

Alternative Solutions to Disinformation: Address the Sources Rather than the Distribution

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In an increasingly concentrated online public sphere, the easiest and fastest way to attack content that is perceived as dangerous—like disinformation—is controlling its dissemination. In recent years, internet companies have been increasingly removing or blocking content, including that of heads of State, labeling expressions, prohibiting the sale of certain goods, demonetizing or prohibiting certain content that question official sources of information, fact-checking efforts, warnings, and contextualization, among others. Implicit in these solutions is the assumption that false information can be contrasted against an objective, clear-cut truth. Most social media directed solutions—both state-imposed like the European Digital Services Act (DSA) and self-regulated like fact checking—rely on an efficient and functional public sphere. If the public sphere is dysfunctional, the entire system fails. This paper argues that focusing on the dissemination alone can create incentives towards censorship and easily lead to abuse. Instead, more attention should be paid to the sources of disinformation. Although all disinformation could be potentially equally harmful, disinformation campaigns are conducted for different purposes, by different means and different actors, with different obligations and responsibilities, and attract different fields of law and social sciences.

I. Introduction

In a letter to the Director-General of UNESCO, Brazil's president, Luiz Inácio Lula Da Silva, stated that “[o]n the one hand, it is necessary to guarantee the exercise of individual freedom of expression, a fundamental human right. On the

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other hand, we need to ensure a collective right: the right of society to have access to trustworthy information, and not lies and disinformation.”¹ Brazil’s president is not alone in his concern over the expansion of disinformation. In July 2022, the European Union (EU) passed the Digital Services Act (DSA), a law mandating internet companies to assess the risks created by their services vis-à-vis the spread of disinformation and adopt measures to mitigate them.²

The DSA was preceded by an EU-led Code of Conduct in 2018, under which several internet companies committed to address disinformation online and take concrete measures to stop their spread.³ The European Union evaluated the code of conduct and amended it in 2022 as the Code of Practice on Disinformation, which is intended to dialogue with the implementation of the Digital Services Act. Concurrently, UNESCO developed their Guidelines for the Governance of Digital Platforms in 2023.⁴ In its introduction, the Guidelines state that “if we can no longer distinguish fiction from reality, falsehood from truth, the foundations of our societies crumble. Democracy, dialogue, and debate – all essential to address major contemporary challenges – become impossible.” The process for the Guidelines’ adoption included three drafts that were opened to public consultation, a global conference in Paris in February 2023, a meeting of experts in New York on the occasion of World Press Freedom Day, and several regional consultations led by

¹ Letter from the H.E. Luiz Inácio Lula Da Silva, President of Brazil to Audrey Azoulay, Director-General of UNESCO, on the Occasion of UNESCO’s Internet for Trust Global Conference (Feb. 22, 2023), at <https://unesdoc.unesco.org/ark:/48223/pf0000384560>.

² Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), 2022 O.J. (L 277) 1. See *Digital Services Act Package*, EUR. COMM’N WEBSITE, at <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package> (last visited Jan. 18, 2024).

³ EUROPEAN COMMISSION, 2022 CODE OF PRACTICE ON DISINFORMATION (2022), at <https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation> (last visited Jan. 18, 2024).

⁴ UNESCO, GUIDELINES FOR THE GOVERNANCE OF DIGITAL PLATFORMS: SAFEGUARDING FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION THROUGH A MULTI-STAKEHOLDER APPROACH (2023), at <https://unesdoc.unesco.org/ark:/48223/pf0000387339> (last visited Jan. 18, 2024) [hereinafter UNESCO GUIDELINES FOR THE GOVERNANCE OF DIGITAL PLATFORMS].

UNESCO's regional offices.⁵ Over 10,000 comments were submitted in response to the open call for feedback.⁶

Obviously, the issue of disinformation is a concern for State and non-State actors alike.⁷ And so are the potential solutions that may be provided to address this particular challenge. In an increasingly concentrated online public sphere, the easiest and fastest way to attack content that is perceived as dangerous—like disinformation—is controlling its dissemination. In recent years, internet companies have increasingly been asked or have volunteered to remove or block content, including those of heads of State, label expressions, prohibit the sale of certain goods, and demonize or prohibit certain content that questions official sources of information, fact checking efforts, warnings, and contextualization, among others. Thus far, most proposals to curb disinformation and propaganda—whether state-led like the European DSA or self-regulated like fact checking—rely on a public sphere that works properly. The most important challenge for these measures though is determining what is true and what is not. To that end, internet companies and states look at different sources, experts, and institutions that may help identify a statement, its nature, and its accuracy. The collection of actors and institutions that provide, circulate, and filter ideas, expertise and knowledge is what Balkin calls a public sphere.⁸

Implicit in the dissemination-oriented solutions is the assumption that false information can be contrasted against an objective, clear-cut truth. And truth is a quality that may only be attributed to certain expressions and not others. Statements of fact may be subject to a test of accuracy and truth. Opinions are exempt, and so are humor, sarcasm, art, dogma or beliefs, or figurative speech.

⁵ See Press Release, UNESCO, UNESCO's Call to Regulate Digital Platforms to Face Online Disinformation and Hate (Feb. 23, 2023), at <https://www.unesco.org/en/articles/unesco-call-regulate-digital-platforms-face-online-disinformation-and-hate> (last visited Jan. 18, 2024). This is the continuation of an effort started in 2021 by UNESCO to treat information as a “public good” in the face of the “proliferation, amplification and promotion ... of potentially harmful content digitally, including disinformation and hate speech, which undermines people’s rights and the quality of collective public debate.” See UNESCO World Press Freedom Day International Conference, *Windhoek+30 Declaration*, U.N. Doc. CI-FEJ/WPFD/2021/1 (May 3, 2021).

⁶ UNESCO GUIDELINES FOR THE GOVERNANCE OF DIGITAL PLATFORMS, *supra* note 4.

⁷ Soroush Vosoughi, Deb Roy & Sinan Aral, *The Spread of True and False News Online*, 359 SCIENCE 1146 (2018).

⁸ Jack M. Balkin, *How to Regulate (and Not Regulate) Social Media*, 1 J. FREE SPEECH L. 72, 73 (2021) [hereinafter “*How to Regulate (and Not Regulate) Social Media*”].

Parody, for example, is meant to look like something that is not.⁹ But even scientific analysis can often be difficult to assess when forced to clearly separate truth from false statements. Faced with the same scientific question, one biologist may offer an opinion and another a different one to approach the answer. Who and how should tell which one is right and which one is wrong?

Speech is ambiguous. And states are ill-suited to determine truth from falsity. It is for other institutions to determine what methods and processes should be followed to ascertain scientific truth, and for society to agree as to what constitutes proof and evidence within a given field.¹⁰ As Prof. Post explains, “The rule establishing equality of ideas stands for the proposition that every democratic citizen has an equal right to influence the contents of public opinion. ... The equality of ideas flows from the premise of political equality, and not from any postulated epistemological equality of ideas, which would be incompatible with the very concepts of truth or falsity.”¹¹ “Fools and Savants are equally entitled to address the public.”¹² In short, a properly functioning public sphere is required to provide the appropriate context, knowledge, or expertise to tell truth from lies.

In short, a properly functioning public sphere is required to provide individuals with the appropriate context, knowledge, or expertise to tell truth from lies. I argue that in addressing disinformation effectively we should be looking and assessing the quality of our public spheres rather than regulating the bottlenecks that facilitate content distribution. This essay suggests that little attention has been paid to the sources of knowledge, expertise and truth in our public spheres and proposes that in a malfunctioning public sphere, attempts to curb dissemination will be ineffective while having a significantly higher potential for abuse. This essay builds on findings from a recent paper we developed at CELE on the duties of public officials regarding their own speech, concluding that state held and state produced information has a longstanding recognition as a fundamental piece in our

⁹ Agustina Del Campo & Paula Roko, Centro de Estudios en Libertad de Expresión y Acceso a la Información (CELE), *Del Cómic a Los Memes: Viejas Y Nuevas Problemáticas en Torno Al Humor Y la Libertad de Expression* [From Humor to Memes] (2019), at https://www.palermo.edu/Archivos_content/2019/cele/noviembre/Humor-y-libertad-de-expresion.pdf.

¹⁰ *Id.*

¹¹ Robert Post, Future Challenges to Freedom of Expression, Keynote Speech for CELE’s 10th anniversary (Sept. 19, 2019), at https://www.palermo.edu/Archivos_content/2019/cele/octubre/Future-Challenges-to-Freedom-Of-Expression.pdf.

¹² ROBERT POST, DEMOCRACY, EXPERTISE AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE (2012) [hereinafter “DEMOCRACY, EXPERTISE AND ACADEMIC FREEDOM”].

information ecosystems, and legal measures intended to guarantee its integrity have been lacking enforcement. Information ecosystems are not only made of media or internet companies but rather important intermediate actors in our societies that have concrete obligations towards their own speech, including public officials who express the voice of the State. If those are systematically ignored, efforts to curb disinformation online will become more aggressive, less effective, and more prone to abuse.

II. Falsehoods: Separating the Wheat from the Chaff

Disinformation is a contested term for which there is still not a universally accepted definition.¹³ Not everybody is working with the exact same categories. Some scholars and advocates have been distinguishing between “disinformation” and “misinformation”, on the basis of the state of mind of the speaker and/or the person that spreads the message.¹⁴ For instance, in the work of Wardle and Derakhshan, there are three kinds of information disorders: disinformation, which they describe as “[i]nformation that is false and deliberately created to harm a person, social group, organization or country,” misinformation, defined as “[i]nformation that is false, but not created with the intention of causing harm,” and a third category, “malinformation”, is added, which they define as “[i]nformation that is based on reality, used to inflict harm on a person, organization or country.”¹⁵ Benkler, Faris and Roberts define disinformation and propaganda as the intentional manipulation of information for political gain.¹⁶

Different authors give relevance or preeminence to different aspects of the information disorder phenomenon. For Wardle and Darakhshan, harm and truthfulness are the relevant elements. Misinformation is only false, malinformation is only harmful, and disinformation is both false and harmful. In turn, the Trust and Safety Glossary classifies disinformation and misinformation

¹³ Irene Khan (Special Rapporteur for Freedom of Opinion and Expression), *Disinformation and Freedom of Opinion and Expression: Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 9, U.N. Doc. A/HRC/47/25 (Apr. 13, 2021).

¹⁴ It is still a very American and European distinction since Spanish speakers don’t necessarily have a translation for misinformation but instead refer to the phenomenon as “Desinformación.”

¹⁵ CLAIRE WARDLE & HOSSEIN DERAKHSHAN, COUNCIL OF EUROPE, INFORMATION DISORDER: TOWARD AN INTERDISCIPLINARY FRAMEWORK FOR RESEARCH AND POLICYMAKING 20 (2017), at <https://edoc.coe.int/en/media/7495-information-disorder-toward-an-interdisciplinary-framework-for-research-and-policy-making.html>.

¹⁶ YOCHAI BENKLER, ROBERT FARIS & HAL ROBERTS, NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS (2018).

under the category “common types of abuse,” but has no definition for malinformation. Intent seems to be the only relevant distinction between them.

Sunstein catalogs false information according to four different elements: state of mind, magnitude of harm, likelihood of harm and the timing of such harm. He reckons that, in fact, as a rule, falsehoods should not be “censored or regulated, even if they are lies.”¹⁷ And he identifies four sets of issues that he believes lies should be evaluated against by the law and organizes them in a table I reproduced below:¹⁸

State of Mind	Lie	Reckless	Negligent	Reasonable
Magnitude of harm	Grave	Moderate	Minor	Nonexistent
Likelihood of Harm	Certain	Probable	Improbable	Highly improbable
Timing of harm	Imminent	Near future	Reasonably soon	Distant future

Central to Sunstein’s test is the harm: Does the lie create a concrete harm? Is that harm serious, grave or is it moderate or minor? Is the harm probable, certain, or improbable and how imminent is it? If there is no harm, then there is no legal liability. This is a principle of civil liability everywhere: where there is no harm there is no cause of action. Now, when there is harm, civil liability would require intent and a causal link between the lie and the harm to establish liability. This is the basis of Sunstein’s proposed analysis and of the general overall permissible limits to freedom of expression. Per international human rights standards, freedom of expression cannot be subject to prior restrictions but only to subsequent liability. And that liability stems from damage (to the rights of others, public morale or safety, the protection of children) causally linked to speech and delivered with intent or negligence. Approaching disinformation this way requires a clear distinction between different kinds of expressions, concrete damages (that in most

¹⁷ CASS SUNSTEIN, *LIARS: FALSEHOODS AND FREE SPEECH IN THE AGE OF DECEPTION* 26 (2021).

¹⁸ The table is a reproduction of SUNSTEIN, *id.* at 41.

legal systems need to be proven and cannot merely be assumed), and a clear intention to deceive. In order to target the dissemination, there needs to be prior determination of these factors.

Several regulatory attempts, however, approach disinformation solely from the harm rather than the intent and do not distinguish between disinformation, malinformation or misinformation. The European DSA approaches disinformation this way. Focusing on the harms allows regulation to target dissemination rather than content creation, skipping the traditional liability analysis and focusing on risk of harm instead. This approach allows regulators to target internet companies - social media and search engines mostly- and create incentives for these actors to remove, filter, block, scale content down or demonetize it. Failure to address the harms caused by disinformation, will most probably lead to civil liability and fines.

III. Civil Liability Limits and the Fifth Element: Who is Lying?

Although the civil liability regime for speech and abuses in speech may be applied to treat false statements generally, it has often proven difficult. This has been particularly true in dealing with the recent online disinformation crises. Irene Khan, UN Special Rapporteur Freedom of Opinion and Expression, suggests:

Part of the problem lies in the impossibility of drawing clear lines between fact and falsehood and between the absence and presence of intent to cause harm. False information can be instrumentalized by actors with diametrically opposite objectives. Truthful information can be labeled as “fake news” and delegitimized. Opinions, beliefs, uncertain knowledge, and other forms of expression like parody and satire do not easily fall into a binary analysis of truth and falsity. Furthermore, false content that is spread online with the intent to cause harm (disinformation) can be picked up and shared by innocent third parties with no such intent (misinformation), the innocent vector boosting dissemination and adding credibility to the malicious campaigner. Intentionally or not, the harm occurs.¹⁹

The civil liability framework has concrete limits. In order to establish civil liability, there needs to be a case-by-case analysis. Each piece of content needs to be treated and analyzed individually. In the digital age, where volume, speed and permanence are the key distinguishing features, this approach has proven slow, hard to implement, expensive and ineffective. As Douek argues:

¹⁹ Khan, *supra* note 13, at ¶ 10.

[H]istory shows that where online speech governance was once dominated by the First Amendment tradition's categorical and individualistic approach to adjudicating speech issues, that approach became strained and online speech governance now revolves around the principles of proportionality and probability. Proportionality requires governance to no longer focus on the speech interest in an individual post alone, but to also take into account other societal interests and place proportionate limitations on content where necessary.²⁰

While online content volume and speed merit creativity in legal thinking, like that proposed by Douek or the European DSA, approaching online content in bulk from a dissemination point of view entails important risks to fundamental freedoms and the effectiveness of such measures still depends on the ability to tell truth from lies in clear-cut, absolute terms. Furthermore, it requires an authoritative way—entity, institution, organism—to establish it.

There is arguably a different way to approach this challenge that could produce results at scale, address massive amounts of content while not diverging from a traditional human rights approach to freedom of expression: focusing on sources of disinformation rather than dissemination. Who is lying and what obligations does that person or institution have?

Consider, for instance, an executive order that cites blatantly false information, which in turn becomes the factual basis of a public policy being enacted or a blatantly false response to a Freedom of Information Act (FOIA) request. And contrast that with the testimony of a witness who lies in criminal proceedings leading to the conviction of an innocent person. Now consider a campaign led by a foreign government to disrupt the elections in another country, or foster instability, or get one party elected instead of another. If analyzed as a communication phenomenon alone, they may look alike: they are all intentional misrepresentations or strict lies directed for profit or gain, either political or not.²¹ The harm arising from those acts may be mild or grave, probable, or improbable, imminent, or distant in time. However, they encompass different risks, affect radically different interests, and merit different legal responses. The source of the disinformation is the distinguishing factor. One is ruled by administrative law; the second is ruled by criminal and procedural law; the third is international law at its best. The

²⁰ Evelyn Douek, *Governing Online Speech: From 'Posts-As-Trumps' to Proportionality and Probability*, 121 COLUM. L. REV. 759 (2020).

²¹ See CELE, *Are Public Officials' Lies Unsustainable or Do They Have Far Reaching Effects?* (2021), at https://www.palermo.edu/Archivos_content/2021/cele/papers/Disinformation-and-public-officials.pdf.

dissemination of the three phenomena may be equally disturbing or harmful but the means to address them are different.

When the sources of disinformation have concrete obligations regarding the accuracy of their speech, there is an assumption *a priori* that their speech has particular importance and its falseness entails potential grave and imminent damage, whether on the liberty of a person (like in a criminal court proceeding), on the life, property, and freedom of members of a given society (like in an administrative act enacted by government), or the sovereignty of a given state (like the case of foreign propaganda which violates the international law of non-intervention). Consider, for example, the case of doctors, who are mandated to advise their patients in good faith according to good standard medical practice. A failure to produce such advice could give rise to liability for malpractice. Now consider a FOIA request. The State is obliged to respond accurately, even if the information is confidential. States are obliged to respond to FOIA requests stating so if that's the case. Should the government official make up information or submit false information instead of true information, the purpose of the Act would have been defeated. The relationship between the party providing the information and the party receiving the information is assumed as uneven and not balanced. Doctors have more medical expertise and knowledge than their patients and are in a position of authority vis a vis their patients. The State produces, acquires and manages information in ways that directly impact individual citizens and groups alike. The power of the State is unequal with that of a private citizen. This has led to the introduction of *habeas data* in Latin America, for example, an individual right to request information from the State. And this was the first step towards recognizing access to State held information as a human right in the region.²² The damage in these cases is presumed as potentially grave and imminent, therefore the concrete obligations on the speaker.

The sources of disinformation matter and ought to be considered to effectively address the harms it generates. Although any lie can potentially impact any audience, some lies, or even partial or decontextualized truths are more harmful than others. When the person or institution that we trust for truth, science, guidance, disinforms us, the harm is greater, the trust is broken and, I argue, the liability should be higher. There is a wide array of relevant aspects that change from case to case. While it is tempting to find a one-size-fits-all “solution” to the problem of “disinformation”, distinctions are of the essence.

²² *Claude-Reyes v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151 (Sept. 19, 2006).*

IV. Distinguishing Public Opinion from Knowledge and Expert Opinion

The potential solutions that are being tried in different latitudes to the disinformation dilemma today often ignore the source of disinformation and focus solely on the dissemination. Most of those rely on an independent third party's ability to tell truth from lies based on an objective standard. In most cases, those standards are to be found in a functioning public sphere, with adequate institutions capable of generating scientific data and expert knowledge. If those institutions and standards are not effective or independent, are discredited or even are the sources of disinformation themselves, the approach fails.

Balkin defines a public sphere as “the space in which people express opinions and exchange views that judge what is going on in society. Put another way, the public sphere is a set of social practices and institutions in which ideas and opinions circulate.”²³ He further explains that “a public sphere is more than just people sitting around talking. It is shaped and governed, and made functional or dysfunctional, rich or poor, by *institutions*.”²⁴ In *Democracy, Expertise and the First Amendment*, Robert Post explains that democratic legitimation through public opinion requires what he defines as “democratic competence.” He further explains that given the primary role that public opinion plays in a democracy, the more educated and informed public opinion is, the better.²⁵ “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.”²⁶

Expertise and knowledge are essential for public policy. Consider, for example, economic policy, or policies pertaining to nuclear energy or nuclear medicine, city zoning, public health, or public education. Legislators and policy makers refer to experts to weigh in with their professional opinions as to the diagnosis of given social problems and priorities, potential and desirable solutions, costs, timeframes, etc. to adopt public policies conducive to the public good. Expert opinions are judged based on a set of standards that are provided by science, professional associations, and practice. The authority of the institutions that govern disciplinary knowledge is based on merit, defined as “the possession of objective qualifications

²³ *How to Regulate (and Not Regulate) Social Media*, *supra* note 8.

²⁴ *Id.* at 73.

²⁵ DEMOCRACY, EXPERTISE AND ACADEMIC FREEDOM, *supra* note 12, at 35.

²⁶ *Id.* at 34.

rationally related to the functions of particular social roles and positions.”²⁷ For instance, the authority of scientists, universities, professors, and researchers stem from their expert knowledge in their field.²⁸ Expert knowledge is essential for governments to effectively design and execute public policies. In turn, it is paramount for democracy, in order for people to have objective standards against which to hold their representatives accountable.

In contrast, public opinion is not subject to professional or academic standards at all. Education is desirable and knowledge is essential but they cannot be required by the government to participate in public debate of public interest issues. “The difficulty,” Post says, “is that government control over factual truth is in tension with the value of democratic legitimation.”²⁹ He further argues that “the creation of disciplinary knowledge must accordingly be relegated to institutions that are not controlled by the constitutional value of democratic legitimation.”³⁰

The Inter-American Court of Human Rights (IACtHR) in Advisory Opinion 5 of 1985 puts it beautifully when it says that “a society that is not well informed is not entirely free.”³¹ In this pre-internet advisory opinion, its first on freedom of expression, the Court evaluated the compatibility of a Costa Rican proposal to create a mandatory bar for journalists. Costa Rica argued that people had a right to accurate and reliable information. Given the importance of journalists in public debate, they considered that professional journalists could be required to hold a permission and be in good standing with a professional association in order to exercise their jobs.³² The Court explained that journalism, unlike the legal or medical profession, entailed the professional exercise of a constitutional and internationally recognized human right. The state could not qualify such an exercise or make it dependent on authorizations, good standing or even truth for that matter. Going back to UNESCO or the concerns of the President of Brazil or those of the EU, democracy requires accurate and reliable information. Still, neither UNESCO nor any government can judge truth from falseness without risking authoritarianism and a radically impoverished public debate. And they cannot mandate a third party to do so on their behalf either.

²⁷ *Id.* at 32, citing Allen Buchanan, *Political Liberalism and Social Epistemology*, 32 PHIL. & PUB. AFF. 95, 99 (2004).

²⁸ *Id.* at 8.

²⁹ *Id.* at 29.

³⁰ *Id.*

³¹ Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. Corte (ser. A) No. 5 (Sept. 13, 1985).

³² *Id.*

Informed public opinion and a functional public sphere in Balkin's terms depend on the existence of facts beyond opinion. If the state cannot officially distinguish good ideas from bad ones in public opinion or debate, other institutions must be encouraged, protected, and strengthened to develop the disciplinary knowledge needed for democracies to function. When such institutions work properly, they are respected and looked to for answers to all sorts of fundamental and mundane questions. What are vaccines for and are they safe? Is the earth flat or round? How many planets are there in the solar system? What is a continent and how many are there on earth? At the same time, these institutions lay the basis for fruitful discussions on questions that do not or may never achieve learned consensus: what is life, what is the purpose of law, or how many gods are out there?

When the institutions that make up our public sphere are not credible or respected, the consequence is the loss of "epistemic authorities," understood as "individuals or groups to whom others defer as reliable sources of true beliefs."³³ We find ourselves before an epistemic crisis. As Benkler et al. argue "as a public we have lost our capacity to agree on shared modes of validation as to what is going on and what is just plain wacky. The perceived threats to our very capacity to tell truth from convenient political fiction, if true, strike at the very foundations of democratic society." The explanation that makes the answer rest exclusively on "the Internet" is both short-sighted and complacent with the responsibilities of well-established, pre-Internet institutions.³⁴ Furthermore, at least in Latin America, pre-internet institutions, including universities, mass media companies, professional associations, etc., have contributed to state led disinformation during the last half of the twentieth century. State-led disinformation is the main concern in this field at least in this region.

Social media has democratized speech and allowed for newcomers to join the public debate and inform public opinion.³⁵ It also leveled the playing field for experts and non-experts to weigh in on public interest issues including anything from law to health, rocket science to religion. Recent scholarship shows that, on the internet, lies travel faster than truthful information.³⁶

V. A Way Forward?

³³ DEMOCRACY, EXPERTISE AND ACADEMIC FREEDOM, *supra* note 12, at 32, *citing* Buchanan, *supra* note 27, at 103.

³⁴ See BENKLER ET AL., *supra* note 16, at 6-8.

³⁵ CELE, *supra* note 21. See also AGUSTINA DEL CAMPO, CELE, DISINFORMATION IN DEMOCRACY OR THE DEMOCRACY OF DISINFORMATION? (2021).

³⁶ Vosoughi et al., *supra* note 7.

In an increasingly concentrated online public sphere, the easiest and fastest way to deal with content that is perceived as dangerous—like disinformation—is controlling its dissemination. The current trend towards high centralization of public opinion fora suggests that the power to exercise control is in fewer hands than it has ever been.³⁷ Digital platforms, pressured by States and civil society alike, have been trying to grapple with the issue of disinformation in different ways.³⁸ In this context, we have seen in recent years internet companies increasingly removing or blocking content, including that issued by heads of State, labeling expressions, prohibiting the sale of certain goods, demonetizing or prohibiting certain content that questions official sources of information, fact checking efforts, warnings, contextualization, etc. Implicit in these solutions is the assumption that false information is always reprehensible; that false information can be contrasted against an objective, clear-cut truth; and that public debate needs to be curated to mitigate potential harm. These solutions have also led to concerns that a double standard may easily build from these logics. As Benkler, Faris and Roberts argue, “it cannot be however that ‘the internet democratizes’ when it enables people who think as we do to challenge institutionalized power that protects institutions we would rather challenge, but ‘the internet threatens democracy’ when it allows people with whom we disagree to challenge institutionalized power that protects institutions we would rather protect.”³⁹

But then what can states do to foster a more informed debate and what tools are available to combat disinformation campaigns in an age of speed, decentralization and virality?

In *Democracy, Peace and Academic Freedom*, Post demonstrates that the First Amendment protects disciplinary knowledge in a different way than it protects public opinion. The means to protect disciplinary knowledge include a prohibition on the State to impose arbitrary obligations on the institutions or experts within our societies that contradict the given rules for their field. He also addresses government disclosures of information as a means to promote an informed public

³⁷ Jack M. Balkin, *Digital Speech and Democratic Culture*, 79 N.Y.U. L. REV. 1, 2 (2004).

³⁸ Carlos Cortés & Luisa Isaza, CELE, *Noticias falsas en Internet: la estrategia para combatir la desinformación* [Fake news on the Internet: the Strategy to Battle Misinformation] (2017); Carlos Cortés & Luisa Isaza, CELE, *¿La nueva normalidad? Desinformación y control de contenidos en las redes sociales con ocasión del covid-19* [The New Normal? Disinformation and Content Control on Social Media During COVID-19] (2021); Álvarez Ugarte & Del Campo, CELE, *Noticias falsas en Internet: acciones y reacciones de tres plataformas* [Fake News on the Internet: Actions and Reactions of Three Platforms] (2021).

³⁹ BENKLER ET AL., *supra* note 16, at 341.

debate, although he quickly concludes that U.S. courts “have been exceedingly reluctant to interpret First Amendment to require government disclosure of information to enhance democratic competence.”⁴⁰ Post’s work was not intended to respond to disinformation necessarily but rather to explain how the First Amendment allowed, fostered and protected two radically different spheres for speech while shaping a cohesive theoretical framework for the protection of disciplinary knowledge in the United States. In Latin America, the Inter-American system for the protection of human rights has played an important role in developing standards to distinguish the two as well.

Without encroaching into any particular science or field, can measures be adopted to strengthen those institutions that our disciplinary knowledge creation depends upon? The question can be hard if we consider that in many countries and regions the State is among the main sources of disinformation and governments are among the most distrusted actors within their societies. Changing this perception would require further state transparency, active measures to disseminate state information and further freedom to analyze, contrast and contradict it. Take for example the case of the many states that criminalized journalists for questioning the number of deaths during the pandemic. Or the many states that condemned research as to the origins of the pandemic without following scientific methods. These are merely two very recent examples of how States can attack the development of disciplinary knowledge. But the failure to guarantee academic freedom, political independence among intermediary institutions, like universities or professional associations, are but a few other examples that clarify the point. Failure to guarantee freedom of expression and academic freedom has a detrimental impact on our public spheres.

Public officials can contribute to fighting disinformation in a positive manner rather than through the prohibition or the incentive to censorship. For example, the obligation not to stigmatize the media and journalists, which the Inter-American system places on state officials and representatives, can be anchored on strengthening the quality of public discourse. More importantly, perhaps congresses and courts have a significant role to play in protecting the systems and institutions that manage knowledge and science by guaranteeing them the independence and autonomy to exercise those functions without political interference.

Extending the liberal rules of freedom of expression from public discourse and opinion to disciplinary and professional knowledge may also contribute to eroding public trust and confidence in them, and more broadly their reliability or accuracy.

⁴⁰ DEMOCRACY, EXPERTISE AND ACADEMIC FREEDOM, *supra* note 12, at 38.

Take for example a recent case in Argentina where two judges were brought before a disciplinary panel for abuse of judicial decorum when they revictimized a 13-year-old girl deliberately acting against existing law and precedent. The case grew from a sexual abuse case of a thirteen-year-old girl. In proving the abuse and the abuser, the victim submitted DNA of a fetus she had legally aborted. The two judges thereafter initiated judicial proceedings against the victim's mother and the doctors for illegal abortion (prior to the law changing to allow for abortion in Argentina at a time when the practice was governed by a protocol issued by the Argentina Supreme Court⁴¹), and in the text of their decision, they stigmatized the victim for having an abortion, which per their personal standards and beliefs was immoral and "should" be illegal. The judges alleged that they were protected by their right to freedom of expression and therefore were exempted from liability. Their expressions were their personal opinions. The disciplinary panel finally held that the judges' conduct was not within their right to free speech and sanctioned them with a fine amounting to half a month's salary. The judges were also required to get training on gender equality and justice (Oct 2023). It took three years for the case against the judges to be decided and the consensus of civil society organizations was that the punishment was weak at the very least.⁴²

Since public figures enjoy wider dissemination, broader access to public debate and greater power to influence public opinion, the laws established to guide their speech, those that mandate truth and accuracy and those that mandate prohibitions and limitations, could be better upheld and be subject to real, concrete and publicly disclosed consequences. This is not to say that the law should punish public official's speech in every case or that there be no room for political debate, campaigning or rhetoric. Rather, where there are concrete obligations, like a sworn statement of income for politically exposed public officials, those need to be enforced. Should sworn statements be found to be false or misleading, there should be political consequences.

These are just a few initiatives that could be adopted to strengthen our public sphere addressing a key actor: the state and its representatives, without dramatically changing any laws or actively intervening in the circulation of content. Other similar measures could be adopted in other spheres to strengthen the rule of law and address disinformation at the source. International law could be

⁴¹ Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 12/03/2012, "F., A. L. / medida autosatisfactiva," <http://www.sajj.gob.ar/corte-suprema-justicia-nacion-federal-ciudad-autonoma-buenos-aires--medida-autosatisfactiva-fa12000021-2012-03-13/123456789-120-0002-1ots-eupmocsollaf> (Arg.).

⁴² Sonia Santoro, *Sancionaron a dos jueces por anti derechos*, PAGINA 12, Oct. 4, 2001, at <https://www.pagina12.com.ar/594682-sancionaron-a-dos-jueces-por-anti-derechos>.

strengthened and given teeth to address foreign state-led disinformation; active measures could be adopted to strengthen the independence of journalism, create conditions for better media and journalism sustainability, provide for stronger intermediate institutions including scientific research centers, universities, professional associations, etc. Creating conditions for self-assessment and self-criticism within different industries, as well as fostering more transparency and better public accountability of these institutions is key.

Immediate reactions to these may be that these initiatives take time, or if laws exist but are not implemented, they need to be changed. However, other proposals are also time-consuming and their consequences could potentially take even longer to materialize. The fact that a law is not implemented is a poor argument for the enactment of a new law.

VI. Conclusion

Disinformation is a concern for many actors, both public and private. However, political will to address the issue seems to be limited to addressing the dissemination of disinformation with little attention to the sources of disinformation or the reasons behind their popular impact. When addressed from a source's point of view, disinformation can be broken down into smaller, more concrete problems and it becomes more obvious that there are different potential solutions for them. The blanket, one-size-fits-all approach of mandating intermediaries to curate speech to protect public debate from disinformation is ill-defined, ill-suited, and potentially dangerous.

The concern over the impact of lies on public discourse is real. Democracy requires information and societies require a common set of facts upon which to build their sense of community. And research shows that globally we are drifting away from this and becoming ever more polarized and distrustful. This essay attempts to identify a different approach to disinformation and a few potential measures that the State could highlight (where they already exist) or adopt (where they don't) to promote the development and strengthening of intermediary institutions that provide expertise and knowledge, without which democracy is not possible.