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Foundational questions for the regulation of digital disinformation

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ABSTRACT
The threat of digital disinformation is a staple in discourse. News media feature examples of digital disinformation prominently. Politicians accuse opponents regularly of slinging disinformation. Regulators justify initiatives of increasing corporate and state control over digital communication environments with threats of disinformation to democracies. But responsible regulation means establishing a balance between the risks of disinformation and the risks of regulatory interventions. This asks for a solid, empirically grounded understanding of the reach and effects of digital disinformation and underlying mechanisms. This article provides a set of questions that a responsible approach to the regulation of disinformation needs to address.

KEYWORDS Disinformation; regulation; media effects; public arena; politics

Foundations for the regulation of digital disinformation

The threat of digital disinformation is by now a staple in public discourse. News media feature cases of disinformation in digital communication environments prominently in their coverage of politics and election campaigns. Politicians accuse opponents and their supporters regularly of slinging disinformation. Regulators justify initiatives of increasing corporate and state control over digital communication environments with the supposed threat of disinformation to democracies.

Clearly, the quality of information environments matters for democracies.[1] Meaningful self-rule depends on people being able to reliably inform themselves about the state of the world and politics and to be able to voice their concerns, interests, and grievances publicly. Both information and voice are threatened in communication environments dominated by

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[1]Andreas Jungherr and Ralph Schroeder, *Digital Transformations of the Public Arena* (Cambridge University Press 2022).

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disinformation. But disinformation is not the only threat to information and voice, this is also true for overly restrictive or ill-conceived regulatory interventions.[2] Responsible regulation of digital communication environments means establishing a balance between the risks of disinformation and the risks of regulatory interventions. This asks for a solid, empirically grounded understanding of the reach and effects of digital disinformation and underlying mechanisms. This article provides a set of questions that a responsible approach to the regulation of disinformation needs to actively address.

What is disinformation?

Academics seem to have a hard time to pin down exactly what they mean by the term disinformation.[3] But we can identify three levels of the underlying phenomenon, that are intertwined and need untangling: information quality, intentionality, and labelling.

Lecheler and Egelhofer[4] provide a helpful definition that captures these dimensions in three terms. They define *misinformation* as 'incorrect or misleading information' in general; *disinformation* as 'incorrect or misleading information that is disseminated deliberatively'; and *fake news* as both 'a type of false information that is the pseudo journalistic imitation of news – it is not only false, but fake' and as a label used 'to discredit and delegitimize journalism and news media'.[5]

How do we identify disinformation? Clearly disinformation consists of wrong information. In some areas the factualness of information can be readily established. In others, such as ongoing crisis events or matters of political opinion or competition, identifying factualness becomes harder. Also, a strength of democratic societies lies in the open exchange of ideas, observations, and concerns. Much of the information exchanged in these interactions will turn out to be false. But often this will only become apparent after the fact. Forcing communication structures to police the factualness of statements risks restricting the diversity of information, concerns, and opinions. In practice, factualness is likely to mean correspondence with declarations of governments or discursive authorities. This is often sensible, but in times of public contestation of authority, institutional crisis and conflict, or unfolding crisis events, this might lead to a deterioration of the epistemic function of democracy and the public's power to police

[2]Ian Cram, *Liberal Democracy, Law and the Citizen Speaker: Regulating Online Speech* (Hart Publishing 2022).

[3]Chico Q Camargo and Felix M Simon, 'Mis- and Disinformation Studies Are Too Big to Fail: Six Suggestions for the Field's Future' (2022) 3 Harvard Kennedy School Misinformation Review 1.

[4]Sophie Lecheler and Jana Laura Egelhofer, 'Disinformation, Misinformation, and Fake News: Understanding the Supply Side' in Jesper Strömbäck and others (eds), *Knowledge resistance in high-choice information environments* (Routledge 2022).

[5]ibid 70–71.

governments and institutions. The epistemic strength of open societies is the ability to engage arguments and viewpoints in public and settle on the most plausible. This process does not depend on strict factualness but on a shared commitment to the process and the underlying epistemic goal. Information quality is a product of this process, not a precondition.

How do we differentiate between honest mistakes and malicious disinformation? This shifts the discussion from the level of the information item to the level of the source. Who is the author or spreader of the false or misleading information and what are their motives, backers, and track records. In practice, this remains difficult to identify due to anonymity in digital communication environments and the widespread use of sock-puppet accounts. The issue is not about the quality of any one communication item, but about the malicious intents and goals of communicative actors. In the malicious actor's communicative toolbox, downright disinformation is only one element. Foreign or local powers interested in weakening political systems from within can just as well use facts to split a society. Once we consider the malicious intent of a communicator and how to counter it, it does not matter much how this intent is pursued. Regulatory focus thus needs to shift to the activities of communicative actors, legitimate and illegitimate.

Disinformation is not a neutral label. Applying the label *disinformation* or *fake news* to a politician, a journalistic medium, or to a government institution is not just a factual diagnosis, it is an indictment of intentional wrongdoing. In discursive practice, the label serves to delegitimize a political other, be it a competitor, a political movement, or an institution.[6] This presents a challenge to regulators and researchers alike moving in a political space where disinformation is the object of political competition, and institutional as well as scholarly interventions – if done haphazardly – can be seen as partisan and threaten their epistemic claims to impartial fact provision.

This shows the multidimensionality of disinformation and associated issues for measurement and intervention design. Regulators face a regulatory object without clear or stable features. They always need to consider information sources, motives, and goals. Regulators also need to consider the larger system-level consequences of being widely seen as taking side in political competition by labelling selected political actors as disinformation agents.

What is special about digital disinformation?

Disinformation is not an exclusively digital phenomenon. Still, digital media and associated transformations feature strongly in the discussion of

[6] Jana Laura Egelhofer and Sophie Lecheler, 'Fake News as a Two-Dimensional Phenomenon: A Framework and Research Agenda' (2019) 43 Annals of the International Communication Association 97; Johan Farkas and Jannick Schou, 'Fake News as a Floating Signifier: Hegemony, Antagonism and the Politics of Falsehood' (2018) 25 Javnost – The Public 298.

disinformation and their regulation.[7] Digital media transform communication spaces. By lowering the costs of information publication, distribution, and search, digital media open communication spaces.[8] This means that central discursive institutions like media companies, newsrooms, as well as regulators lose the ability to exclude nefarious communicators, content, or expressions from the public arena. Accordingly, a digitally enhanced public arena will contain more unreliable or false information, nefarious actors trying to manipulate people – be it for economic, political, or entertainment purposes –, and hostile and offensive contributions and interactions than a public arena controlled by a small set of institutions or providers of communication structures. Importantly, this does not mean that the digital public arena degenerates in confusion, offense, and harassment. An open public arena can surface information, opinions, and concerns that might remain hidden, in constellations more dependent on gatekeeper attention and selection.

Media elites find themselves challenged by digital competitors and international regulators find themselves confronted with communication structures ran by US and Chinese companies. This weakens their hand in regulating national public arenas that run on foreign communication structures, whose owners show varying interest in accommodating their sensibilities or demands.[9] It is tempting for regulators and discursive elites to blame digital media for harming society and democracy through disinformation. Perceived dangers serve as legitimisation for strong regulatory interventions to regain control over unruly communication environments. They also take the shine off some of the new technology companies busy at disrupting established industries, business models, and power structures.

Regulators and the public need to remain aware of the good that open and unruly communication spaces bring for the epistemic function of open societies. Overly enthusiastic interventions – even those motivated by the best of intentions – can lead to a chilling effect and a deterioration in the epistemic function of democracies and their capabilities to control elites and institutions.

Where does disinformation come from?

Doubtless, digital communication environments contain plenty false or misleading information. This disinformation comes both from the top as well as

[7]Andreas Jungherr and Ralph Schroeder, 'Disinformation and the Structural Transformations of the Public Arena: Addressing the Actual Challenges to Democracy' (2021) 7 Social Media + Society 1; Alexander Peukert, 'Desinformationsregulierung in der EU: Überblick und offene Fragen' (2023) 78 Juristen Zeitung 278; Alexander Peukert, 'Modi der Plattformregulierung in den Bereichen Urheberrecht, Hassrede und Desinformation' in Raven Kirchner and others (eds), *Digitalisierung im Recht der EU* (Nomos 2023).

[8]Andreas Jungherr, Gonzalo Rivero and Daniel Gayo-Avello, *Retooling Politics: How Digital Media Are Shaping Democracy* (Cambridge University Press 2020).

[9]Anu Bradford, *Digital Empires: The Global Battle to Regulate Technology* (Oxford University Press 2023).

the bottom. Domestic actors interested in advancing a political agenda or faction can spread false information. This is also true for foreign actors who spread falsehoods and foster civil divisions. These interventions from the top can reach large audiences, especially when associated topics, frames, narratives, and speakers jump from interested sites and sources into mainstream media coverage.[10] Digital media are an important channel for these activities, but by far not the only one or that with the greatest reach. Importantly, for distribution digital disinformation still depends on news media picking up on it and distributing it to large audiences.

Disinformation can also emerge from the bottom up. This type of disinformation flows through networks of the converted and their social contacts. Digital disinformation could thus spread without necessarily becoming visible to the public at large, discursive elites, or regulators. This disinformation from the bottom is demand driven and dilutes the factual basis on which people form political decisions.

Tellingly, public debate about the ills of disinformation focuses on the supposed role that digital media play in enabling disinformation from the bottom up and foreign actors but largely ignores the role of disinformation from the domestic top and the crucial role of news media in amplifying disinformation. Regulatory interventions could be seen as an attempt by governments to gain greater control over publics and contestation by having digital media companies police contributions and exchanges. Public fears of disinformation could thus increase the control of governments and technology companies while giving up opportunities to challenge their power.

What do we know about the reach of disinformation?

Surprisingly, only a handful of studies tries to measure the reach of disinformation. Some measure stated beliefs in wrong statements. Others measure audiences of known sources of disinformation. Both approaches come with limits. Measuring apparent belief in wrong statements likely overestimates the reach of digital disinformation as it conflates different information channels through which disinformation reaches people. Also, answers can be performative. For example, people claiming to believe that Donald Trump won the 2020 Presidential election might do so for reasons other than actual belief, namely performance of group allegiance or partisan cheerleading.[11] Thus, this might not measure the reach or persuasive appeal of disinformation. Instead, this might result from elite signalling, especially in

[10]Yochai Benkler, Robert Faris and Hal Roberts, *Network Propaganda: Manipulation, Disinformation, and Radicalization in American Politics* (Oxford University Press 2018).
[11]Kevin Arceneaux and Rory Truex, 'Donald Trump and the Lie' (2023) 21 Perspectives on Politics 863.

situations where there are no costs to the professed believes.[12] But focusing on known sources of disinformation is also a problematic proxy. For one, this approach might underestimate the actual set of disinformation sources, especially those active on messenger services or those often switching web-presences or social media accounts.

The empirical evidence speaks to digital disinformation having limited direct reach online. We have the best – if still limited – evidence for the reach of disinformation for the USA. Studies indicate only a limited reach of disinformation sources among online audiences[13] and that they constitute a very limited share of people's overall information consumption.[14] For other countries, the evidence is thinner still. But overall, there is little evidence that digital disinformation is a broad society-wide phenomenon in Western democracies.[15]

What do we know about the effects of disinformation?

Potential effects from information include learning (the uptake and retention of new information), agenda setting (the perception of issue importance), and persuasion (the changing of attitudes). Of these, persuasion is the most evocative but also the most difficult to achieve. To change attitudes, new information needs to compete with already present information, needs to be remembered, and persist in the context of other competing information. Accordingly, psychology attributes single pieces of information only limited powers for sustainable attitude change.[16] There is no reason to expect that this should be different for disinformation.

People might encounter information designed to misinform them about political events, issues, or actors. But this information would compete with other contradicting information for their attention. For disinformation to have lasting persuasive effects, they either need to run consonant with other information streams in people's social circles and information environments or they need to hit people who are, regarding political information consumption or exchange, isolated and blank slates. This might be the case for some subgroups but is highly unlikely for the general population.

Studies show that people who are most likely to interact with and share disinformation tend to already agree with the advocated political stance.[17]

[12] Hugo Mercier, *Not Born Yesterday: The Science of Who We Trust and What We Believe* (Princeton University Press 2020).
[13] Andrew Guess, Jonathan Nagler and Joshua A Tucker, 'Less Than You Think: Prevalence and Predictors of Fake News Dissemination on Facebook' (2019) 5 Science Advances 1.
[14] Jennifer Allen and others, 'Evaluating the Fake News Problem at the Scale of the Information Ecosystem' (2020) 6 Science Advances 1.
[15] Edda Humprecht, Frank Esser and Peter Van Aelst, 'Resilience to Online Disinformation: A Framework for Cross-National Comparative Research' (2020) 25 The International Journal of Press/Politics 493.
[16] Daniel J O'Keefe, *Persuasion: Theory and Research* (3rd edn, SAGE 2016).
[17] Guess, Nagler and Tucker (n 13).

For them, the viewing, sharing, and interacting with disinformation items does not predominantly serve an informative but an expressive function.[18] Publicly interacting with and pointing others to highly controversial and unlikely information can serve as a powerful signifier of group identity and belonging. Disinformation would thus primarily not be a problem of information quality but one of political identity.

While these patterns might hold for the general population, it is conceivable that disinformation has stronger negative effects in select sub-populations or for individuals at risk of radicalisation. In sub-populations that establish distinct communication environments open to disinformation, the impact of disinformation might compound over time and not be countered. Similar dynamics might hold for people at risk of radicalisation who over time continue to actively select items of false or misleading information or who might be algorithmically pushed into an algorithmic cage of disinformation. Here, disinformation can mislead people. But any intervention in this dynamic situation, which treats the issue as an information problem, will miss the actual underlying cause. Instead, we are dealing with political, social, or personal problems that find expression in the use of disinformation.

What are the risks of inflated disinformation fears?

Disinformation is not the only threat to democracy. So are regulatory overreach and alarmist warnings against disinformation.[19] While there are clear risks with political speech veering into untruths and hostility, regulation has tended to be reluctant to intervene heavy-handedly. Political speech includes the challenge of authority. Increasing the power of governments and companies about challenging political speech risks exercising a chilling effect over this speech in digital information environments.[20] Political disagreements and conflict could be turned into a question of factuality and information quality. This raises the question of who is allowed to decide about what information is factual and what is fake.[21]

Also, warnings against disinformation carry unintended side effects. Warning people against disinformation can make them distrustful of information and sources in general irrespective if they are true or false, and lower

[18] Mathias Osmundsen and others, ‘Partisan Polarization is the Primary Psychological Motivation Behind “Fake News” Sharing on Twitter’ (2021) 115 American Political Science Review 999.

[19] Jeff Kosseff, *Liar in a Crowded Theater: Freedom of Speech in a World of Misinformation* (Johns Hopkins University Press 2023).

[20] Cram (n 2).

[21] Alexander Peukert, ‘Who Decides What Counts as Disinformation in the EU?’ [2023] Verfassungblog <https://verfassungsblog.de/who-decides-what-counts-as-disinformation-in-the-eu/> accessed 6 February 2024.

people's trust in media and journalism in general,[22] lower their satisfaction with the current state of democracy, and increase their support for restrictive regulation of speech.[23]

These are obvious trade-offs in the regulation of disinformation. Disinformation might carry dangers for democracy but so do restrictive speech regulation and the propagation of inflated fears. Proponents of regulatory and communicative interventions in the fight against digital disinformation need to provide evidence about the balance between the dangers of disinformation and the risks and drawbacks associated with their proposed interventions.

Conclusion: foundations for a responsible, empirically grounded regulation of digital communication environments

The case for a transformative or strong society-wide impact of digital disinformation is thin.[24] Even in the US, the country with the strongest academic and public attention on public disinformation, the reach of digital disinformation appears limited and mainly restricted to people already willing to agree with the political slant in the presented information. Additionally, the label disinformation is broadly used to discredit political opponents, journalists, and news sources. Its attribution is widely perceived as a cudgel to silence political opposition. This makes regulation tricky, as enforcing governments and companies are not necessarily perceived as neutral arbiters of the truth but interested actors taking sides in political competition, risking the loss of institutional legitimacy. This raises the stakes for evidence-based regulation of digital communication spaces. There is a demand for robust and systematic evidence on the reach and effects of digital disinformation as well as for open assessments of potential harms by downstream effects of regulatory interventions.

Digital disinformation has grown into a vibrant research area.[25] It is even more surprising that the questions raised in this article do not receive more attention and are only rudimentarily understood. This has given rise to claims by some that the incentives in disinformation research are

[22]Sacha Altay, Anne-Sophie Hacquin and Hugo Mercier, 'Why Do so Few People Share Fake News? It Hurts Their Reputation' (2022) 24 New Media & Society 1303; Melanie Freeze and others, 'Fake Claims of Fake News: Political Misinformation, Warnings, and the Tainted Truth Effect' (2021) 43 Political Behavior 1433; Emily Van Duyn and Jessica Collier, 'Priming and Fake News: The Effects of Elite Discourse on Evaluations of News Media' (2019) 22 Mass Communication and Society 29.

[23]Andreas Jungherr and Adrian Rauchfleisch, 'Negative Downstream Effects of Alarmist Disinformation Discourse: Evidence from the United States' [2024] Political Behavior <https://link.springer.com/article/10.1007/s11109-024-09911-3#citeas> accessed 6 February 2024.

[24]Sacha Altay, Manon Berriche and Alberto Acerbi, 'Misinformation on Misinformation: Conceptual and Methodological Challenges' (2023) 9 Social Media + Society 1; Brendan Nyhan, 'Facts and Myths about Misperceptions' (2020) 34 Journal of Economic Perspectives 220.

[25]Camargo and Simon (n 3).

misaligned.[26] By inflating fears of disinformation, researchers raise the profile and importance of their work. After all, who would argue about the relevance of research making digital communication environments safe for democracy. This in turn guarantees attention by media and funders. More problematic might be the contribution of this work to restrictive and overbearing regulatory interventions in digital communication spaces. This again can translate into funding opportunities leading to more research in this vein. Showing the limits of the reach and effects of digital disinformation does not provide such a virtuous feedback loop. Consequently, we might see less of the kind of research that we need to provide a sound empirical basis for a responsible regulation of digital communication environments.

Claims overstating the dangers of digital disinformation increasingly meet with claims underplaying or negating these risks. This can result in a sort of academic position game, where researchers settle into camps and propose extreme positional statements, which they then defend; instead of focusing on the development, aggregation, and critical interrogation of evidence. This is worsened if the opposing camps do not accept contradicting evidence and react to it by a shifting of conceptual goal posts and the redefinition or stretching of concepts.

Disinformation happens and is somewhat harder to police in digital communication environments than in traditional communication environments. But, as with any form of communication, the effects of disinformation are limited and highly context dependent. Harms are possible but likely embedded in other factors, such as economic or cultural insecurity or relative deprivation.[27] Underplaying the risks of disinformation is not helping anyone, especially in the face of mounting geopolitical conflicts and connected coordinated influence operations. At the same time, inflating the risks of disinformation is also highly dangerous. Associated fears can drive democratic dissatisfaction, provide pretense to not accept election results, mount doubts of factually correct but inconvenient information, and increase support for far-reaching and ill-understood regulatory interventions by states and companies in political speech. To accept these considerable negative downstream effects, one should be very sure about the actual reach and dangers of disinformation.

It is fashionable to attribute overwhelming societal risks to digital media, be it polarisation, disinformation, or lately artificial intelligence. The grandness of these challenges and risks then serves as justification for heroic regulatory interventions and innovations.[28] We need to demand more of those who propose innovative new ways to regulate or intervene in digital

[26] Joseph Bernstein, 'Bad News: Selling the Story of Disinformation' *Harper's Magazine* (New York City, September 2021) <https://harpers.org/archive/2021/09/bad-news-selling-the-story-of-disinformation/> accessed 6 February 2024.

[27] Jungherr and Schroeder (n 7).

[28] Marietje Schaake, 'The Premature Quest for International AI Cooperation: Regulation Must Start with National Governments' [2023] Foreign Affairs <https://www.foreignaffairs.com/premature-quest-international-ai-cooperation> accessed 6 February 2024.

communication environments. Especially now, when recent advances in generative artificial intelligence have given rise to fears as to their impact on democracy[29] and digital communication environments.[30] All the more so, as many of these fears are speculative and might be overblown.[31]

We should make sure that the empirical basis for the diagnoses of disinformation as a driver of societal harms is sound before we boldly innovate and increase central corporate and governmental control over digital technology, which can result in chilling legitimate speech that contests authority and the powerful and could stifle technological innovation. Looking back at the conceptual shambles and empirical elusiveness of prior digital fears like echo chambers, filter bubbles, bots, or psychometric targeting, we need to start demanding better conceptual and empirical foundations for the regulation of digital communication spaces.

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[29] Andreas Jungherr, 'Artificial Intelligence and Democracy: A Conceptual Framework' (2023) 9 Social Media + Society 1.

[30] Andreas Jungherr and Ralph Schroeder, 'Artificial Intelligence and the Public Arena' (2023) 33 Communication Theory 164.

[31] Felix M Simon, Sacha Altay and Hugo Mercier, 'Misinformation Reloaded? Fears about the Impact of Generative AI on Misinformation Are Overblown' (2023) 4 Harvard Kennedy School Misinformation Review 1.