander Krishnamurthy, Piotr Sapie|yDżki, David Lazer, Christo Wilson, Arash Molavi Kakhki & Alan Mislove, *Measuring Personalization of Web Search*, WWW '13: PROCS. OF THE 22D INT'L CONF. ON WORLD WIDE WEB 527 (search results); Eytan Bakshy, Solomon Messing & Lada A. Adamic, *Exposure to Ideologically Diverse News and Opinion on Facebook*, 348 SCIENCE 1130 (social media feeds); Dimitar Nikolov, Diego F.M. Oliveria, Alessandro Flammini & Filippo Menczer, *Measuring Online Social Bubbles*, PEERJ COMPUT. SCI. 1 (social media feeds); Latanya Sweeney, *Discrimination in Online Ad Delivery*, 11 COMMC'NS OF THE ACM 1 (advertising); Yannis Bakos, *The Emerging Role of Electronic Marketplaces on the Internet*, 41 COMMC'S OF THE ACM 35 (pricing).

148.   Hugo Mercier, *Confirmation Bias – Myside Bias*, *in* COGNITIVE ILLUSIONS 78, 78 (Rüdiger F. Pohl ed., 2016).

bias[149]). We mostly socialize with people who are like us, have few topics for discussion in common with people from other social classes,[150] and read those newspapers that tend to serve our political outlook, level of education, and general worldview.[151] However, existing in one physical world exposes us to a shared reality and to people who are very different from us. The homeless walk on the same public roads, the poor go to the same high schools, the uneducated go to the same football games, and foreigners drink from the same wells as the rich, powerful, educated, etc. Commonality of human experiences is less avoidable in a physical, non-digital world. In the pre-digital era, this commonality was reinforced by common media experiences: we watched the same ten TV shows, followed the same forty TV channels, and discussed the same set of four commentary columns in major newspapers.[152] These moments of commonality and shared experiences are what enable us to socially cooperate.[153] They also force us at times to call into question our previously held beliefs when they can no longer be squared with our common experience.[154] The more speech and media expe-

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149.   *See* Simon et al., *supra* note 43, at 1250 (demonstrating the cognitive shift towards more coherent beliefs in the process of belief formation and decision making).

150.   MICHAEL ARGYLE, THE PSYCHOLOGY OF SOCIAL CLASS 69 (1994) ("In all studies, and in all classes, a preference is found for friends of the same class.").

151.   Bobby Duffy & Laura Rowden, *You Are What You Read? How Newspaper Readership is Related to Views*, MORI SOCIAL RESEARCH INSTITUTE 1, 20 ("The three tiers of the newspaper market are very clear when we look at the class profile of readers. As you might expect, the large majority of "quality daily" readers belong to white collar social classes, ABC1. In fact, the class profile of each is very similar. "Mid-market" Daily Mail and Daily Express readers also have very similar class profiles, and actually come from a fairly even spread of social classes."); Tak Wing Chan & John H. Goldthorpe, *Social Status and Newspaper Readership*, 112 AM. J. OF SOCIO. 1095, 1130 ("The probability of individuals reading "highbrow" broadsheets rises with status, and at an increasing rate; the probability of their reading "lowbrow" redtop tabloids falls with status in a more or less linear fashion; and the probability of their reading "middlebrow" tabloids first increases with status and then decreases.").

152.   *See* Balkin, *supra* note 111 at 9. ("Mass media are asymmetrical and unidirectional. The ability to broadcast widely is held in relatively few hands; what is broadcast is sent out to a large number of people with very little opportunity for people to talk back. Access to mass media is comparatively limited. Mass media create a technological bottleneck, and the people who control mass media are gatekeepers controlling its use.").

153.   *See e.g.,* Jeffrey C. Alexander & Ronald N. Jacobs, *Mass Communication, Ritual and Civil Society,* in MEDIA, RITUAL AND IDENTITY 23, 28 (James Curran & Tamar Liebes eds., 1998) ("Media is concerned not only with the diffusion of information to a mass public, but also–and this is particularly true for media events–with the dramatization of civil society and the creation of a common cultural framework for building common identities. Elaborated through the most compelling narratives of civil society, media events provide the cultural grounds for attachment to the social imaginary of civil society, and they provide plot points for updating the ongoing public narratives of civil society and nation.").

154.   In sociology, this phenomenon is often called "relativization", *see* PETER L. BERGER, THE MANY ALTARS OF MODERNITY 3 (2014) ("Relativization occurs, at least minimally, when someone visibly behaves differently from what someone else had taken for granted as proper behavior. The relativization intensifies if the challenger verbalizes the disa-

riences are fragmented and tailored to ever-smaller and more uniform social subgroups, the more we lose common ground for our factual beliefs and a common trust in a certain set of institutions. The strategy of social platform algorithms—to tailor our digital lives and experiences to the interests and ideas we have previously exhibited—thus has a very divisive built-in tendency.[155] This fragmentation of experiences, in turn, leaves us with fewer and fewer patches of commonality that could serve to halt the spread of false beliefs. More widely distributed alternative worlds, in turn, exacerbate both sides' tendency to even more fiercely tailor their respective experiences to their existing beliefs and preferences,[156] since there no longer is any factual common ground upon which to speak and socially coordinate. The online distribution of falsity as powered by platforms thus reinforces itself and deepens existing political divides. Factual issues, sooner or later, get infused with political polarization and themselves become questions of political creed.[157]

a. The Disruptive Potential of the Epistemic Divide

Most likely, the processes just described will not lead to a majority of the population ascribing to self-insulated alternative views of the world. Traditional media and epistemic authorities still exert powerful influence over the beliefs held in liberal democracies and will continue to do so. Much of platform media content is still generated by the knowledge-producing networks and institutions of the classical media landscape (foreign correspondents, press conferences, professionalized investigative research, general press services such as the AP, etc.).[158] Most importantly, a great part of social life still takes place in the analogous, tangible, less tailorable world. However, permanently alienating even twenty percent of the population from the prevailing factual beliefs, epistemic authorities, and decision-making procedures in a democracy seriously threatens its legitimacy and has

greement. Thus various forms of interaction with different worldviews and the behaviors they engender initiate a process of relativization.").

155.   These divisions are sometimes called echo chambers or filter bubbles. *See generally* R. Kelly Garrett, *Echo Chambers Online?: Politically Motivated Selective Exposure Among Internet News Users,* 14 J. OF COMPUTER-MEDIATED COMMC'N 265; ELI PARISER, THE FILTER BUBBLE: HOW THE NEW PERSONALIZED WEB IS CHANGING WHAT WE READ AND HOW WE THINK (2012).

156.   For the cascade-like dynamics of group polarization *see* Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 78, 82 f.; see generally CASS R. SUNSTEIN, GOING TO EXTREMES, HOW LIKE MINDS UNITE AND DIVIDE (2009).

157.   *See generally* Dan M. Kahan & Donald Braman, 24 YALE L. & POL'Y REV. 149 (discussing the underlying phenomenon of cultural cognition); for more on disentanglement of cultural/political creed and factual propositions as the main cure to this ailment, *see* Dan M. Kahan, *What Is the "Science of Science Communication"?*, 14 J. OF SCI.COMMC'N 1.

158.   *See* Balkin, *supra* note 111, at 10-11 (describing the ability of social media to either route around mass media or to appropriate and utilize mass media content as a part of platform content).

a substantial disruptive potential (see the storming of the United States Capitol in 2021). Factual beliefs, coupled with normative views, are a strong motive for action and resistance to opposing views. If I find that the majority in my society is making decisions and determining policies that are not only normatively wrong but also based on entirely misguided factual premises, I am more likely to stage opposition and even violent resistance. In a sense, divides in factual beliefs run deeper and are more fundamental than normative differences.[159] They call into question not only our conclusions about the best path for action but the very ground we stand on. Potential disruptive and violent consequences of such deep divides in beliefs about the world are independent of which side is (more) correct. We should thus focus on epistemic commonality and trust, not on truth, when thinking about how to regulate and contain fake news.

II. What To Do About The Epistemic Divide?

So far, we hope to have demonstrated that a major part of the challenge posed by fake news is not the falsity of the information circulated but the fact that the practice undermines the socially indispensable widespread trust in common epistemic institutions. The question left before us is, how are we to counteract the effects of misinformation in the digital age?

As a general matter, our account pushes us to be skeptical of any truth-based solutions focusing on individual pieces of content. Fact-checking, content removal, and even criminal and tort sanctions for individual content will not be able to resolve the foundational issue: that civil society (as well as the state) has lost much of its ability to maintain trust in common epistemic authorities and norms. This idea is supported by the two most salient examples of widely shared fake news in recent years: the voting fraud allegations after the 2020 Presidential election and the COVID-related misinformation. While the fact that the major social networks were aggressively fact-checking and removing content during the 2020 election season certainly helped the situation, it didn't prevent Seventy percent of registered republicans from believing that the election was stolen.[160] A similar tale can be told about the evolution of the anti-vax misinformation campaign. Social media platforms were relatively vigilant from the outset, but the lack of common epistemic norms and trusted authorities led to the same result: fifteen percent of U.S. adults are not vaccinated against COVID-19 as of Janu-

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159.   This is so because, in Hannah Arendt's words, facts are the "ground on which we stand on," by which she means it is the basis for any other human debate. *See* Arendt, *supra* note 40 at 313. ("Conceptually, we may call truth what we cannot change; metaphorically, it is the ground on which we stand and the sky that stretches above us.")

160.   Jon Greenberg, *Most Republicans still falsely believe Trump's stolen election claims*, Politifact (Jun. 14, 2022), https://www.politifact.com/article/2022/jun/14/most-republicans-falsely-believe-trumps-stolen-ele/

ary 1, 2022, and even more avow that they do not trust COVID vaccines.[161] These examples make perfect sense if the problem with fake news lies not in the very existence of factually incorrect information in the public sphere and its potential to mislead but rather in the way these lies undermine the level of foundational trust in common epistemic norms and procedures, especially in knowledge-producing institutions. Regulatory solutions, if they are to work, must target at reestablishing this lost trust. With this realignment in mind, in this section we debate several reform proposals meant to alleviate the damages of digital fake news.

A. *Tort and criminal law responses as a Sisyphean undertaking*

One idea is to use existing laws dealing with certain types of false statements to tackle the growing problem of fake news. Indeed, some scholars suggest that a reform of tort and criminal law could be an effective tool for addressing fake news. [162] One option is to expand the scope of reputational torts. This could be done by tying certain general truth claims to individual persons who can be said to be especially concerned by them. In this way, lawyers could incorporate historical truths regarding the role of the Polish partisan movement under Nazi occupation into the reputation of former partisans and their offspring (making false claims a type of defamation) or historical truth about the Nazi genocide of the Jewish population of Europe into the reputation of the persecuted Jewish population and their offspring (making comparisons of these measures with current COVID-19 measures a type of criminal insult), etc. Similar strategies could build on the observation that some factual falsities are financially relevant to someone. Cases in point are the lawsuits (and threats of lawsuits) that accompanied the Republican election-stealing campaign in the aftermath of the 2020 election.[163] Since some of the lies concerned specific companies providing voting infrastructure (Smartmatic and Dominion),[164] were repeated by legally

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161.   Monte, *supra* note 9.

162.   *See* Jill I. Goldenziel & Manal Cheema, *The New Fighting Words?: How US Law Hampers the Fight against Information Warfare*, 22 U. PA. J. CONST. L. 81, 143 ("However, defamation law provides an existing cause of action for those targeted by fake news stories, especially political candidates."); David O. Klein & Joshua R, Wueller, *Fake News: A Legal Perspective*, 20 J. OF INTERNET LAW (offering an overview of legal tools able to hamper the spread of fake news); Andrea Butler, *Protecting the Democratic Role of the Press: A Legal Solution to Fake News*, 96 WASH. U. L. REV. 419, 420 ("Applying a modified standard of common law distributor liability specifically targeted to address fake news to internet service providers [ISPs] and websites would hold social media websites like Facebook responsible for fake news that site administrators have been informed is defamatory. ").

163.   For an overview of the post-election law suits, *see generally* Brendan Williams, *Did President Trump's 2020 Election Litigation Kill Rule 11?*, 30 B.U. PUB. INT. L.J. 181 (2021).

164.   *See* Michael Conklin, *The Real Cost of Fake News: Smartmatic's $2.7 Billion Defamation Lawsuit Against Fox News*, 47 U. DAYTON L. REV. 17, 41 (2022) (analyzing both the

recognizable corporations (Fox News)[165] and individuals,[166] and created clear financial damages, lawsuits and damages for defamation could become an easily accessible deterrent. These are merely two examples of tort law tackling the issue of factual falsity; others include the crimes of impersonation,[167] fraudulent claiming of false titles, and other types of forgery. These falsity-directed legal institutions could be expanded and used to more decisively combat the spreading of disinformation.

However, while these torts and their intensified and extended use may have some limiting effect on fake news, their potential impact is severely and necessarily limited. An example of this is the case of falsely claimed voting irregularities:[168] these lawsuits did nothing to deter nonspecific claims of election fraud, even those made and distributed by prominent corporations and individuals. Existing tort law's focus on individualized harm[169] disables its aptitude to deal with more general, collectively relevant questions, such as claims of election fraud as such, or other general truths, such as the reliability of COVID-19 vaccines, which country started a war, or which general policy was conducted by a particular government or country. Factual accuracy and reliability regarding such general truths, however, are what are precious for democratic self-government and what are behind the growing calls for fake news regulation.[170]

Moreover, existing speech law's focus on individualized harm and its immediate causation through speech does little to address all sorts of ambiguity of possible actions and defamatory claims the speaker only hints at and of speech practices whose harms function only due to the large scale of an audience. Donald Trump's "stand back and stand by"[171] statement di-

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Dominion and Smartmatic suits, and arguing that if damages are granted, that would have an effect on the promulgation of fake news).

165.   *Id.*

166.   *See, e.g.*, Katelyn Polantz, *Judge allows defamation lawsuits against Sidney Powell, Rudy Giuliani and MyPillow CEO to go forward*, CNN: POLITICS (Aug. 11, 2021, 11:27 PM) https://edition.cnn.com/2021/08/11/politics/defamation-lawsuits-sidney-powell-rudy-giuliani-mike-lindell/index.html.

167.   *See, e.g.*, United States v. Lepowitch, 318 U.S. 702, 704 (1943) (describing the criminalization on the impersonation for a public official as meant to avoid harm to "the general good repute and dignity of the [government] service itself.").

168.   *See* Williams, *supra* note 167; Conklin, *supra* note 168; Polantz, *supra* note 1170.

169.   *See* LII / Legal Information Institute, *Tort*, https://www.law.cornell.edu/wex/tort (last visited Nov. 8, 2022) ("A tort is an act or omission that gives rise to injury or harm to another and amounts to a civil wrong for which courts impose liability. In the context of torts, 'injury' describes the invasion of any legal right, whereas 'harm' describes a loss or detriment in fact that an individual suffers).

170.   *See generally* Chris Tenove, *Protecting Democracy from Disinformation: Normative Threats and Policy Responses*, 25 THE INT'L J. OF PRESS/POL., 517 (2020) (offering a taxonomy of disinformation risks to democracy).

171.   Bill McCarthy, *In context: Donald Trump's stand back and stand by' debate comments on white supremacists*, POLITIFACT (Sept. 30, 2020), https://www.politifact.com/article/2020/sep/30/context-donald-trumps-stand-back-and-stand-debate-/.

rected at a potentially violent extremist right-wing audience cannot easily be framed as an immediate incitement to violence even if there may be—among an audience of several million—some lone extremist wolves who may be prompted by it to take action.[172] Much in the same way, factual falsity and disregard for truth come in many shades and nuances, with only the most explicit and blatant forms being potentially up for legal regulation.[173]

Finally, in a communicative infrastructure where speech that is (potentially) visible to everyone is no longer a scarce resource, focusing on individual instances of harmful speech is a Sisyphean undertaking. There simply is too much potentially harmful untrue speech out there, and legal processes are far too formalized and burdensome to make such individualized responses a serious contender for useful fake news regulation.

While it may be possible to cure some of these shortcomings by reforming tort and criminal law, this option is also normatively unconvincing. Torts and criminal law would have to be fundamentally changed to include a much wider scope of legally cognizable harms, especially with regard to false collectively relevant information. At the same time, procedural standards would have to be significantly lowered and sanctions increased to make formalized legal cognition of these false-speech-induced harms worthwhile and more than mere regulatory window dressing. Extending truth-related torts beyond the realm of individualizable harms would entail a significant expansion of the truth-producing role of courts in society[174] and therefore severely undermine the goal of democratic legitimacy. Heightened sanctions and the lowering of procedural standards and other burdens of formalized legal processes could have a significant chilling effect on speech in general[175] and threaten important achievements of liberal legal systems, such as rule-of-law values and proportionality. Liberal societies should not give up these foundational commitments in their justified concern about widespread disinformation.

The reason for tort law's inadequacy is straightforward. As our argument goes, effective solutions cannot, and for normative reasons should

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172.   For a discussion of stochastic terrorism *see* MARK S. HAMM & RAMÓN SPAAIJ, THE AGE OF LONE WOLF TERRORISM 84 (David Brotherton ed., 2017) ("Indirect enabling often takes the form of stochastic terrorism, or the use of mass media to provoke random acts of ideologically motivated violence that are statistically predictable but individually unpredictable.").

173.   *See* HARRY G. FRANKFURT, ON BULLSHIT (2005) (describing different sorts of non-truthful speech, particularly the practice of bullshitting as a complete indifference to issues of truth).

174.   Gertz v. Robert Welch Inc., 418 U.S. 323, 339-40 (1974) ("Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries").

175.   *See id.* ("… punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship.").

not, be found on the level of individual acts of speech and their immediate consequences. Instead, we must look at the general level and at the conditions under which and thanks to which fake news spreads, as well as the kind of harm it causes. We argued above that the real challenge of fake news in the digital age is not the individual piece of falsity but the general erosion of epistemic norms and common trust in knowledge-producing institutions. We are faced with an institutional problem. The issue is trust, not truth.

B. *Bolstering locally bound civil society institutions*

As the erosion of epistemic norms is the main issue to be solved – what can be done about it? We should turn to the causes of this erosion. As we have argued, the erosion occurs in two ways: First, digitalization enables publishing and access to audiences without going through traditional media organizations; this disables the gatekeeping function of traditional media. Second, digital platforms disrupt the ad-based business model of a majority of newspapers and mass media channels. These causes can be addressed by regulatory means.

More easily, tools are available to resolve at least the financial part of the crisis facing traditional media.[176] For example, governments can require payment for news circulated on digital platforms. Australia has already passed a Media Bargaining Code that is meant to mitigate the power imbalance between Australian news organizations and Facebook, Google & Co. The code requires these two companies to negotiate with media organizations regarding payment for making their content available on their platforms. If an agreement is not reached, the companies are required to enter arbitration. The arbitrator makes a final decision on the price, a decision that is binding for one year.[177] An alternative to making platforms pay is for governments to directly subsidize local media organizations.[178] The funds for such a subsidy could potentially be raised by taxing the ad revenue of digital platforms.

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176.   *See* Martha Minow, *The Changing Ecosystem of News and Challenges for Freedom of the Press*, 64 LOY. L. REV. 499, 550 (2018).

177.   *See generally* Tama Leaver, *Going Dark: How Google and Facebook Fought the Australian News Media and Digital Platforms Mandatory Bargaining Code*, 24 M/C JOURNAL (2021) (describing the content of the Bargaining Code and the struggle between Facebook/Google and the Australian government).

178.   *See* Genevieve Lakier, *The Limits of Antimonopoly Law as a Solution to the Problems of the Platform Public Sphere*, KNIGHT FIRST AMEND. INST. COLUM. U., Mar. 30, 2020, 9-10, https://knightcolumbia.org/content/the-limits-of-antimonopoly-as-a-solution-to-the-problems-of-the-platform-public-sphere ("Perhaps the easiest (although certainly not the cheapest) way that Congress could mitigate the democratic harms created by the economic and cultural dominance of the large platform companies is to subsidize other, more traditional platforms for expression—namely, local newspapers.").

This approach of reinforcing existing mass media institutions offers many benefits. First, as long as they are view-point neutral, subsidies do not raise constitutional issues in the United States[179] or other liberal democracies and do not undermine the egalitarian/democratic legitimacy principle of free-speech protections. Second, they create ways in which a domestic government (Australia) can use transnational corporations (Facebook and Google) to financially bolster its domestic public sphere. These approaches therefore have the potential to give local actors (both governments and civil society organizations) more of a fighting chance to set the tone in their domestic digital public sphere.[180]

That being said, giving domestic media organizations a financial lifeline does nothing to rectify the fact that digitalization undermined their gatekeeping capacity. In other words, the fact that quality newspapers will be available at rates similar to those of the pre-digital age does not mean they will be commonly read at similar rates.

C. *Existing Proposals for Digital Platform Regulation*

Perhaps what is needed is to make the dominant digital platforms into functionally equivalent gatekeepers? Such an approach would acknowledge the utter dominance of digital platforms in our global media sphere and ask whether these platforms can meaningfully take the place of pre-digital civil society institutions. In this endeavor, the issue and containment of fake news is part and parcel of the general regulatory project aimed at making digital platforms into caretakers of our public spheres.

In light of online platforms' dominance over the general conditions of online speech, many scholars seek to design platform regulation regimes that will lead "social media companies to be responsible and trustworthy institutions that will help foster a healthy and vibrant digital public sphere."[181] This is a challenge because, in the new digital public sphere, "[w]e lack trusted digital institutions guided by public-regarding professional norms. Even worse, the digital companies that currently exist have contributed to the decline of other trusted institutions and professions for the creation and dissemination of knowledge."[182] How do these scholars suggest we accomplish this feat?

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179.   *See id.* at 9 ("Subsidies pose no constitutional problem. They do not infringe anyone's First Amendment rights, so long as they are applied in a viewpoint-neutral manner.").

180.   *See* Abiri, *supra* note 26 for a discussion of why we ought to prefer democratically elected governments over global tech giants.

181.   Jack M. Balkin, *How to Regulate (and not Regulate) Social Media* KNIGHT FIRST AMEND. INST. COLUM. U., Mar. 25, 2020, 2, https://knightcolumbia.org/content/how-to-regulate-and-not-regulate-social-media.

182.   *Id.* at 9.

1. Reforming content liability and moderation

Many of the suggestions focus on reforming the now infamous 47 U.S.C. § 230 (known as "Section 230"). This legislation has two parts. The first exempts intermediaries that provide access to the internet from liability for the speech of their users.[183] They are not considered "publishers" of the content.[184] The second part adds that even if an intermediary does moderate or curate user content, the liability shield still holds.[185] Moderating content does not make a digital platform into a publisher in the legal sense.[186] Some scholars for example, suggest that we look at Section 230 as an "enormous gift to the young Internet industry."[187] And similar to other media gifts, such as broadcasting licenses or phone monopolies, both of which came with inherent public-facing obligations, so should Section 230. In other words, Section 230 (and similar legislation) should be used as a lever to make social media companies accept a range of norms and duties with respect to their users. What should these norms and duties include? Many suggest due process and transparency obligations.[188] Platforms should be required to provide information on their moderation process or decisions to the public (or to an agency);[189] they should also allow some recourse to those users that are moderated, such as the appeal process now put in place for the Facebook oversight board.[190] Some legislative proposals also suggest more particular duties with regard to fake news, such as mandatory and systematic evaluations of disinformation risks and potential counter-measures.[191]

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183.   Tarleton Gillespie, *Platforms are not Intermediaries*, 2 GEO. L. TECH. REV. 198, 204 (2018).

184.   *Id.*

185.   *Id.* at 204-5.

186.   *Id.* at 204.

187.   *Id.* at 213.

188.   *See, e.g.,* European Parliament legislative resolution of 5 July 2022 on the proposal for a regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC at 161 ("Providers of intermediary services shall make publicly available and in a machine readable format and in an easily accessible manner, at least once a year, clear, easily comprehensible reports on any content moderation they engaged in during the relevant period.").

189.   Gillespie, *supra* note 187, at 213 ("Platforms could be required to report data on the process of moderation to the public or to a regulatory agency.").

190.   Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418, 2470–73 (2020) (describing the appeal process as enshrined in the oversight board bylaws).

191.   European Parliament legislative resolution of 5 July 2022 on the proposal for a regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC at 9 ("This Regulation fully harmonizes the rules applicable to intermediary services in the internal market with the objective to ensure a safe, predictable and trusted online environment, addressing the dissemination of illegal content online and the societal risks that the dissemination of disinformation or other content may generate, where fundamental rights enshrined in the Charter are effectively protected and innovation is facilitated.").

However, if our account is correct, any focus on the proper moderation of potentially fake news content necessarily misses the core problem. For the problem does not lie with individual acts of harmful speech (fake news/hate speech) but rather with the general mechanisms, specific functionality, and social effects of their widespread distribution. Any regulatory policy should thus focus on the general conditions and effects of online speech, not on individual content. Regulatory strategies such as the German Network Enforcement Act, which requires platforms to implement effective deletion procedures for individual criminal content, thus fall short of the central challenge while adding a host of new problems, such as the risk of over-blocking and the increased and largely unchecked power of platforms over speech conditions.[192]

2. Antitrust and competition law

Another proposed avenue of reform is the use of antitrust and competition law to break apart the major digital platforms. The pertinent goal here is to ensure that there are many social media and digital media organizations "in order to prevent a small number of powerful for-profit companies from dominating how public opinion is organized and governed."[193] One concern is that a giant company like Facebook could decide to enforce some specific set of (civility or epistemic) norms across the world. Having a variety of options and venues of speech can mitigate such a risk.

However, if the general conditions of online speech as distributed through social media platforms form a large part of the problem with fake news, an approach that simply multiplies the relevant platform competitors does not suffice to cure the ailment. That is because the underlying logic of platform communication—the logic of tailoring and sharing—would remain unchanged, each platform again functioning according to these basic tenets. What is more, breaking up the market might even contribute to additional epistemic divides by creating incentives for users to regroup into different platform services, each catering to particular parts of societies and to particular viewpoints. Trump supporters would find themselves on Truth Social, while libertarians would regroup on Telegram, average Jane on Facebook, and intellectuals on Twitter. In a way, the network effects responsible for the huge size and cartel-like makeup of the social media market[194] are an

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192.   Jack M. Balkin, *Free Speech Is a Triangle*, 118 COLUM. L. REV. 2011, 2030 (2018) ("Germany's new NetzDG law was designed to co-opt social media companies into monitoring and taking down prohibited content in Germany, including hate speech.").

193.   *Id.* at 2035.

194.   *See* Sinan Aral, *Breaking Up Facebook Won't Fix Social Media*, HARV. BUS. REV., Sept. 30, 2020 ("Social media markets tip toward monopoly because of network effects: The value of a networked platform is a function of the number of people connecting to it. As more people use the product, its value to everyone increases. The greater the number of people on a network, the greater its gravitational pull.").

opportunity for democratic communities in that they provide the potential raw material for a reinvigorated public sphere comprising a large part of the population, all users of the same platform. This, however, would require platforms to resist and restrict their logic of tailoring content. Merely breaking up platforms into smaller and more diverse units, however, does nothing to change the underlying problems with platform-driven communication. Instead, we need other regulatory approaches that question and reform the working logic of platform communication.

3. Information fiduciaries

One such idea, suggested by Jack Balkin, that tackles the working logic of platforms is to legally establish an information fiduciary relationship between digital platforms and their users.[195] This relationship would include three duties: "a duty of care, a duty of confidentiality, and a duty of loyalty."[196] This legal regime is meant to fundamentally change the way digital platforms understand their obligations to their end users. At the moment, they treat them as a "commodity sold to advertisers."[197] In imposing these duties, companies would have to change their business models in ways that take into account the effects they have on their users. While this suggestion heads in the right direction by engaging with and reforming the functional logic of platform communication, it prompts certain normative objections:

A fiduciary-type relationship has a certain patronizing edge that challenges the democratic legitimacy value and egalitarian assumptions underlying free-speech guarantees. Fiduciary duties presuppose that that which is good and beneficial to the beneficiary is sufficiently known and ascertainable, the good faith pursuit of these benefits being the primary duty of the trustee. Fiduciary relationships would thus assume a picture of online communication according to which large—and very wise—online platforms curate and tailor online communication and information according to the best interests of the public they serve. In this picture, the general public of platform users is in an inactive and merely receptive mode, starkly contrasting with communicative equality and autonomy in the public sphere. A certain distrust of claims that others know best what is good for oneself is a cornerstone of liberal speech norms. Though a certain sense of fiduciary duty toward the public may form part of the traditional professional ethics of journalism,[198] it does not form part of the legal duties of journalists and does

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195.   *See* Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183 (2016).

196.   Balkin, *supra* note 120, at 92.

197.   *Id.* at 92.

198.   For an "objectivity norm" in classical journalism *see* Michael Schudson, *The Emergence of the Objectivity Norm in American Journalism*, *in* DIFFUSION OF THE NEWS PARADIGM 19 (Svennik Hoyer & Horst Pottker eds., 2005).

not define the self-conception of professional journalism. Journalism's main norm is not—like a fiduciary's—to feed the public information that best serves its interests; rather, it is to find out and say what is the case, to challenge and check government, and to simply promote the ideas of those who are responsible for a journalistic publication.[199] A journalist speaks for herself, not in the name and interest of the audience or public at large. Even if the outcome—gatekeeping, i.e., controlling which content reaches the general public—may be similar, the way in which this outcome is reached—by assuming responsibility for the content produced—is something completely different from a fiduciary-type relationship. This will remain the case as long as platforms remain content distributors instead of content producers.

Even if this normative objection were unsound, the endeavor to transform digital platforms into trustworthy actors and information fiduciaries to the public at large has an important flaw: the detachment of the regulators from any particular democratic community. As we saw in the 2020 U.S. election, when platforms try to tackle a major fake-news crisis, they can have some success in the realm of fact-checking, removing false information and providing access to trusted sources. However, without societal trust in epistemic authorities, no amount of fact-checking will address the foundational problem. Since, as we argue, the real challenge of fake news is the undermining of domestic civil society institutions and their ability to maintain local epistemic norms, we are skeptical of the ability of globalized digital platforms (even if they become trustworthy, which is a big if) to effectively reestablish epistemic norms and shared trust in epistemic authorities. As we discuss above, epistemic norms can be understood only from the internal point of view of a certain culture or community. In other words, they require socialization into a particular culture. The members and actors of a domestic civil society are socialized members of the particular political community, and they are therefore able to promulgate and enforce epistemic norms in a way that a bunch of engineers in Palo Alto, Tel Aviv, and Delhi simply cannot. This is not to say that digital platforms cannot be a part of the solution, but rather that no number of incentives can motivate or enable these globalized corporations to replace the complex arrays of domestic civil society as constituted by pluralist mass media and cultural, educational, and research institutions.

D. *The Fragmentation-based approach: Promoting epistemic commonality and trust*

All the above proposals for fake news regulation have a common a focus on falsity, which they seek to overcome by criminal and tort liability,

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199.   *See generally* Michael Ryan, *Journalistic Ethics, Objectivity, Existential Journalism, Standpoint Epistemology, and Public Journalism*, 16 J. MASS MEDIA ETHICS 3 (2001) (summarizing the main schools in media ethics).

effective content moderation, reliable and civic-minded information fiduciaries, or competition. They do not address the digital epistemic divide and the scarcity of societal trust and epistemic commonality. The main normative contribution of this Article is to suggest that the future regulation of digital platforms should, therefore, focus on measures to increase commonality of media experiences and common exposure to trusted sources of information. No amount of law and regulation can turn back the clock and return us to the pre-digital age. It is impossible to reconstruct the technological limits (the existence of three newspapers or three TV networks) that mitigated and bridged the epistemic divide in the past. What is needed is imaginative regulatory thinking that attempts, through trial and error, to address the root of the problem: the growing epistemic divide that is ripping democratic societies apart. Our suggestions below are meant to begin such a discussion.

1. Nudging through mandatory featuring of trusted sources

States could require digital platforms operating within their borders to instruct their feeds to privilege the visibility of a certain self-defined and transparent set of "trusted sources."[200] An example of such an act (done voluntarily) is the increased visibility of information from the WHO and the CDC during the COVID-19 pandemic. However, such a measure should not be limited to major crises but rather designed to create a degree of higher probability of common media experiences among citizens. In a way similar to the role of traditional mass media, these regulations should be designed to create common experiences, not identical ones.

Two caveats will greatly reduce any risk of violating democratic legitimacy values behind free-speech protections. First, the government should not be the body that determines or revises the list of "trusted sources." This task should instead be delegated to the regional chapters of platforms themselves and decided through a set of processes that include discussions with relevant stakeholders and the public. Second, as a principle, government pronouncements and publications will have to be excluded from the list of trusted sources. It is true that certain governmental agencies (central statistics bureaus, the CDC) and certain legal processes (criminal proceedings) are part and parcel of our knowledge-producing institutions. However, allowing the government to pass regulations privileging its own

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200.   A variation on this idea has been around for a while, *see Fighting Fake News Workshop - Yale Law School*, https://law.yale.edu/isp/initiatives/floyd-abrams-institute-freedom-expression/practitioner-scholar-conferences-first-amendment-topics/fighting-fake-news-workshop (last visited Feb. 10, 2022) ("Some favored developing 'whitelists' of articles or news sources, based either on user or an independent institution's ratings. This proposal was critiqued on the grounds that government regulated 'whitelisted' media often becomes a proxy for state-sponsored or government approved news."). Our proposal tried to avoid this critique.

speech would be a direct violation of the democratic legitimacy rationale and has long been alien to liberal democratic systems. The influence of the government on the content of publicly circulated knowledge (through government press conferences, through findings in administrative and court proceedings, through congressional findings, etc.) is already significant enough to guarantee that this content will be featured by private trusted sources.

The list of trusted sources should be set by the platforms, transparent to the public, and broad enough to include a plurality of political viewpoints. At the same time, feeds will maintain their diversity by remaining sensitive to user preferences. Users could still escape exposure to trusted sources, but their escape would be more difficult to carry out and thus contained in its large-scale effects. As long as such regulatory measures are undertaken in public, transparently, they would be open to criticism, debate, and individual avoidance strategies. Since private actors would decide on whose speech to privilege and speech by non-privileged actors would remain possible and be distributed, but with relatively lower visibility/priority, the risk of violating fundamental democratic legitimacy norms of public debate would be effectively contained. At the same time, such regulations would not engage in the Sisyphean labor of targeting and moderating individual pieces of content with regard to truth; they would instead focus on the dimension where the problem lies by promoting trust in institutions and certain speakers who have exhibited reliability in the past. The regulations would not assume that every piece of factual information can be identified and evaluated by everyone but instead would promote a sort of epistemic humility.

2. Counteracting platform logic

More importantly and more controversially, regulatory measures should turn to regulating the specific social media mechanisms that are – in part – responsible for epistemic fragmentation: the logic of sharing/liking and tailoring. Both are deeply embedded in the communication logic and business model of social networks, which mainly function and draw in their audiences through emotive attachment (sharing/liking) and tailoring (advertisement). Social media platforms will therefore fight hard to avoid any serious regulation of their business model. Nevertheless, if the problem with fake news is epistemic fragmentation and divide rather than falsity as such, the most straightforward means of regulation is creating patches of commonality and common experience—no matter their content. While privileging "trusted sources" would have a direct link to the truth value by privileging reliable sources, restricting the degree of individualization and malleability of users' media experiences would be completely agnostic to the issue of truth. Such regulations could simply mandate that fifteen or twenty percent (or another percentage) of content in a user's feed should be selected at ran-

dom from outside the user's network of "friends" (from among the contents in a given regional chapter) without making any reference to the content thus displayed.[201] This would create user exposure to non-selected content and interests not previously exhibited, avoiding an ever-intensifying centrifugal drive into fragmented and seclusive alternative realities. Social media could still more or less operate according to its overall tailoring logic, limited only by the twenty percent-rule to optimize away any unforeseen and generally relevant content. Some degree of exposure to divergent views and ideas may be enough to keep epistemic division at bay – i.e., keep it at its pre-digital level.

A second measure directly targeting platforms' working logic would be limiting the speed and or number of sharing instances on social networks. If it is true that this sort of decontextualized, mostly emotive speech act enables falsities to travel much farther and much more quickly than they used to travel under non-platform-speech situations (see above), limiting this specific means of content distribution may be a viable—again, strictly content neutral and thus free-speech conducive—alternative. WhatsApp already restricts the number of subgroups into which a piece of content can be posted on a single occasion.[202] In the same way, the sharing speed and number of sharing/liking-expressions per account could be limited by platforms so as to decelerate on a broad scale the spread of information in general, thus enabling at least a minimal degree of reflection, pause, and relevance before a content item is redistributed. This suggestion, too, aims at the heart of social media's business model. However, it would mirror the fact that the problem with fake news lies at the heart of the same business model when taken to the extreme.

CONCLUSION

The digitalization—and democratization—of our means of communication and sources of information brings with it tremendous opportunity for global communication, citizen participation, empowerment and solidarity. However, free-reeling and unchecked as they currently are, the conditions and driving forces of online speech also undermine societies' ability to establish and maintain common epistemic norms and saps at our trust in common knowledge-producing institutions. This digital epistemic divide growing within democratic polities poses a grave threat to our ability to generate and collectively make use of information.

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201.   This is similar to the "architecture of serendipity" offered by Cass Sunstein as a way of breaking echo chambers. Our goal, however, is not only to expose individuals to new, unexpected, content, but to common content. *See* Sunstein, *supra* note 34 at 5.

202.   *About forwarding limits,* WHATSAPP HELP CENTER, https://faq.whatsapp.com/75928 6787919153/?locale=en_US (last visited Sept. 19, 2022).

Fortunately, this process is not unavoidable. We should embrace the new possibilities and promising pathways of online speech while making intelligent attempts at mitigating their detrimental effects, such as the drive towards ever-more personalized media experiences. This Article seeks to pursue such a strategy in the case of digital fake news and its negative effects on democratic societies.

To bridge the digital epistemic divide, we should recalibrate our policy and scholarship. We must turn away from truth-based solutions, and toward the measures bolstering trust in knowledge-producing institutions and minimum commonality of media experiences and epistemic norms. The challenge of developing such tools is great enough, and will require all of our creativity and rigor.