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The Internet, Democracy, and Misinformation

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The structure of society is heavily dependent upon its means of producing and distributing information. As its methods of communication change, so does a society. In Europe, for example, the invention of the printing press created what we now call the public sphere. The public sphere, in turn, facilitated the appearance of 'public opinion', which made possible wholly new forms of politics and governance, including the democracies we treasure today.

Society is presently in the midst of an information revolution. It is shifting from analogue to digital information, and it has invented the Internet as a nearly universal means for distributing digital information. Taken together, these two changes are profoundly affecting the organization of our society. With frightening rapidity, these innovations have created a wholly new digital public sphere that is both virtual and pervasive.

Law is of course a lagging indicator. We typically call upon law only *after* our lives have been disrupted, and we then turn to law to intervene and restore order. But law will prove a blunt and ineffective instrument unless we first identify with precision the causes of our discomfort. We have already witnessed too many incoherent legal interventions in the developing arena of the virtual public sphere.[1]

The theme of this volume is misinformation. This theme cannot be adequately understood unless it is theorized within the context of the new social structures everywhere emerging due to the Internet's distribution of digital information. In this chapter I shall discuss six unique and novel dangers that the Internet may pose to democratic forms of self-government. These threats stem from aspects of the Internet that are qualitatively different from all previous forms of mass communication. Each of these threats has important consequences for the problem of misinformation, but

[1] See, e.g., Robert Post, 'Privacy, Speech, and the Digital Imagination' in Susan J. Brison and Katharine Gelber (eds.), *Free Speech in the Digital Age* (Oxford: Oxford University Press, 2019); Robert Post, 'Data Privacy and Dignitary Privacy: *Google Spain*, the Right to Be Forgotten, and the Construction of the Public Sphere' (2018) 67 *Duke Law Journal* 981.

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because these threats are fundamentally new, we only dimly understand them. We cannot fashion adequate legal responses to the flood of misinformation that prompts this volume until we first theorize the nature of these threats.

2.1 HOW THE INTERNET DIFFERS FROM PAST MEDIA OF MASS COMMUNICATION

Without purporting to be comprehensive, there are (at least) three ways in which the Internet differs from all prior mass media: zero marginal information cost, integration with life tasks, and interactivity.

First, digitized information spreads on the Internet in a frictionless way that is virtually cost-free at the margin. The price of sending information to 1,000 persons is no greater than sending it to 1 person. The price of sending information to someone on the other side of the globe is no greater than sending it to someone around the corner. As a result, the Internet differs from prior mass media in three important ways:

- *Scale*: Information spreads on the Internet on a scale that is orders of magnitude greater than that attained by any prior medium of communication. Facebook, for example, had 2,989,000,000 monthly active users during the first quarter of 2023.[2]
- *Virality*: Not only is the *quantity* of information distributed on the Internet greater than that transmitted by prior media, but the *speed* of that distribution is far faster.[3] When we speak about the virality of information on the Internet, we refer to the almost unimaginably rapid pace at which information spreads from person to person in the virtual public sphere.
- *Cosmopolitanism*: The scale and virality with which information spreads on the Internet renders national borders almost irrelevant. This has put immense pressure on the integrity of national public spheres. In the past, we have conceptualized public spheres as tied to particular nation states. It used to make sense to speak of the German theater, of the English press, of the French novel, or of the American cinema. But the medium of the Internet is so cosmopolitan that we can now begin to glimpse the possibility of a virtual public sphere that is truly international. Although linguistic and legal barriers have so far prevented the realization of that

[2] Stacy J. Dixon, 'Number of Monthly Active Facebook Users Worldwide as of 1st Quarter 2023', Statista, 9 May 2023, www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide.

[3] Mary Duffy, 'Internet Is the Fastest Mode of Information Dissemination' (2000) 15(4) *Health Promotion International* 350; Mistura A. Salaudeen and Ngozi Onyechi, 'Digital Media vs Mainstream Media: Exploring the Influences of Media Exposure and Information Preference as Correlates of Media Credibility' (2020) 7 *Cogent Arts & Humanities* 2.

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possibility, it is easy to predict that in the not-so-distant future the Internet may foster a true and novel cosmopolitanism.

Second, the Internet is typically accessed through phones, which have become all-purpose tools for negotiating life tasks. We use phones to get directions, to order food, to contact friends, to monitor local news, to locate partners, to charge expenses, and so on. Traditional media did not permeate everyday life in this way. We may have watched a great deal of television, or spent every Sunday morning reading the newspaper, but the virtual public sphere is now integrated with everyday life in ways that dwarf our prior engagement with the traditional public sphere. Because the Internet is seamlessly integrated into our ordinary lives, its influence has become pervasive and inescapable. Our dependence on the communicative structure of the Internet for daily life practices is something entirely new in the world.

Third, the Internet differs from previous forms of mass communication because it is interactive. In traditional mass media, speakers unilaterally addressed large audiences. We ate popcorn while we watched movies in a theater; or we read what our daily newspaper had to tell us over brunch on Sunday mornings; or we listened to our favorite TV commentators over dinner. The Internet has rendered these isolated activities almost passé. It has given rise to wholly new social media like Facebook that are built on the principle of interactivity. Social media are constructed to sustain conversations in virtual space. This unique feature of the Internet has many profound social consequences, of which I shall focus on two: the loss of epistemological authority and polarization.

Traditional media featured professional gatekeepers who vouched for the authenticity and epistemological value of distributed information. The editors of newspapers and magazines staked their reputations on the quality of the product they published. Traditional mass media were controlled by elites who created structures of communication that were quintessentially top down. Social media like Facebook, by contrast, have no equivalent gatekeepers. Facebook may use algorithms to control feeds, but these algorithms do not guarantee the authenticity and epistemological value of the information they distribute.[4] They instead facilitate decentralized and dispersed conversations among users.[5] Those who participate in social media are thus less like the readers of a newspaper than they are like persons who gather to converse on a street corner or around the water cooler at work.

This has potentially important consequences for the creation of epistemological authority. In prior forms of mass communication, gatekeepers warranted the

[4] José Van Dijck, *The Culture of Connectivity: A Critical History of Social Media* (Oxford: Oxford University Press, 2013) p. 47. Cf. Claude Castelluccia and Daniel Le Métayer, *European Parliamentary Research Service. Understanding Algorithmic Decision-Making: Opportunities and Challenges* (Brussels: European Union, 2019).

[5] Beverly Skeggs and Simon Yuill, 'The Methodology of a Multi-model Project Examining How Facebook Infrastructures Social Relations' (2015) 19(10) *Information, Communication & Society* 1356.

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epistemological authority of the news they conveyed. But Facebook features no such elite gatekeepers. The structure of epistemological authority produced on social media is more like that created in self-reinforcing circles of gossip. Some have celebrated traditional gossip because it created nodes of resistance to socially dominant ways of thinking. Gossip has this capacity because it is not just about the exchange of information but also about the creation of group solidarity and identity.[6] This solidarity underwrites self-validating forms of epistemological authority. The social and power dynamics of a gossip circle become the measure of truth and falsity.

Traditional gossip is frequently dismissed as a premodern phenomenon. In contrast to mass media, gossip requires face-to-face interactions, which seems to render gossip irrelevant in the context of large nation states whose publics stretch over millions of persons. But the Internet creates, for the first time, the possibility of large, virtual gossip groups that are connected through the medium of the Internet. This has vast implications for the social construction of epistemological authority.[7] It fractures public epistemological authority and disperses it into competing circles of gossip. It democratizes truth.

The creation of gossip groups also has important implications for the phenomenon of polarization. Although traditional mass media often targeted discrete groups that were potentially at odds with each other, social media actually *create* such groups.[8] As social media increasingly integrate the virtual public sphere into the conduct of everyday life, so does its potential to create powerful groups whose influence permeates ordinary living. These groups can endow their members with identities that empower them to negotiate the tasks of everyday life. Such groups can acquire epistemological authority sustained by the social solidarity of the group itself. Because circles of gossip define themselves in terms of the distinction between those who are inside and those who are outside, interactive social media like Facebook can foster a terrifying tribalism, homologous to that which has come to dominate our public space. The combination of polarization and democratized epistemological authority creates a toxic brew.

2.2 DEMOCRACY AND THE PUBLIC SPHERE

Taken together, the three structural ways in which the Internet differs from all prior forms of mass communication may create new and fundamental threats to our democracy. I shall discuss six such threats. Each has important implications for how we should address the problem of misinformation. These threats are significant

[6] Robin Dunbar, *Grooming, Gossip, and the Evolution of Language* (Cambridge, MA: Harvard University Press, 1996).

[7] See, e.g., Neil F. Johnson et al., 'The Online Competition between Pro- and Anti-vaccination Views' (2020) 582 *Nature* 230.

[8] Eli Pariser, *The Filter Bubble: How the New Personalized Web Is Changing What We Read and How We Think* (New York: Penguin, 2011).

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insofar as we deem it imperative to defend democracy. Why might we deem that important? Democracy is the only modern form of government that instantiates the value of self-determination.[9] Democracy is therefore the only modern form of government that respects equally all persons who are subject to state authority. It is also the only form of government that seeks to reconcile the value of individual autonomy with the need for a state strong enough to perform the services required in the twenty-first century.

Freedom of speech is indispensable for democracy, because democracy consists of 'government by public opinion'.[10] Democracies were made possible when the invention of printing in the fifteenth century facilitated the emergence of the 'public sphere'[11] in the seventeenth and eighteenth centuries. What we now call the 'public'[12] emerged within the public sphere. It was created by 'the circulation of texts among strangers who become, by virtue of their reflexively circulating discourse, a social entity'.[13]

The public sphere, and its corresponding 'public', are presently maintained by an infrastructure of media, like newspapers or museums, which connect strangers to each other. To speak 'in public' is to speak to those whom one does not otherwise know, but whom one expects to reach through mass media that underwrite the public sphere. In our own time, social media and the Internet have created a new, vast, and comprehensive public sphere that is virtual.[14]

What we call 'public opinion' arises within the public sphere. The appearance of public opinion makes modern democracies possible. The public, in the words of

[9] Robert Post, 'Between Democracy and Community: The Legal Constitution of Social Form' in John W. Chapman and Ian Shapiro (eds.), *NOMOS XXXV: Democratic Community* (New York: New York University Press, 1993) p. 163.

[10] Carl Schmitt, *Constitutional Theory*, ed. and transl. by Jeffrey Seitzer (Durham, NC: Duke University Press, [1928] 2008) p. 275. Democracy is 'the organized sway of public opinion'; Charles Horton Cooley, *Social Organization: A Study of the Larger Mind* (New York: Charles Scribner's Sons, 1909) p. 118. For an account of the emergence of this concept of democracy, see Robert Post, *Citizens Divided: Campaign Finance Reform and the Constitution* (Cambridge, MA: Harvard University Press, 2014).

[11] On the public sphere, see Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, transl. by Thomas Burger (Cambridge, MA: MIT Press, 1989); Charles Taylor, *Philosophical Arguments* (Cambridge, MA: Harvard University Press, 1995) pp. 257–87.

[12] John B. Thompson, *The Media and Modernity: A Social Theory of the Media* (Stanford, CA: Stanford University Press, 1995) p. 126.

[13] Michael Warner, *Publics and Counterpublics* (New York: Zone Books, 2002) pp. 11–12. Warner adds that 'one of the most striking features of publics, in the modern public sphere, is that they can in some contexts acquire agency … They are said to rise up, to speak, to reject false promises, to demand answers, to change sovereigns, to support troops, to give mandates for change, to be satisfied, to scrutinize public conduct, to take role models, to deride counterfeits', ibid. pp. 122–23.

[14] See Post, 'Data Privacy' (n 1).

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Michael Schudson, is 'the fiction that brings self-government to life'.[15] All modern democracies must allow for the free formation of public opinion. If they do not, they no longer serve the value of self-determination and hence no longer deserve the appellation of democracy, whether liberal or illiberal. I shall use the term 'public discourse' to refer to the speech necessary for public opinion formation.

We can now ask whether the rise of the Internet and of the virtual public sphere pose distinctive threats to modern democracy. The Internet surely creates many dangers for democracy, but only some are truly novel. The widespread anonymity of the Internet, for example, can be disorienting. The possibilities of impersonation, of misattribution, of inauthenticity, are legion. But anonymity, with its accompanying dangers, was a phenomenon characteristic of the traditional public sphere, and law has had a few centuries to face down whatever issues it might pose. What I shall explore in this chapter are threats to democracy that *uniquely* arise from the digital circulation of information on the Internet. I shall discuss six such threats. Each will have important implications for the problem of misinformation.

2.3 THE INTERNET AND POTENTIAL THREATS TO DEMOCRACY

The first threat concerns the loss of epistemological authority. We know that every stable society requires a convincing form of epistemological authority. This is especially true for modern society, which depends so heavily on the authority of expertise. Division of labor has made expertise indispensable for nearly all aspects of modern life, from health to technology to energy to agriculture. But in recent decades this authority has come under sustained political assault from populist movements that reject the authority of expertise. Saliant examples include the contemporary attack on universities and the vigorous resistance to public health authorities during the COVID-19 pandemic.

Existing forms of epistemological authority have in the past been undermined by new structures of communication. The invention of printing in the fifteenth century had this effect. Prior to printing, bibles were hand-copied, and so were rare and expensive. Access to bibles was strictly controlled by the church, which prohibited lay persons from reading the words of the Gospel. Epistemological authority over salvation was monopolized by the church. The printing press, however, allowed the bible to be widely and cheaply disseminated. As people began to read the words of Jesus for themselves, the church began to lose control over theological knowledge. The upshot was the Reformation and two centuries of chaos, ranging from outright religious conflict to the English revolution to the Peasant's war in Germany. All

[15] Michael Schudson, 'Why Conservation Is Not the Soul of Democracy' (1997) 14 *Critical Studies in Mass Communication* 297, at 304–05. On the relationship between the development of printing and the creation of the nation state, see Benedict R. O'G. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. Revised and extended ed. (London: Verso, 1991).

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Europe struggled to contain the antinomian consequences of the communicative revolution produced by the printing press.

The widespread and virtually costless access to universal knowledge created by the Internet has had an analogous effect on today's society. Now everyone can be an expert on everything. They need only look up the relevant information on the Internet. If we go to the doctor, we research our symptoms and feel free to challenge the medical authority of our physician. I now see signs in doctors' waiting rooms to the effect: 'Your Google search is not equivalent to my medical degree.' The zero marginal information cost of the Internet, in other words, has potentially undermined the forms of epistemological authority by which modern society underwrites order and stability. The diminishment of epistemological authority is magnified by the existence of gossip groups, which construct their own epistemological authority based on the groups' needs for social solidarity.

The implications for democracy of these developments are obviously profound. As we lose the ability to identify figures of authority whom the public can trust to distinguish truth from fiction, we correspondingly lose the capacity to establish common facts. Hannah Arendt rightly observed that we cannot inhabit a common political world unless we acknowledge shared facts.[16] Democracy cannot survive in the absence of the epistemological authority necessary to create a shared political world. We need to be able to decide whether nicotine causes cancer, or whether climate change is produced by human action, or whether seat belts reduce the harms of automobile accidents. This can happen only if we are able to create authoritative disciplinary methods to underwrite our ability to answer such questions. By unleashing epistemological antinomianism, the Internet threatens the capacity of democracy for coherent self-governance.

It is in this context that the dangers of misinformation should be understood. It requires authority, which means it requires trust, to distinguish true information from false information. There was surely a great deal of untrue information distributed by traditional media. But misinformation has become a cardinal problem of the Internet age because zero marginal information has undermined the forms of authority society uses to distinguish falsity from truth. As Ross Douthat recently observed in the *New York Times* in the context of vaccine skepticism, the main theory of countering misinformation 'seems to be to enforce an intellectual quarantine, policed by media fact-checking and authoritative expert statements. And I'm sorry, but that's just a total flop. It depends on the very thing whose evaporation has made vaccine skepticism more popular – a basic trust in institutions, a deference to credentials, a willingness to accept judgments from on high'.[17]

[16] Hannah Arendt, *Between Past and Future* (New York: Viking, 1968) p. 238.

[17] Ross Douthat, 'Go Ahead: Debate Robert F. Kennedy Jr.', *The New York Times*, 24 June 2023, www.nytimes.com/2023/06/24/opinion/rfk-jr-joe-rogan-debate.html.

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The social problem of misinformation, as distinguished from misinformation itself, concerns the loss of epistemological authority. The circulation of untrue information is a symptom of this underlying social dislocation. One can treat the symptom, of course, but the underlying disease will likely manifest itself in other ways. And if treating the symptom means using the state to suppress free participation in public discourse, it may well mean losing the patient in an effort to save it. Those who distrust 'trusted' flaggers or experts will distrust them even more if their objections are officially suppressed. In a democratic society, the revenge of the repressed can be a terrible thing.[18] In dealing with the undoubted problem of misinformation, we must negotiate between the Scylla of widely circulating falsehoods and the Charybdis of the loss of democratic participation. Under conditions of polarization, suppression that is experienced as illegitimate can easily lead to an existential opposition between friends and enemies that would undermine the very possibility of democratic politics.[19]

The second danger concerns the nature of a public in a democracy. At the turn of the twentieth century, sociological theorists such as Gabriel Tarde began to distinguish between a public and what they called a crowd or a mob.[20] Publics were created by mass communications like newspapers or magazines. Persons read these communications and then gathered in small groups to talk about them. The information contained in mass communications spread about as far and as fast as analogue communications could spread. This gave persons time to think about the information and to discuss its implications. Crowds or mobs, by contrast, are large groups of people created in the heat of a simultaneous exposure to common stimuli. Crowds interact immediately and in ways that are typically characterized as emotional.[21] We describe crowds using metaphors such as contagion or frenzy. We might today make the contrast between what Daniel Kahneman calls system 1 and system 2 thinking, the former being immediate and emotional, and the latter being slower and more reflective.[22]

A danger that the Internet poses to modern democracy is that the virality of information might convert the demos of a democracy from a public into a crowd.

[18] See, e.g., Robert Post, 'The Legality and Politics of Hatred' in Thomas Brudholm and Birgitte Schepelern Johansen (eds.), *Hate, Politics, Law: Critical Perspectives on Combating Hate* (Oxford: Oxford University Press, 2018).

[19] Compare Carl Schmitt, *The Concept of the Political*, transl. by George Schwab (Chicago: University of Chicago Press, 1996), with Chantal Mouffe, 'The "End of Politics" and the Challenge of Right-Wing Populism' in Francisco Panizza (ed.), *Populism and the Mirror of Democracy* (London: Verso, 2005) pp. 50–71. See Robert Post, 'Disagreement: Reconceiving the Relationship between Law and Politics' (2010) 98 *California Law Review* 1319.

[20] Gabriel Tarde, *L'opinion et la foule* (Paris: F. Alcan, 1901); cf. John S. McClelland: *The Crowd and the Mob: From Plato to Canetti* (London: Unwin Hyman, 1989) pp. 138–49.

[21] See, e.g., *Terminiello* v. *Chicago*, 337 US 1, 2–6 (1949) (invalidating on First Amendment grounds convictions for breach of the peace where right-wing speakers in Chicago deliberately and effectively provoked a large group of progressive demonstrators).

[22] Daniel Kahneman, *Thinking, Fast and Slow* (New York: Farrar, Straus and Giroux, 2013).

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The flash mob is a physical representation of this social phenomenon. Mob thinking on the Internet is encouraged because the scarce resource in the virtual public sphere is not information, as we theorize in ordinary economic modeling, but instead attention. The Internet has accordingly developed methods to drive attention, which typically emphasize the arousal of emotional reactions like anger or affection. We thus slip from reflection into immediate and emotional reactions.

Democracy requires a public that thinks,[23] and thinking does not occur instantaneously. The virality and interactivity of the Internet, its integration in real time into the pressing tasks of everyday life, may well be inconsistent with necessary public reflection. As a medium, the Internet may privilege immediate reactions that marginalize self-conscious thoughtfulness and contemplation. The result is the production of a kind of mob mentality, characterized by rapid and instantaneous responses, that is inconsistent with democracy. The circulation of misinformation thus occurs in a context that is especially fertile for its uptake and use.

A third danger to democracy that might uniquely be posed by the Internet concerns issues of scale. The vast dimensions of the Internet frequently produce forms of harm that may best be characterized as stochastic. Previously we asked whether particular speech acts might *cause* particular harms. The Internet has rendered this kind of inquiry almost obsolete. Speech that is simultaneously distributed to millions of persons may produce harm in ways that cannot meaningfully be conceptualized through the discrete pathways of simple causality. We must instead think in terms of the statistical probabilities of harm. At present, however, we lack any legal framework capable of assessing stochastic harms in ways that will not drastically overregulate speech. If we were to suppress every form of communication that might cause harm if distributed in sufficiently large numbers, we would have precious little communication left unregulated.

This problem is particularly acute in the context of misinformation. No society punishes statements merely because they are false.[24] In traditional mass media, false information is regulated when it causes legally cognizable harm, such as loss of reputation or privacy. No epistemological authority has ever been strong enough to

[23] See William E. Hocking, *Freedom of the Press: A Framework of Principle. A Report from the Commission on Freedom of the Press* (Chicago: University of Chicago Press, 1947); Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper & Bros, 1948) pp. 22–27, 89–91. See also John Dewey, *Democracy and Education: An Introduction to the Philosophy of Education* (New York: Macmillan, 1916) pp. 4–11, 23–24, 81–99. For a general overview of the integral relationship of education, informed engagement, and democratic self-government, see Diane Ravitch, 'Education and Democracy' in Diane Ravitch and Joseph P. Viteritti (eds.), *Making Good Citizens: Education and Civil Society* (New Haven, CT: Yale University Press, 2001) pp. 16–27.

[24] See generally *United States* v. *Alvarez*, 567 US 709, 718 (2012) ('Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements. This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee').

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sustain a state that might seek to suppress every false statement in traditional mass media. A fortiori this is true of the contemporary Internet. If the problem of misinformation is to be addressed, therefore, the concept of harm must be refined. But at present we lack the conceptual tools to distinguish among the kinds of stochastic harms that may be caused by the nearly infinite variety of false statements widely circulated on the Internet.

A fourth danger to democracy that might be uniquely caused by the Internet concerns the definition of the public sphere itself. Almost every sophisticated democratic legal system offers special protections to speech that is about public officials or public figures, or that is about matters of public concern.[25] Speech that is distributed to the public at large is often *ipso facto* accorded such protections, as can be seen in the unique privileges enjoyed by the press. The modern architecture of freedom of speech heavily depends upon the fundamental distinction between public and private speech. Public speech is protected insofar as modern legal systems seek to preserve the free development of public opinion that insures both public accountability and democratic legitimacy. Most states permit the circulation of a good deal more falsity in public discourse than, say, in commercial speech. Speech between private persons, by contrast, is more heavily regulated to sustain the community norms that define and maintain personal dignity and respect.

The Internet fundamentally threatens this essential legal architecture by blurring the distinction between public and private speech. Even the most personal communication on the Internet can be more widely circulated than an article of public concern in the largest newspapers. On the Internet the personal becomes public.[26] Yet so much about our understanding of how freedom of speech works depends upon a clear demarcation between public and private spheres of speech and action. As this demarcation is blurred by the Internet, so is our ability to conceptualize how speech on the Internet is to be categorized and regulated. This has major implications for the regulation of misinformation.

A fifth unique danger to democracy posed by the Internet concerns cosmopolitanism. All systems of freedom of speech in modern democracies aspire to subordinate political authority to national public opinion. But because the Internet produces opinion that may be cosmopolitan rather than national, it threatens to undermine

[25] *Grant* v. *Torstar Corp.*, [2009] 3 S.C.R. 640, 2009 SCC 61 (Can.) (holding protected under the Canadian Charter of Rights and Freedoms free expression guarantee false statements about matters of public interest published in good faith, and observing standards of responsible journalism); *Khumalo* v. *Holomisa*, CCT 53/01, 2002 (5) S.A. 401 (CC) (South Africa) (reaching the same conclusion under Section 16 of the Constitution of the Republic of South Africa, which safeguards the freedom of speech and press); *Jameel* v. *Wall Street Journal Europe*, [2007] 1 AC 359 (HL) (app. from Eng., reaching the same conclusion under the United Kingdom's Human Rights Act 1998).

[26] See, e.g., Liz Arcury, 'Here's What You Need to Know about the Backlash against Jonah Hill's Ex', *Huffpost*, 13 July 2023, www.huffpost.com/entry/jonah-hill-texts-emotional-abuse_n_64af22a3e4b033dd8e5d6f28?ncid=APPLENEWS00001.

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this entire framework of analysis. It is not clear why the American government should hold itself accountable to Russian public opinion. That is why foreign actors spreading misinformation from abroad are accorded very different legal treatment than domestic actors who are accused of disseminating misinformation. Once the Internet transforms the public sphere into an international phenomenon, however, any such distinction will become problematic, and we shall have to develop entirely new paradigms to explain and justify our protections for freedom of speech.

I shall conclude by sketching a sixth and very subtle danger that the Internet may pose to modern democracies. This is a danger that derives from the immense scale of the Internet. That scale makes its regulation incompatible with law. The Internet is far too big to be policed through the exercise of human judgment. During the first quarter of 2022, for example, Facebook alone took down some 151,900,000 pieces of content. These removals resulted in some 2,614,400 appeals.[27] And these calculations do not even begin to account for the large number of communications that were *not* taken down but that should have been.

No court, no human legal institution, has the capacity to oversee this volume of business. Human judgment simply does not operate at this scale. Content moderation on the Internet therefore mostly does not operate through human decision-making, but instead through the application of Artificial Intelligence (AI). The upshot is that the free formation of public opinion on the Internet, which is the lifeblood of any democracy, has essentially been delegated to AI.

The problem is especially acute in the context of misinformation. It is necessary to understand facts about the world to know whether a statement is true or false. When certain falsehoods are frequently repeated and become stereotyped, it is possible to program AI to detect and remove them. But AI is a poor instrument for determining in the first instance whether statements are true or false. For such tasks we require human judgment, typically exercised in the form of law. Over the centuries, law has earned the political legitimacy and epistemological authority required to determine disputed facts about the world.

The implication of this analysis is that we may be facing a potential crisis insofar as democracy depends upon public speech, and insofar as public speech is controlled by an AI that lacks the political legitimacy and epistemological authority of law. We need, therefore, to theorize the relationship between AI and law so as to endow AI with the legitimacy and authority required to govern the Internet. How to accomplish this poses a profound puzzle.

Law carries authority because it instantiates the human capacity for judgment, which, as Immanuel Kant taught us in his third *Critique*, ultimately depends upon an appeal to the *sensus communis* of humanity. Judgment, including legal

[27] See Facebook's Community Standards Enforcement Report, https://transparency.fb.com/data/community-standards-enforcement.

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judgment, depends upon our common participation in a shared community.[28] As we exercise judgment, we participate in and shape the nature of that community.[29] Judgments are validated by the reciprocal relationship between a community and its members,[30] which is why judges must be *representative* figures to pronounce law. Judges must *commit* to participating in the community that their judgments establish, which is one important reason why we trust their judgments and endow them with authority.[31]

AI cannot be a member of any human community. It cannot participate in, and hence construct a dialectical relationship with, any human community. AI therefore cannot pronounce law. At most AI can report factual determinations about the way that actual humans regard law. The decisions of AI are analogous to those of a jury that seeks to evade its responsibility to determine the 'reasonableness' of an action by taking an opinion poll of the ambient community. Juries are not permitted to act in this way because law is not a mere fact; it does not consist in mere information. Juries are required to exercise independent human judgment for the same reason as are judges. By exercising judgment, juries both participate in and define their community. This dialectical process is the essence of law.

It follows that AI cannot make content moderation decisions with the legitimacy or authority of law. The clear implication is that society will need to invent new ways to endow AI decisions with the kind of authority and legitimacy necessary to govern the Internet. One possibility is to take advantage of the fact that AI is not static. AI learns as it receives feedback about its decisions. Because AI algorithms learn through iterative training, politically appropriate participation in this training might offer the possibility of legitimating the decisions of AI. Whether or not these means are ultimately used, it is plain that the day-to-day governance of the Internet, which is of essential importance to the contemporary formation of public opinion, will remain estranged both from law and from political legitimation until we invent some mechanism to make AI accountable. The potential dangers to democracy are obvious.

2.4 CONCLUSION

I have identified six potentially unique threats that the Internet may pose to modern democracies: the loss of epistemological authority, the substitution of a crowd for a

[28] Ronald Beiner, *Political Judgment* (London: Routledge, 1983).

[29] Robert C. Post, 'The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and *Hustler Magazine* v. *Falwell*' (1990) 103 *Harvard Law Review* 601.

[30] Robert C. Post, 'The Social Foundations of Privacy: Community and Self in the Common Law Tort' (1989) 77 *California Law Review* 957.

[31] Robert Cover, 'Foreword: Nomos and Narrative' (1983) 97 *Harvard Law Review* 4.

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public, the creation of stochastic harm, the loss of the public/private distinction, the loss of the national public sphere, and the chasm between a regime of law and a regime of AI. The problem of misinformation is implicated in each of these threats. We cannot solve the problem of misinformation until we apprehend these dangers and develop strategies for their amelioration. That is the bad news. The good news is that there is much work for all of us to do.

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