

The Doors of Janus: A critical analysis of the socio-technical forces eroding trust in the Rule of Law

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Abstract

The Rule of Law is neither just a principle nor solely the institutions that embody that principle, a critical aspect of the Rule of Law is its grounding in trust which often gets neglected in the surrounding discourse. *When the citizens' trust in the Rule of Law weakens, the Rule of Law becomes fragile.* In this article we examine the impact of emerging technologies on the citizens' trust in the Rule of Law. Our analysis is specifically focused on the effect of systemic disinformation which is likely to worsen with the advent of Generative AI, algorithmic misgovernance, and the digitalization of the social contract on the relationship between citizens and the Rule of Law. Through analysis of global techno-legal developments we demonstrate that new data-driven technologies are eroding the citizens' trust in the rule of law by weakening the epistemic justifications of trust in the rule of law, belying expectations of good governance, and disrupting the temporal-spatial aspects of governance respectively. The issues raised in this article are both of contemporary relevance in view of the upcoming democratic elections across the world and also of long term significance in view of the declining trust in public institutions. To understand why the Rule of Law has ceded governance space to the rule of code we need to acknowledge the mediating role played by law and technology in social interaction. To recover this lost governance space and restore trust in the Rule of Law, we develop a framework comprising better enforcement and the reinterpretation of existing rights and the formulation of new collective interest-based rights.

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*My reign began in the primaeval tide
Of Mundane things, when gods dwelt side by side
With men below; or ere Dame Justice fled
From earth and crime, last of the gods who sped;
When man was swayed by virtue, not by lust,
And laws were all superfluous for the just;
When peace and doors domestic were my charge,
(He showed the key) and Peace I set at large...*

~ January-Book I, The Fasti of Ovid, 8 C.E.¹

I. Introduction

In ancient Rome, people worshipped a God with two faces who presided over beginnings and endings, he was the God of change.² With one face towards the past and

¹ John Benson Rose, THE FASTI OF OVID 10 (1866)

² Donald L. Wasson, Janus, WORLD HISTORY ENCYCLOPEDIA, <https://www.worldhistory.org/Janus>. S.J. Green, *Multiple Interpretation of the Opening and Closing of the Temple of Janus: A Misunderstanding of Ovid "Fasti" 1.281*, 53 MNEMOSYNE 302 (2000). Thiébaud Weber, *Janus and the Trade Union Challenge of Digital Technology*, 23 TRANSFER: EUROPEAN REVIEW OF LABOUR AND RESEARCH 225 (2017).

another towards the future, this God oversaw all transitions.³ This God's shrine was marked by doors, which remained open during the time of war for the armies to march out and closed during peace time. He was *Janus*- the God in whose memory the first month of the year- January is named.⁴ But what if instead of marching out, an army of insurrectionists decided to march in and invade the citadel? Would the doors of the present day Janus-the Rule of Law-hold? On January 6th, 2021, perhaps when it mattered most, the God of transition failed. Instead of witnessing a peaceful transfer of power, the U.S. Capitol witnessed a riot that shook the foundations of the Rule of Law. A mob fed on systemic disinformation stormed through the Capitol and the doors of Janus fell.

But we are getting ahead of ourselves. In ancient Rome, when the doors of the temple of Janus were closed, it signified that peace prevailed behind them.⁵ However, in modern democracies even when the doors of Janus are still in place, not all is well behind them. Over the last few years, with the rise of algorithmic misgovernance and digitalization of the social contract, the Rule of Law has ceded space to the rule of code at an alarming pace.⁶ This replacement is driven by efficiency considerations and an inadequate understanding of whether the new public analytics⁷ can adequately represent and protect the social contract between the citizen and the state. Consequently, liberal democracies world over that are meant to be governed by the Rule of Law have been rocked by monumental failures of automated decision making such as the child benefits scandal in

³ *Supra* Weber note 2 at 225

⁴ Caillan Davenport, *Who was Janus, the Roman god of beginnings and endings?*, THE CONVERSATION, <http://theconversation.com/who-was-janus-the-roman-god-of-beginnings-and-endings-86853>.

⁵ I bar my doors in peacetime, so that [peace] might not leave by any means[.]” Green *supra* note 2 at 303.

⁶ Lawrence Lessig, CODE VERSION 2.0 (2006). Sebastian Rosengrün, *Why AI is a Threat to the Rule of Law*, 1 DISO 10 (2022). Abeba Birhane, *Algorithmic injustice: a relational ethics approach*, 2 PATTERNS 100205 (2021).

⁷ According to Yeung,

[G]overnments everywhere are enthusiastically embarking on projects of ‘modernisation’ that rely on wholesale networked digital transformation. I have referred to this movement as the ‘New Public Analytics’ - a term chosen to reflect both continuity and discontinuity with the ‘New Public Management’ movement which swept through governments in many democratic states beginning in the early 1980s and the following two decades. Beguiled by promises of enabling governmental services to be delivered faster, cheaper, and better through reliance on automation, datafication and the population-wide profiling of users and citizens – the Rule of Law project faces an important and increasingly urgent challenge: the need to demonstrably bring these technologies, and the socio-technical systems into which they are embedded, under law.

Karen Yeung, *Constitutional Principles in a Networked Digital Society* 2 (2022), <https://papers.ssrn.com/abstract=4049141>. See also: Karen Yeung, *The New Public Analytics as an Emerging Paradigm in Public Sector Administration*, 27 1 (2023).

the Netherlands⁸, the robodebt in Australia⁹ and the UK's A-level grading fiasco¹⁰. The failures of algorithmic misgovernance have contributed to the erosion of public trust in the Rule of Law. The problems of systemic disinformation and algorithmic misgovernance have been accentuated by the digitalization of the social contract. The rapid digitalization of governance has changed the rules of engagement between citizens and the government. On the one hand, it has enhanced consumerist and activist tendencies, on the other it has not provided adequate avenues for sustained effective engagement between citizens and institutions that embody the Rule of Law. The lack of effective participation has led to the failure of realization that along with the institutions, the citizens too have a crucial stake in the Rule of Law project.

The issue of citizens' losing trust in the rule of law on account of emerging technologies is of pressing importance. The year 2024 is globally being marked as the year of critical elections.¹¹ This critical election year comes against the backdrop of declining trust in governments and public institutions.¹² Global institutions have flagged AI driven misinformation and disinformation as the leading short term threat to the electoral process, global economy, and trust in institutions,¹³ while experts have cautioned against

⁸ Gabriel Geiger & Cathryn Virginia, *How a Discriminatory Algorithm Wrongly Accused Thousands of Families of Fraud*, VICE (2021), <https://www.vice.com/en/article/jgq35d/how-a-discriminatory-algorithm-wrongly-accused-thousands-of-families-of-fraud>. Sofia Ranchordas & Luisa Scarcella, *Automated Government for Vulnerable Citizens: Intermediating Rights*, 30 WM. & MARY BILL Rts. J. 373 (2021).

⁹ Jordan Pearson, *The Story of How the Australian Government Screwed Its Most Vulnerable People*, VICE (2020), <https://www.vice.com/en/article/y3zkgb/the-story-of-how-the-australian-government-screwed-its-most-vulnerable-people-v27n3>. Terry Carney, *Robo-Debt Illegality: The Seven Veils of Failed Guarantees of the Rule of Law?*, 44 ALTERNATIVE LAW JOURNAL 4 (2019). Peter Whiteford, *Debt by Design: The Anatomy of a Social Policy Fiasco – Or Was It Something Worse?*, 80 Australian Journal of Public Administration 340 (2021).

¹⁰ Daan Kolkman, "F**k the algorithm?": *What the world can learn from the UK's A-level grading fiasco*, IMPACT OF SOCIAL SCIENCES (2020), <https://blogs.lse.ac.uk/impactofsocialsciences/2020/08/26/fk-the-algorithm-what-the-world-can-learn-from-the-uks-a-level-grading-fiasco/>.

¹¹ Koh Ewe, *Elections Around the World in 2024*, TIME (2023), <https://time.com/6550920/world-elections-2024>

¹² Pew Research Center, *Public Trust in Government: 1958-2023*, PEW RESEARCH CENTER - U.S. POLITICS & POLICY (Sep. 19, 2023), <https://www.pewresearch.org/politics/2023/09/19/public-trust-in-government-1958-2023/>. Emanuele Sapienza, *A Conceptual Framework and Insights for Improved Governance Programming*, UNDP (August 2021) https://www.undp.org/sites/g/files/zskgke326/files/migration/oslo_governance_centre/Trust-in-Public-Institutions-Policy-Brief_FINAL.pdf

¹³ World Economic Forum, GLOBAL RISKS REPORT 2024 <https://www.weforum.org/publications/global-risks-report-2024/in-full/global-risks-2024-at-a-turning-point/>. On the threat posed by AI to electoral democracy see: Archon Fung & Lawrence Lessig, *How AI Could Take over Elections – and Undermine Democracy*, The Conversation (2023), <http://theconversation.com/how-ai-could-take-over-elections-and-undermine-democracy-206051>. On the challenge

“algorithmic displacement of social trust”¹⁴ on account of algorithmic amplification— “the amplification of content as a result of formalized and operationalized sets of instructions, typically carried out by computer systems.”¹⁵ The challenge posed by AI systems have extended to other democratic institutions like media and judiciary as well. The coming years are likely to witness increased adoption of AI in journalistic reporting and justice dispensation. However, a recent study reveals that in polarized polities like the US, journalistic content labelled as AI-generated is perceived to be less trustworthy by the viewers, which is of concern from a democratic legitimacy and institutional credibility perspective.¹⁶ On the judicial front, in his annual report to mark the end of the year 2023, Chief Justice Roberts, while reflecting upon the technological changes in justice dispensation, cautioned that while AI holds great information potential it also risks “invading privacy interests and dehumanizing the law”.¹⁷

In this backdrop, we examine the role played by new data-driven technologies in eroding trust in the Rule of Law. After critically examining the impact of systemic disinformation, algorithmic misgovernance and digitalization of the social contract on the relationship between the citizens and the Rule of Law through the lens of global technological developments, we provide a framework by which the Rule of Law can regain the governance space ceded to the rule of code. Our analysis unfolds over nine parts. The second part analyses the conceptual aspects of the Rule of law. In the third part, the nuances of systemic trust are explored. The fourth part highlights the impact of the rule of code on fundamental rights through examples of arbitrary decision making at erstwhile Twitter now X Corp. The fifth part analyses how systemic disinformation is eroding the

posed by disinformation to democracy see: Nick Robins-Early, *Disinformation Reimagined: How AI Could Erode Democracy in the 2024 US Elections*, The Guardian, Jul. 19, 2023, <https://www.theguardian.com/us-news/2023/jul/19/ai-generated-disinformation-us-elections>. Sarah Kreps & Doug Kriner, *How AI Threatens Democracy*, 34 *Journal of Democracy* 122 (2023).

¹⁴ Benjamin Laufer and Helen Nissenbaum, *Algorithmic Displacement of Social Trust*, 23-12 KNIGHT FIRST AMEND. INST. (Nov. 29, 2023) <http://knightcolumbia.org/content/algorithmic-displacement-of-social-trust>.

¹⁵ *Id.*

¹⁶ Benjamin Toff & Felix M. Simon, “Or They Could Just Not Use It?": *The Paradox of AI Disclosure for Audience Trust in News* (2024), <https://osf.io/mdvak>.

¹⁷ John G. Roberts, Jr. Chief Justice of the United States, 2023 Year-End Report on the Federal Judiciary 5 (December 31, 2023) <https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf>

epistemic justifications for the citizens' trust in the Rule of Law by analyzing the Congress report on the January 6th Capitol Hill attack¹⁸ in conjunction with disinformation threat posed by Generative AI. The sixth part tackles the issue of algorithmic misgovernance through the lens of social structuring, representation, and human rights. The analysis in this part is focused on the important safeguards enshrined in the Rule of Law that are lost during the migration to the rule of code, thus belying expectations of good governance. The seventh part explores the impact of the digitalization of social contract on the temporal-spatial aspects of governance. The road towards regaining trust in the Rule of Law by highlighting its *Janusque* powers of managing transition is elaborated in the eighth part. The roadmap proposed by us begins by acknowledging the mediating relation of law and technology and comprises better enforcement and reinterpretation of existing rights and formulation of new collective interest-based rights. The paper concludes by addressing the importance of preserving trust in the Rule of Law.

II. The Rule of Law

In the introductory paragraphs, we have provided a brief overview of some of the contemporary challenges faced by the Rule of Law. Devoid of its technical complexities at its core, the Rule of Law means “the Rule of the Law.”¹⁹ As distinguished from the rule of the individual, which may be marred by whims, fancies, and caprices, the Rule of Law is aimed at introducing certainty and fairness.²⁰ The Rule of Law as generally understood is meant to ensure equality before the law.²¹ It is meant to be a harbinger of fairness and a safeguard against discrimination. According to Waldron,

The Rule of Law comprises a number of principles of a formal and procedural character, addressing the way in which a community is governed. The formal principles concern the generality, clarity, publicity, stability, and prospectivity of the norms that govern a society. The procedural principles concern the processes by which these norms are administered, and the

¹⁸ Select Committee to Investigate the January 6th Attack on the United States Capitol, FINAL REPORT (December 22, 2022) 117th Congress Second Session House Report 117-663 <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf>.

¹⁹ Joseph Raz, *The Rule of Law and its Virtue*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 212 (Joseph Raz ed., 1979), <https://doi.org/10.1093/acprof:oso/9780198253457.003.0011>.

²⁰ Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, SINGAPORE JOURNAL OF LEGAL STUDIES 232 (2012).

²¹ United Nations, *What is the Rule of Law*, <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>

institutions—like courts and an independent judiciary that their administration requires.²²

At times, scholars draw a distinction between the thin and thick conception of Rule of Law,

A thin Rule of Law describes governance in a society in which many of the procedural principles of the Rule of Law are observed, but not the elements of substantive justice and protection of human rights... A thick Rule of Law, by contrast, is governance under a Rule of Law that includes all of the principles of the Rule of Law, including those related to substantive justice and enforcement of human rights protections.²³

From a more technical checklist perspective, the Rule of Law embodies the principles of legality, legal certainty, prevention of abuse (misuse) of powers, equality before the law and non-discrimination, and access to justice.²⁴ From an institutional perspective, the Rule of Law requires democratic safeguards in the form of an independent judiciary.²⁵ These are not just constitutive elements of the Rule of Law but these features also act as a rational justification for the citizens to trust the Rule of Law. In view of such wide-ranging definitions, it is possible that one might get exasperated in the search for conceptual clarity and wonder if a principle like the Rule of Law even exists. In his treatise on the Rule of Law, Lord Bingham anticipated this objection and in his reply cited the judicial practice of referring to Rule of Law in judgments, international instruments citing Rule of Law, and British statute referring to Rule of Law as evidence of the existence of the Rule of Law.²⁶ He then provided a definition of the Rule of Law that has become widely accepted,

[A]ll persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.²⁷

²² Jeremy Waldron, *The Rule of Law*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Summer 2020 ed. 2020).

²³ Robert A. Stein, *What Exactly Is the Rule of Law?*, 57 HOUS. L. REV. 185 (2019).

²⁴ European Commission for Democracy through Law (Venice Commission), *Rule of Law Checklist*, STUDY NO. 711 / 2013 CDL-AD(2016)007 (2016)

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e)

²⁵ Waldron *supra* note 22

²⁶ Tom Bingham, THE RULE OF LAW 5-7 (2010)

²⁷ *Id* at 8.

Perhaps more than the evidentiary approach adopted by Lord Bingham, his intuitive response makes a more compelling case for the existence of the Rule of Law. After stating that acceptance of the Rule of Law does not equal to the adulation of courts or lawyers, Lord Bingham states,

We can hang on to most of our prejudices. It does, however call on us to accept that we would very much rather live in a country which complies, or at least seeks to comply, with the principle I have stated than in one which does not. The hallmarks of a regime which flouts the Rule of Law are, alas, all too familiar: the midnight knock on the door, the sudden disappearance, the show trial, the subjection of prisoners to genetic experiment, the confession extracted by torture, the gulag and the concentration camp, the gas chamber, the practice of genocide or ethnic cleansing, the waging of aggressive war. The list is endless.²⁸

A more ardent plea for the existence of the Rule of Law would be hard to find. This is as far as the conceptual and governance aspects of the Rule of Law are concerned. However, as Waldron notes,

[T]he Rule of Law is not just about government. It requires also that citizens should respect and comply with legal norms, even when they disagree with them. When their interests conflict with others' they should accept legal determinations of what their rights and duties are.²⁹

This can only be achieved when citizens trust the Rule of Law. In order to ensure that the Rule of Law is actually worthy of citizens' trust, the people in power and the institutions that embody the said power should lead by example. They have to actively show that they are trustworthy. This in turn requires that, "the law should be the same for everyone, so that no one is above the law, and everyone has access to the law's protection."³⁰ The Rule of Law then is neither just a principle³¹ nor solely the institutions that embody the principle, a critical aspect of the Rule of Law is its co-constituting connection with citizens' trust. *When citizens' trust in the Rule of Law weakens, the Rule of Law*

²⁸ *Id* at 9.

²⁹ Waldron *supra* note 22

³⁰ *Id.*

³¹ "The Rule of Law comprises a number of principles of a formal and procedural character, addressing the way in which a community is governed. The formal principles concern the generality, clarity, publicity, stability, and prospectivity of the norms that govern a society. The procedural principles concern the processes by which these norms are administered, and the institutions—like courts and an independent judiciary that their administration requires." *Id.*

becomes fragile. If the Rule of law is fragile, the ability of citizens to develop trust, not just in their institutions but also in each other, diminishes.

III. Trust

Trust is often characterized as a fuzzy concept, meaning different things to different people. In everyday life, when people (trustors) declare that they trust someone (trustee), this generally implies that they are *certain* that the trustee will live up to their promises and will take the trustor's interest to heart. These interpersonal relations based on trust are oftentimes reserved for people with whom we share a long history and have common friends and habits (e.g. going to the same church, school, or football club). However, in academic discourse, trust is first and foremost linked to *uncertainty* rather than certainty, emphasizing the fundamental vulnerability that trust entails. After all, trusting someone means depending on someone to be responsive to a claim on their cooperation or help. Trusting presupposes an affective optimistic attitude that others will put their competence to use on our behalf.³² It includes a leap of faith, in the sense that it is paid ahead of time, as only afterwards it can be established if trust was warranted.³³

While the lay perspective and the academic perspective seemingly take opposite positions, they actually complement each other. While trust, from a theoretical perspective, is intrinsically intertwined with uncertainty (after all, hypothetically, if one is in complete control of the situation, trust is redundant), from an everyday life, phenomenological perspective, when one trusts someone, this uncertainty is no longer experienced as decisive. When people trust, they act as if the future is certain, and their vulnerability will not be taken advantage of. Trust, one could say, has a fictitious basis, an as-if character, that is a prerequisite for social reality to take shape³⁴; it is a *functional fiction*, according to Keymolen.³⁵ Trusting others does not mean disregarding one's own vulnerability, but rather choosing not to let it prevent one from building relationships with others, as stated by Baier.³⁶ As

³² Karen Jones, *Trust as an affective attitude*, 107 ETHICS 4 (1996).

³³ See generally: Guido Möllering TRUST: REASON, ROUTINE, REFLEXIVITY (2006). Judith Simon, *Trust*. In OXFORD BIBLIOGRAPHIES IN PHILOSOPHY (Pritchard Ed.) (2013).

³⁴ Guido Möllering, TRUST: REASON, ROUTINE, REFLEXIVITY (2006).

³⁵ See generally: Esther Keymolen, TRUST ON THE LINE. A PHILOSOPHICAL EXPLORATION OF TRUST IN THE NETWORKED ERA. (2016).

³⁶ Annette Baier, *Trust and antitrust*, 96 ETHICS 231 (1986).

inherently social beings, being able to develop trust relations is a crucial skill for people to master.³⁷

Trust does not take place in a vacuum, but always in an environment that is to a certain extent already familiar. The familiar world — in phenomenology also referred to as lifeworld— is the un-reflected background of beliefs and meaning, actively structuring human perception. In developing trust, we take for granted that other people basically function in a similar way as we do. They feel, see, smell, and process information in a similar way. We presuppose that the world we live in is a shared world (*Mitwelt*). We take for granted that their perception and access to the world is structured in the same way as it is for us. When we ask our neighbor to take care of our plants while going on a holiday, we presuppose that she can distinguish plants from chairs and knows that plants need water.³⁸ These beliefs and meaning work in the background, supporting our trust in her. Part V will address in depth the problems that arise from disinformation for the stability of the familiar world. For now, it is sufficient to acknowledge that the taken-for-granted character of the familiar world becomes pressured when due to disinformation citizens increasingly come to reside in data-driven personalized worlds where it is no longer obvious that perception is shared. This personalized world might be experienced as familiar, yet it is through-and-through automated and impersonal. The decreasing of a shared, familiar world challenges trust, both in the interpersonal realm and in the Rule of Law.

According to Rousseau *et al*, “Trust is a psychological state comprising the intention to accept vulnerability based upon positive expectations of the intentions or behavior of another.”³⁹ When it comes to the relation between trust and trustworthiness, trust can be defined as “an attitude we have towards people whom we hope will be trustworthy, where trustworthiness is a property not an attitude.”⁴⁰ When it comes to trusting an institution like the Rule of Law, the formation of the attitude of trust becomes a collective exercise.

³⁷ Thomas W Simpson, *What is trust?*, 93 PACIFIC PHILOSOPHICAL QUARTERLY 550 (2012).

³⁸ See generally: Helmuth Plessner, *DIE STUFEN DES ORGANISCHEN UND DER MENSCH; EINLEITUNG IN DIE PHILOSOPHISCHE ANTHROPOLOGIE*. (1975).

³⁹ Denise M. Rousseau *et al*, *Not So Different After All: A Cross-Discipline View Of Trust*, 23 AMR 393 (1998).

⁴⁰ Carolyn McLeod, *Trust*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed.2021), <https://plato.stanford.edu/archives/fall2021/entries/rust/>.

An individual's attitude towards the Rule of Law is not shaped just by her experience but also by those who form part of her community. It is in this crucial space that systemic disinformation erodes trust in the Rule of Law. When it comes to the property of being trustworthy, institutions are required to be honest and competent.⁴¹ We posit that when it comes to the Rule of Law these requirements translate into procedural and substantive expectations. The requirement of honesty translates into expectations of transparency and procedural justice. On the substantive side, the competency requirement translates into a two-fold expectation of good governance and just resolution of disputes involving our democratic interests. When the Rule of Law falls short of these expectations, it betrays our trust. We address examples of this in the section on algorithmic misgovernance in Part VI.

The time and space in which the attitude of trust and property of being trustworthy interact in the context of the Rule of Law is the domain of the social contract, which is increasingly becoming digitalized. The digitalization of the social contract is impacting trust in the Rule of Law by enhancing activist and consumerist tendencies, while not providing a corresponding space for participatory governance. We address these issues in Part VII, but for now, it is important to acknowledge that in a society that is increasingly becoming complex due to disruptive economic, technological, and environmental developments on a global scale, trust does not merely take shape on the interpersonal level, but on the system level as well. Citizens do not only rely on individuals to take their interests at heart, they also rely on systems, such as the banking system, the health system, or the political system to enable them to live a flourishing life. For instance, while a patient is of course still dependent on her physician to come up with a clear diagnosis and treatment, the trust put in the physician is not predominantly based on personal trust cues (e.g., a shared history, mutual friends, a good character) but on system-related checks and balances such as medical training, evidence-based treatments, and external oversight which all shape the behavior of the physician. Similarly, the Rule of Law shapes the checks and balances of the democratic system, enabling trust. Principles such as legality, legal certainty, and prevention

⁴¹ Katherine Hawley, TRUST A VERY SHORT INTRODUCTION, 99 (2012)

of abuse (misuse) of powers lower uncertainty and contribute to a foreseeable and stable political system.

The relationship between trust and the Rule of Law is, however, not unilateral. On the contrary, the Rule of Law also depends on citizens' trust and it does so in two ways. First, there is the positive expectation of citizens that the Rule of Law in a predictable manner reduces the uncertainty inherent in a complex society. This trust in the general functioning of the Rule of Law increases its effectiveness. Secondly, the Rule of Law builds on the citizens' fundamental acceptance of its functioning. Thus, even if a certain decision or outcome is disappointing on a personal or group level, citizens trust that the Rule of Law provides sufficient manners to voice disappointment (e.g. voting) and that there are explicit controls set in place ensuring that, notwithstanding possible disagreement, it remains feasible to lead a flourishing life.⁴² All in all, it becomes clear that trust and the Rule of Law are deeply intertwined and that in a democratic society, it is key to keep a close eye on how their interaction takes shape. As our society, and therefore also our governance system, including the Rule of Law, are being penetrated by new data-driven technologies, such as artificial intelligence, it is not far-fetched to assume that this has a significant impact, both on trust as well as on the Rule of Law.⁴³ In the next section, we will discuss the 'coming together' of the governance and technology in the concept of the Rule of Code.

IV. The Rule of Code

In 1992, as part of a presentation titled, *A Cloudy Crystal Ball—Visions of the Future*, internet pioneer David D. Clark proclaimed, "We reject: kings, presidents and voting. We believe in: rough consensus and running code."⁴⁴ Over the years, this iconic declaration has come to define the "technical and political values of Internet engineers during a crucial phase in the Internet's growth."⁴⁵ These famous words are also quoted in the introductory

⁴² See generally, Niklas Luhmann, *TRUST AND POWER. TWO WORKS* (1979).

⁴³ So far this relationship has mostly been examined from the perspective of the role that law can play in fostering trust in AI. See for instance the HLEG, *Ethics guidelines for trustworthy AI* (2019) <https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai>. However, the impact of new data-driven technologies on eroding trust in the Rule of Law has largely remained unexamined.

⁴⁴ David D. Clark, *A Cloudy Crystal Ball -- Visions of the Future*, IETF (1992). https://groups.csail.mit.edu/ana/People/DDC/future_ietf_92.pdf

⁴⁵ A.L. Russell, "Rough Consensus and Running Code" and the Internet-OSI Standards War, 28 IEEE ANNALS OF THE HISTORY OF COMPUTING 48 (2006).

chapter of Lawrence Lessig's treatise,⁴⁶ where Lessig ponders over the power of code to regulate cyberspace leading up to Lessig's own seminal formulation that *Code is law*.⁴⁷ Read together, the proclamation and formulation provide an interpretive lens for the tussle between the Rule of Law and the rule of code. One way of understanding the rule of code is in terms of the power that the technical infrastructure exercises over the society.⁴⁸ According to Rosengrün,

AI (or the companies who control it) promotes and monetizes free speech, political competition, and other aspects of democracy, while our societies have been shifting towards a “rule of code,” i.e., a system in which source code is able to put meaningful restraints not only on any individuals and institutions within a society, but also on law and the State.⁴⁹

This power of the rule of code defies transparency requirements mentioned under the Rule of Law and becomes visible only when its unjust impacts are felt. But we also need to acknowledge the social aspects of the technical infrastructure. The source code is not just a product of the algorithmic choices made by the developers but also the larger social rubric in which the developers function. Based on this expansive understanding, the rule of code is also shaped by the entrepreneurial choices, the monetization structure, the governing norms, and the social ethos that go into the making of a platform. Slowly but surely, policymakers are waking up to the threat posed by the rule of code to the Rule of Law and are adopting an expansive understanding of AI systems. A feasibility study conducted by the Council of Europe's Ad Hoc Committee on Artificial Intelligence (CAHAI) defined AI systems as “socio-technical” systems⁵⁰ and concluded that,

[C]urrent rules and legal regimes are neither adequate for safeguarding these basic values [of human rights, democracy, and the Rule of Law] as they pertain to AI, nor suitable, in and of themselves, for creating an AI innovation environment that can be deemed sufficiently trustworthy for

⁴⁶ Lawrence Lessig, *CODE AND OTHER LAWS OF CYBERSPACE* 4 (1999)

⁴⁷ *Id.* at 6. “In real space we recognize how laws regulate—through constitutions, statutes, and other legal codes. In cyberspace we must understand how code regulates—how the software and hardware that make cyberspace what it is.” *Id.*

⁴⁸ Rosengrün *supra* note 6

⁴⁹ *Id.*

⁵⁰ Ad Hoc Committee on Artificial Intelligence (CAHAI), *Feasibility Study* 5 (2020), CAHAI(2020)23 <https://rm.coe.int/cahai-2020-23-final-eng-feasibility-study-/1680a0c6da>

steering AI and data-intensive technologies in the right direction. A new legal framework is needed.⁵¹

This expansive understanding of the rule of code and its impact on fundamental rights can be further understood with the help of the extraordinary events that unfolded on Twitter (now known as X Corp.)⁵² in the recent past.

A tale of two Twitter suspensions (and reinstatements)

The rise of Big Tech corporations in the USA is a testament to the socio-technical aspects of new data-driven technologies. The enormous importance that the American legal system places on free speech has played a huge role in shaping the norms on social media platforms.⁵³ However, the adjudication of the disputes pertaining to freedom of speech on social media platforms is increasingly being done in accordance with the rule of code and not in accordance with the Rule of Law. The constitutional guarantees that one expects in terms of legal certainty and equality under the Rule of Law become ephemeral under the rule of code. This point is best illustrated with the tale of two twitter suspensions (and reinstatements).

The suspension (and reinstatement) of former President Donald Trump's twitter account

In the aftermath of the capitol hill attack, social media firms that had acted as fence sitters in face of systemic disinformation finally decided to act against President Trump. On January 8th, 2021, Twitter decided to *permanently suspend* President Trump's twitter account as two of his tweets were "in violation of the Glorification of Violence Policy."⁵⁴ The lack of timely intervention and meaningful regulation of former president Donald Trump's spread of disinformation through social media provides an interesting

⁵¹ David Leslie et al., *Artificial Intelligence, Human Rights, Democracy, and the Rule of Law A Primer Prepared to support the Feasibility Study published by the Council of Europe's Ad Hoc Committee on Artificial Intelligence*, THE ALAN TURING INSTITUTE (2021) <https://rm.coe.int/primer-en-new-cover-pages-coe-english-compressed-2754-7186-0228-v-1/1680a2fd4a>

⁵² Kate Conger, *So What Do We Call Twitter Now Anyway?*, THE NEW YORK TIMES, Aug. 3, 2023, <https://www.nytimes.com/2023/08/03/technology/twitter-x-tweets-elon-musk.html>

⁵³ Mark S Kende, *Social media, the first amendment, and democratic dysfunction in the Trump era*, 68 DRAKE LAW REVIEW. Robert A. Sedler, *An Essay on Freedom of Speech: The United States versus the Rest of the World Essay*, 2006 Mich. St. L. Rev. 377 (2006). See also: Will Oremus, *Analysis | Want to regulate social media? The First Amendment may stand in the way.*, WASHINGTON POST, Jan. 21, 2023, <https://www.washingtonpost.com/technology/2022/05/30/first-amendment-social-media-regulation/>. While many of the existing choice architectures may represent a degree of cultural homogeneity, there is an increasing call for making the algorithmic landscape more inclusive to account for different cultural contexts. For instance see: Nithya Sambasivan et al., *Re-imagining Algorithmic Fairness in India and Beyond*, (2021), <http://arxiv.org/abs/2101.09995>.

⁵⁴ Twitter Inc., *Permanent suspension of @realDonaldTrump*, https://blog.twitter.com/en_us/topics/company/2020/suspension.

opportunity to understand how citizens lose trust in the Rule of Law. The surveillance capitalist firms did not make adequate efforts to fact check President Trump while he was still in power. Only when he had lost the election and the doors of the capitol hill crumpled under the force of systemic disinformation, did the social media firms decisively act against President Trump.⁵⁵ By the time President Trump's twitter account was permanently suspended, the damage to the Rule of Law was already done. We will focus on the impact of systemic disinformation on the Rule of Law in greater detail in Part V of the article. For now, we turn our attention to the manner in which President Trump's twitter account was *permanently* suspended and subsequently reinstated after the takeover of Twitter's ownership by Elon Musk.⁵⁶ The social media firms inadequate attempts at controlling disinformation⁵⁷ and profiting from surveillance capitalism at the expense of democratic values⁵⁸ have recently come under immense criticism.⁵⁹ The suspension of President Trump's account raised concerns both about the belated action on part of social media firms as well as the concentration of enormous power in hands of a few surveillance capitalist firms to shape public opinion.⁶⁰ From a Rule of Law perspective, allowing an individual to spread disinformation, *permanently* suspending the said individual's social media account only after grave damage had been caused and then finally revoking the said suspension at the pretext of *vox populi, vox dei*⁶¹ through a twitter poll reeks of precisely the kind of arbitrariness that Rule of Law is supposed to guard against. The hypocrisy gets further compounded when

⁵⁵ Luciano Floridi, *Trump, Parler, and Regulating the Infosphere as Our Commons*, 34 PHILOS. TECHNOL. 1 (2021).

⁵⁶ BBC News, *Musk lifts Donald Trump's Twitter ban*, November 20, 2022, <https://www.bbc.com/news/world-us-canada-63692369>.

⁵⁷ David Lauer, *Facebook's ethical failures are not accidental; they are part of the business model*, 1 AI ETHICS 395 (2021).

⁵⁸ Shoshana Zuboff, *Surveillance Capitalism or Democracy? The Death Match of Institutional Orders and the Politics of Knowledge in Our Information Civilization*, 3 ORGANIZATION THEORY 263178772211292 (2022).

⁵⁹ Jonathan Haidt, *Why the Past 10 Years of American Life Have Been Uniquely Stupid*, THE ATLANTIC (2022), <https://www.theatlantic.com/magazine/archive/2022/05/social-media-democracy-trust-babel/629369/>. David Brooks, *America Is Having a Moral Convulsion*, THE ATLANTIC (2020), <https://www.theatlantic.com/ideas/archive/2020/10/collapsing-levels-trust-are-devastating-america/616581/>.

Philipp Lorenz-Spreen et al., *A systematic review of worldwide causal and correlational evidence on digital media and democracy*, NAT HUM BEHAV 1 (2022). Jonathan Haidt, *Yes, Social Media Really Is Undermining Democracy*, THE ATLANTIC (2022), <https://www.theatlantic.com/ideas/archive/2022/07/social-media-harm-facebook-meta-response/670975/>.

STEPHEN HAWKINS ET AL., *Hidden Tribes: A Study of America's Polarized Landscape*, (2019), <https://osf.io/xz25v>. Craig Silverman Klühspies Ruth Talbot, Jeff Kao, Anna, *How Google's Ad Business Funds Disinformation Around the World*, PROPUBLICA, <https://www.propublica.org/article/google-alphabet-ads-fund-disinformation-covid-elections>. Gallup Inc, *Confidence in Institutions*, GALLUP.COM (2007), <https://news.gallup.com/poll/1597/Confidence-Institutions.aspx>.

⁶⁰ Floridi *supra* note 55

⁶¹ Elon Musk [@elonmusk], *Reinstate former President Trump*, TWITTER (2022), <https://twitter.com/elonmusk/status/1593767953706921985>.

doubts were cast on the result of a similar twitter poll regarding Musk's own future as CEO of twitter on the alleged ground that the poll might have been rigged by bot accounts and in the future only twitter users with a blue tick mark should be allowed to vote in such polls.⁶² But the arbitrary exercise of power under the rule of code is not restricted to accounts spreading disinformation, the weakening of the Rule of Law has affected also those tasked with spreading information.

The suspension (and reinstatement) of journalists' twitter accounts

On December 16th, 2022, Twitter banned the accounts of many prominent journalists for allegedly doxxing Elon Musk i.e. sharing his real-time location.⁶³ The suspension which received widespread condemnation including from the UN and the EU⁶⁴ was subsequently revoked after yet another opinion poll.⁶⁵ The bizarre manner in which the accounts were first suspended and then subsequently reinstated is another example of arbitrary exercise of power under the rule of code. If the accounts were suspended for a legitimate cause then they should have been given a proper explanation along with a grievance redressal mechanism and if the account holders chose not to correct the alleged wrong then their accounts shouldn't have been reinstated. The theatrical manner in which journalistic Twitter accounts got suspended and restored is a hallmark of the whimsical authority of an individual and not the Rule of Law. Matters concerning fundamental rights require serious deliberation under the Rule of Law and not a spectacle where the rights of a few are impinged to serve as an example for others. The failure of the Rule of Law in effectively governing digital information platforms does not just impact individual rights

⁶² Shirin Ghaffary, *Elon Musk now says he'll step down as Twitter CEO*, VOX (2022), <https://www.vox.com/recode/2022/12/20/23519453/elon-musk-twitter-ceo-why-not-quit-resign>. See also: Elon Musk [@elonmusk], @Unfilteredboss1 @KimDotcom Good point. Twitter will make that change., TWITTER (2022), <https://twitter.com/elonmusk/status/1604985324505030658>. Finally in May 2023, Linda Yaccarino was appointed as the new CEO for twitter. Dan Milmo, *Elon Musk Confirms Linda Yaccarino as New Twitter CEO*, THE GUARDIAN, May 12, 2023, <https://www.theguardian.com/technology/2023/may/11/elon-musk-twitter-new-ceo>.

⁶³ Oliver Darcy, *Elon Musk bans several prominent journalists from Twitter, calling into question his commitment to free speech* | CNN Business, CNN (2022), <https://www.cnn.com/2022/12/15/media/twitter-musk-journalists-hnk-intl/index.html>.

⁶⁴ Max Matza & Simon Read, *Twitter condemned by UN and EU over reporters' ban*, BBC NEWS, Dec. 16, 2022, <https://www.bbc.com/news/world-us-canada-63996061>.

⁶⁵ Jamie Knodel, *Musk reinstates suspended journalists after Twitter poll*, NBC NEWS, <https://www.nbcnews.com/tech/social-media/musk-reinstates-suspended-journalists-twitter-poll-rcna62227>.

but also gives rise to challenges such as systemic disinformation which pose an existential risk to democracy.

V. Systemic Disinformation

To understand systemic disinformation, it would be helpful to begin with a definition of disinformation and then build towards its systemic aspects. The field of disinformation has received a lot of scholarly attention in recent years. Broadly speaking, disinformation has been sought to be understood in terms of the actors involved in spreading disinformation⁶⁶, the methodology adopted in spreading disinformation⁶⁷, the motives behind and the objectives sought to be achieved through disinformation⁶⁸, and the harms suffered on accounts of disinformation.⁶⁹ While these nuances are important, a conceptual definition should also provide precision and clarity.⁷⁰ In disinformation's case, this would require distinguishing it from related concepts such as misinformation. The European Union High Level Expert Group on fake news and online disinformation (HLEG) defines disinformation "as false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm or for profit"⁷¹ which is different from misinformation which is "defined as misleading or inaccurate information shared by people who do not recognize it as such[.]"⁷² The harm suffered on account of disinformation has been explained by HLEG as

⁶⁶ Camille François, *Actors, Behaviors, Content: A Disinformation ABC Highlighting Three Vectors of Viral Deception to Guide Industry & Regulatory Responses*, TRANSATLANTIC WORKING GROUP (2019). Samantha Bradshaw & Philip N. Howard, *The Global Organization of Social Media Disinformation Campaigns*, 71 *Journal of International Affairs* 23 (2018).

⁶⁷ Sophie Lecheler Egelhofer Jana Laura, *Disinformation, Misinformation, and Fake News: Understanding the Supply Side, in KNOWLEDGE RESISTANCE IN HIGH-CHOICE INFORMATION ENVIRONMENTS* (Strömbäck *et al* ed. 2022).

⁶⁸ Mathias Osmundsen *et al.*, *Partisan Polarization Is the Primary Psychological Motivation behind Political Fake News Sharing on Twitter*, 115 *American Political Science Review* 999 (2021).

⁶⁹ Spencer McKay & Chris Tenove, *Disinformation as a Threat to Deliberative Democracy*, 74 *Political Research Quarterly* 703 (2021).

⁷⁰ Anil Gupta, *Definitions*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2021 ed. 2021), <https://plato.stanford.edu/archives/win2021/entries/definitions/>.

⁷¹ Final report of the High Level Expert Group on Fake News and Online Disinformation | Shaping Europe's digital future 10 (2018), <https://digital-strategy.ec.europa.eu/en/library/final-report-high-level-expert-group-fake-news-and-online-disinformation>.

⁷² *Id.* This is not to say that misinformation cannot have negative consequences. See generally: Bertie Vidgen, Harry Taylor, Myrto Pantazi, Zoe Anastasiou, Becky Inkster and Helen Margetts, *Understanding vulnerability to online misinformation*, THE ALAN TURING INSTITUTE (March 2021) and Richard Mackenzie-Gray Scott, *Managing Misinformation on Social Media: Targeted Newsfeed Interventions and Freedom of Thought*, 21 *Northwestern Journal of Human Rights* 109 (2023).

The risk of harm includes threats to democratic political processes and values, which can specifically target a variety of sectors, such as health, science, education, finance and more. It is driven by the production and promotion of disinformation for economic gains or for political or ideological goals, but can be exacerbated by how different audiences and communities receive, engage, and amplify disinformation.⁷³

In this context, the systemic aspect of disinformation can be understood in two inter-related manners. Firstly, the systemic aspect refers to a coordinated attempt at spreading disinformation. An example of this is the revelations from the recent Guardian investigation which exposed a disinformation black ops group, “who claim to have manipulated more than 30 elections around the world using hacking, sabotage and automated disinformation on social media[.]”⁷⁴ Such systemic campaigns apart from materially affecting electoral results distort social reality and undermine trust in democratic institutions. After all, trust can only be established in a world that is, to a certain extent, already familiar. If systemic campaigns of disinformation succeed in creating a fragmented social environment where it becomes increasingly difficult to distinguish between truth and falsehood, existential uncertainty rises. These campaigns rarely succeed on account of an individual attempt and their impact is also not felt solely at an individual level, instead the harms suffered due to disinformation campaigns are often collective.⁷⁵

In addition to the coordinated aspects of disinformation campaigns, the second systemic emphasis is on the deployment of AI systems for spreading disinformation. AI systems-driven disinformation campaigns offer both the advantage of operating at a mass scale as well as catering to personalized content.⁷⁶ When it comes to disinformation, AI systems “boost the problem not only by increasing opportunities to create realistic AI-generated fake content, but also, and essentially, by facilitating the dissemination of disinformation to a targeted audience and at scale by malicious stakeholders.”⁷⁷ In the

⁷³ HLEG *supra* note 71 at 10.

⁷⁴ Stephanie Kirchgaessner et al., *Revealed: the hacking and disinformation team meddling in elections*, The Guardian, Feb. 15, 2023, <https://www.theguardian.com/world/2023/feb/15/revealed-disinformation-team-jorge-claim-meddling-elections-tal-hanan>.

⁷⁵ Lennon Y. C. Chang, Souvik Mukherjee & Nicholas Coppel, *We Are All Victims: Questionable Content and Collective Victimization in the Digital Age*, 16 ASIAN J CRIMINOL 37 (2021).

⁷⁶ Sophia Ignatidou, *AI-driven Personalization in Digital Media Political and Societal Implications*, CHATHAM HOUSE (2019)

⁷⁷ Noémi Bontridder & Yves Poulet, *The role of artificial intelligence in disinformation*, 3 DATA & POLICY e32 (2021).

ensuing paragraphs, we give examples of systemic disinformation and missed regulatory opportunities to enforce the Rule of Law.

The Select Committee Final Report on the January 6th Attack on the United States Capitol and the disinformation threat posed by Generative AI

On Tumblr, a 1973 mafia movie presented by Martin Scorsese-*Goncharov* has developed a cult following.⁷⁸ It has inspired theme songs, memes, and posters. Reading about *Goncharov* can take one down a crazy rabbit hole, the only problem is that the movie is not real.⁷⁹ But that hasn't stopped cinephiles from pursuing it like a massive inside joke.⁸⁰ One could argue that *Goncharov* does not qualify as disinformation in the absence of harm. But what if the rabbit hole did not concern intense discussions about a non-existing movie but about the existence of a pandemic or the winner of an election? Suddenly the stakes change from an inside joke to an existential crisis for democratic institutions. In its early days, social media held a democratic promise, glimpses of which were witnessed during the Arab spring.⁸¹ However, now that promise stands betrayed and instead of democratizing information, social media has led to a rise in disinformation.⁸² Instead of enabling democratic dialogue, the behavioral targeting model deployed by social media firms for generating advertisement revenues panoptically sorts individuals into epistemic bubbles.⁸³ When citizens are barred from openly engaging with each other, democratic discourse becomes hostage to confirmation bias. In such an infosphere⁸⁴ conspiracy theories rule and trust in democratic institutions plummets.

⁷⁸ Madison Malone Kircher, *The Fake Scorsese Film You Haven't Seen. Or Have You?*, THE NEW YORK TIMES, November 22, 2022, <https://www.nytimes.com/2022/11/22/style/goncharov-scorsese-tumblr.html>.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Zack Beauchamp, *Social media is rotting democracy from within*, VOX (2019), <https://www.vox.com/policy-and-politics/2019/1/22/18177076/social-media-facebook-far-right-authoritarian-populism>.

⁸² Hans Kundnani, *The Future of Democracy in Europe Technology and the Evolution of Representation*, CHATHAM HOUSE 11 (2020). See also: Disinformation is a high-stake game threatening freedom, CHATHAM HOUSE – INTERNATIONAL AFFAIRS THINK TANK (2022), <https://www.chathamhouse.org/2022/07/disinformation-high-stake-game-threatening-freedom>.

⁸³ Anuj Puri, *A Theory of Group Privacy*, 30 (3) CORNELL JOURNAL OF LAW AND PUBLIC POLICY 477 (2021)

⁸⁴ Floridi *supra* note 55

Against this backdrop, the January 6th Select Committee report⁸⁵ represents a lost opportunity to hold the Big Tech firms accountable. As part of its mandate, the Select Committee was empowered to

[I]nvestigate the facts, circumstances, and causes relating to the domestic terrorist attack on the Capitol, including facts and circumstances relating to...influencing factors that contributed to the domestic terrorist attack on the Capitol and *how technology, including online platforms*, financing, and malign foreign influence operations and campaigns may have factored into the motivation, organization, and execution of the domestic terrorist attack on the Capitol.⁸⁶

However, the final report of the committee shied away from affixing platform responsibility and instead focused on individual actors.⁸⁷ This is despite the Select Committee's own noting that "Social media played a prominent role in amplifying erroneous claims of election fraud."⁸⁸ Interestingly, the leaked draft summary of the report was more forthcoming and concluded, "The sheer scale of Republican post-election rage paralyzed decisionmakers at Twitter and Facebook, who feared political reprisals if they took strong action."⁸⁹ These remarks and many other findings of the Select Committee's social media team, the purple team, on the role of social media in the Capitol Hill Attack

⁸⁵ Select Committee to Investigate the January 6th Attack on the United States Capitol *supra* note 18

⁸⁶ 117TH CONGRESS 1 ST SESSION H. RES. 503 Establishing the Select Committee to Investigate the January 6th Attack on the United States Capitol <https://www.justsecurity.org/wp-content/uploads/2021/06/Jan-6-Clearinghouse-House-Resolution-503-June-28-2021.pdf> See also: Justin Hendrix, *The Final January 6th Report on the Role of Social Media*, TECH POLICY PRESS (2022), <https://techpolicy.press/the-final-january-6th-report-on-the-role-of-social-media/>. {Emphasis added}

⁸⁷ On the role of media, the Select Committee specifically noted in its recommendations,

The Committee's investigation has identified many individuals involved in January 6th who were provoked to act by false information about the 2020 election repeatedly reinforced by legacy and social media. The Committee agrees that individuals remain responsible for their own actions, including their own criminal actions. But congressional committees of jurisdiction should continue to evaluate policies of media companies that have had the effect of radicalizing their consumers, including by provoking people to attack their own country.

Select Committee *supra* note 18 at 691-692. This is in contradistinction to the foreword of the report, where the Chairman states that the Select Committee has "pulled back the curtain at certain major social media companies to determine if their policies and protocols were up to the challenge when the President spread a message of violence and his supporters began to plan and coordinate their descent on Washington." *Id* at xi. See also: Hendrix *supra* note 86.

⁸⁸ Select Committee *supra* note 18 at 213.

⁸⁹ Adam Rawnsley, *Leaked Jan. 6 Committee Report Exposes Twitter's Post-Insurrection Chaos*, ROLLING STONE (2023), <https://www.rollingstone.com/politics/politics-news/jan6-twitter-trump-elon-musk-capitol-attack-1234655022/>.

did not find their way in the final report.⁹⁰ The Select Committee's failure to reassert the Rule of Law becomes more stark in view of a remark buried deep inside Appendix 4 of the report on page 838 out of the 845 page report. In the said remark, the Select Committee cited Dr. John Kelly's warning before the Senate Select Committee on Intelligence, "We are facing a sustained campaign of organized manipulation, *a coordinated attack on the trust we place in our institutions and in our media—both social and traditional.*"⁹¹ In the same hearing before the Senate Select Committee on Intelligence in 2018, another expert Renee DiResta had cautioned,

We should anticipate an increase in the misuse of less resourced social platforms. We should anticipate an increase in the use of peer-to-peer encrypted messaging services. Future campaigns will likely be compounded by the use of witting or unwitting persons through whom state actors will filter their propaganda. We anticipate the incorporation of new technologies, such as video and audio produced by AI, to supplement these operations, making it increasingly difficult for people to trust what they see. *This problem is one of the defining threats of our generation.*⁹²

These warnings, raised years before the Capitol Hill Attack, along with scores of other neglected warnings on the perils of systemic disinformation⁹³ paved the way for not just the Capitol Hill Attack but similar attacks in Brazil as well.⁹⁴ In their book *System Error Where Big Tech went wrong and how we can reboot*, Reich *et al* express their concern over the

⁹⁰ *Id.* In an interview after the publishing of the final report, Dean Jackson a member of the purple team stated, "And I think what's really important is that we... and the reason I think all of us are here today talking to you, and why we're so eager to get into this is that it's important that the conclusion not be that there was no role that social media played or that the companies were exonerated by our investigation[.]" Justin Hendrix, *Results of the January 6th Committee's Social Media Investigation*, TECH POLICY PRESS (2023), <https://techpolicy.press/results-of-the-january-6th-committees-social-media-investigation/>.

⁹¹ Select Committee *supra* note 18 at 838 (Emphasis added). See also: S. HRG. 115-397 Open Hearing on Foreign Influence Operations' use of Social Media Platforms (Third Party Expert Witnesses) Hearing before the Select Committee on Intelligence of the United States Senate One Hundred Fifteenth Congress Second Session (Wednesday, August 1, 2018)

<https://www.intelligence.senate.gov/sites/default/files/hearings/CHRG-115shrg30959.pdf>

⁹² Senate Select Committee on Intelligence *supra* note 91 at 17. (Emphasis added)

⁹³ Jeremy Bender, *44 pictures of the incredible bromance between President Obama and Vice President Biden*, BUSINESS INSIDER NEDERLAND (2017), <https://www.businessinsider.nl/obama-biden-photos-2016-12/>.

⁹⁴ Oliver Darcy, *Déjà coup: How election lies sparked the violent attack on Brazil's government* | CNN Business, CNN (2023), <https://www.cnn.com/2023/01/09/media/brazil-government-reliable-sources/index.html>. Brazil insurrection: Social media platforms must act to stop spread of disinformation and calls to violence, GLOBAL WITNESS, <https://en.press-releases/brazil-insurrection-social-media-platforms-must-act-stop-spread-disinformation-and-calls-violence/>.

decreasing cost of synthetic media while referring to the then latest language model-GPT 3,

GPT-3 is the latest arrival in systems that can produce what researchers call “synthetic media” or deep fakes, the ability of increasingly powerful machines to generate or alter text, audio, images, and video in ways that are readily believable to humans. And far from resting in the hands of only a powerful few, many of these tools are, or soon will be, commercially available. And as the cost of computing resources continues to decrease exponentially, such systems will eventually become accessible to nearly anyone.⁹⁵

Below we present an example of how AI has lowered the threshold in producing disinformation and how concerns raised by Reich *et al* have come true with the advent of Generative AI systems like the ChatGPT.⁹⁶ We asked ChatGPT, a large language model which is the latest AI system that has captured the imagination of millions of users globally, to write a story about how President Biden defeated President Obama in basketball, the resultant effort is a testament to the well-documented *bromance* between the two Presidents-

⁹⁵ Rob Reich, Mehran Sahami, Jeremy M. Weinstein, SYSTEM ERROR WHERE BIG TECH WENT WRONG AND HOW WE CAN REBOOT 237 (2021). See also: Maria Pawelec, *Deepfakes and Democracy (Theory): How Synthetic Audio-Visual Media for Disinformation and Hate Speech Threaten Core Democratic Functions*, 1 DISO 19 (2022)..

⁹⁶ On the Generative AI's potential to spread disinformation see: Allie Funk *et al*, *The Repressive Power of Artificial Intelligence*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-net/2023/repressive-power-artificial-intelligence> (last visited Jan 18, 2024). Will Bedingfield, *Generative AI Is Playing a Surprising Role in Israel-Hamas Disinformation*, Wired, <https://www.wired.com/story/israel-hamas-war-generative-artificial-intelligence-disinformation/>. Cf. Felix M. Simon, Sacha Altay & Hugo Mercier, *Misinformation Reloaded? Fears about the Impact of Generative AI on Misinformation Are Overblown*, Harvard Kennedy School Misinformation Review (2023), <https://misinfoview.hks.harvard.edu/article/misinformation-reloaded-fears-about-the-impact-of-generative-ai-on-misinformation-are-overblown/>

A Write a story about how President Biden defeated President Obama in basketball



As the sun began to set over the basketball court at the White House, President Biden and President Obama faced off in a highly anticipated one-on-one game.



The two leaders had been practicing for weeks, each determined to come out on top. President Obama was known for his quick reflexes and precise shooting, while President Biden was known for his endurance and relentless hustle.

As the game began, the two leaders traded baskets back and forth, each one refusing to let the other gain the upper hand. President Obama was in the lead for much of the game, but President Biden refused to give up. He worked tirelessly on defense, stealing the ball from President Obama and driving to the hoop for a series of thunderous dunks.

As the final seconds ticked down, President Biden found himself with the ball and a chance to tie the game. He faked left, then spun right and launched a long three-pointer. As the ball swooshed through the net, the crowd erupted in cheers.

President Obama was gracious in defeat, congratulating President Biden on his victory. "You played a great game, Joe," he said, shaking his hand. "I knew you had it in you."

President Biden smiled, still panting from the intense game. "Thanks, Barack," he said. "But I couldn't have done it without your help."

As the two leaders left the court, they knew that they had not only competed in a friendly game of basketball, but had also strengthened the bond of friendship and respect that had always existed between them.

Figure 1

(Source: ChatGPT)

The innocuous story takes a dramatically different turn with a change in characters. When asked to write a fictitious letter from Joe Biden to President Trump conceding the election, the AI chatbot's resultant effort is a combination of magnanimity in fictitiously conceding the election and the acrimonious relationship between the two politicians.⁹⁷

⁹⁷ Anne Gearan, Philip Rucker & Annie Linskey, *Trump incessantly interrupts and insults Biden as they spar in acrimonious first debate*, WASHINGTON POST, Sep. 30, 2020, https://www.washingtonpost.com/politics/debate-trump-biden/2020/09/30/722499a8-0274-11eb-b7ed-141dd88560ea_story.html.

A Write a fictitious letter from Joe Biden to President Trump conceding the election



Figure 2

(Source: ChatGPT)

The above is one example of how easy and low-cost it is to generate disinformation using AI.⁹⁸ The concern highlighted by the advancement of such technology has been succinctly summarized by Kundnani as

The fear is that, as technologies for manipulating audiovisual content evolve further, it could become even more difficult for citizens to identify ‘fake news’. This could distort policy debates and even elections and erode trust in institutions.⁹⁹

Unfortunately, in the aftermath of the January 6th Capitol Hill attacks, we have seen little progress on legislative and operational measures against disinformation. The limitations

⁹⁸ For another interesting example involving ChatGPT see: Megan McArdle, *Opinion | The new AI writing tool might teach us the value of truth*, WASHINGTON POST, Dec. 8, 2022, <https://www.washingtonpost.com/opinions/2022/12/07/openai-chatgpt-writing-tool-journalism-truth/>. On trustworthy aspects of ChatGPT see: Anuj Puri and Esther Keymolen, *Of ChatGPT and Trustworthy AI*, JOURNAL OF HUMAN-TECHNOLOGY RELATIONS 1 (2023).

⁹⁹ Kundnani *supra* note 82 at 14.

of the voluntary nature of EU's Strengthened Code of Practice on Disinformation, 2022¹⁰⁰ became sharply visible after Twitter (X Corp)'s withdrawal from the code in May 2023.¹⁰¹ On December 18, 2023 the European Commission opened formal proceedings against X under the recently enacted Digital Services Act "to assess whether X may have breached the Digital Services Act (DSA) in areas linked to risk management, content moderation, dark patterns, advertising transparency and data access for researchers."¹⁰² While, the Digital Services Act with transparency obligations and a role for trusted flaggers and the proposed regulations on the transparency and targeting of political advertising offer some semblance of hope¹⁰³, as things stand today on the operational front, the disinformational descent continues unabated. For instance, YouTube recently announced that it will no longer be deleting videos that make false claims concerning fraud in 2020 US presidential elections.¹⁰⁴ Further evidence of a lack of sincerity on the part of Big Tech firms to effectively handle issues of trust and safety comes from Australia. In its summary of the response received from X Corp. in reply to a transparency notice issued under the Online Safety Act, 2021, the Australian eSafety Commissioner noted a reduction of 80% in "Engineers focused on trust and safety issues globally."¹⁰⁵ The relentless disinformational

¹⁰⁰ European Commission, *The 2022 Code of Practice on Disinformation*, <https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation>

¹⁰¹ Ewa Krukowska, *Twitter Withdraws From EU Disinformation Code: Commissioner*, TIME (2023), <https://time.com/6283183/twitter-withdraws-from-eu-disinformation-code-commissioner-says/>.

¹⁰² European Commission, Commission opens formal proceedings against X under the Digital Services Act (December 18, 2023) https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6709

¹⁰³ 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). Alain Strowel & Jean De Meyere, *The Digital Services Act: Transparency as an Efficient Tool to Curb the Spread of Disinformation on Online Platforms?*, 14 J.INTELL. PROP. INFO. TECH. & ELEC. COM. L. 66 (2023). Folkert Wilman, *The Digital Services Act (DSA) - An Overview*, (2022), <https://papers.ssrn.com/abstract=4304586>. European Commission, Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising 2021 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0731>. See also: Tom Kane, *Fake News: EU Targets Political Social Media Ads with Tough New Regulation Proposal*, THE CONVERSATION (2023), <http://theconversation.com/fake-news-eu-targets-political-social-media-ads-with-tough-new-regulation-proposal-208132>.

¹⁰⁴ Mike Wendling, *YouTube stops deleting false 2020 election claims*, BBC NEWS, Jun. 2, 2023, <https://www.bbc.com/news/world-us-canada-65772505>. YouTube Team, *An update on our approach to US election misinformation*, INSIDE YOUTUBE, <https://blog.youtube/inside-youtube/us-election-misinformation-update-2023/>.

¹⁰⁵ eSafety Commissioner, *Basic Online Safety Expectations Summary of response from X Corp. (Twitter) to eSafety's transparency notice on online hate* (January 2024) <https://www.esafety.gov.au/sites/default/files/2024-01/Full-Report-Basic-Online-Safety-Expectations-Summary-of-response-from-X-Corp-Twitter-to-eSafetys-transparency-notice-on-online-hate.pdf>. eSafety Commissioner, *Basic Online Safety Expectations Summary of response to non-periodic notice issued to X Corp. (Twitter) in June 2023 Focus: Online hate Key findings* (January 2024) <https://www.esafety.gov.au/sites/default/files/2024-01/Key-Findings-Basic-Online-Safety-Expectations-Summary-of-response-to-non-periodic-notice-issued-to-X-Corp-Twitter-in-June-2023.pdf>

spiral is a contributing factor in the growing distrust against public institutions amongst citizens worldwide.¹⁰⁶ There is a direct co-relation between epistemic verifiability and trust. Verifiable information contributes to citizens' judgment that institutional conduct is trustworthy. The information generated during the course of a policy action becomes the basis for subsequent scrutiny and can act as a trust-enhancing measure. When the informational grounds on which a policy decision is based as well as the factual justification generated during the course of implementation are distorted by disinformation the epistemic justification for trust weakens. Disinformation can cast doubt on the legitimacy of certain policy decisions. As a result, complexity rises, and retaining trust becomes challenging. Moreover, disinformation contributes to social and political polarization. As we saw in part III, trust in the rule of law should, however, be a collective effort. Disinformation undermines the shared belief in the fairness and impartiality of the Rule of Law. Finally, as trust in the rule of law is fundamental to a well-functioning democratic society, disinformation that targets policy-making and legal institutions may lead to a broader decline of trust in public values. This however is not the only governance challenge posed by AI systems. We address the issue of algorithmic misgovernance in the next section.

VI. Algorithmic Misgovernance

Citizens' trust in the Rule of Law is born out of an expectation of good governance and resolution of disputes concerning their rights in a just and fair manner. When these

¹⁰⁶ Various studies have highlighted the growing distrust amongst citizens towards democratic institutions. See: United Nations Department of Economic and Social Affairs Social Inclusion, *Trust in public institutions: Trends and implications for economic security* (July 20, 2021). <https://www.un.org/development/desa/dspd/2021/07/trust-public-institutions/>. Pew Research Center, *Americans' Views of Government: Decades of Distrust, Enduring Support for Its Role* (June 6, 2022) <https://www.pewresearch.org/politics/2022/06/06/americans-views-of-government-decades-of-distrust-enduring-support-for-its-role/>. While there are various socio-economic factors driving this growing distrust, disinformation plays a crucial role in impacting the credibility of the democratic institutions. McKay & Tenove *supra* note 69. Sarah McCammon & Liz Baker, *Disinformation Fuels Distrust And Even Violence At All Levels Of Government*, NPR, (Mar. 1, 2021), <https://www.npr.org/2021/03/01/971436680/from-the-u-s-capitol-to-local-governments-disinformation-disrupts>. Fabian Zimmermann & Matthias Kohring, *Mistrust, Disinforming News, and Vote Choice: A Panel Survey on the Origins and Consequences of Believing Disinformation in the 2017 German Parliamentary Election*, 37 POLITICAL COMMUNICATION 215 (2020). Gabriel R. Sanchez, Keesha Middlemass, *Misinformation is eroding the public's confidence in democracy*, Brookings, <https://www.brookings.edu/articles/misinformation-is-eroding-the-publics-confidence-in-democracy/>. Carme Colomina, Héctor SÁNCHEZ Margalef & Richard Youngs, *The Impact of Disinformation on Democratic Processes and Human Rights in the World*, Policy Department Directorate General of External Policies (2021) [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/653635/EXPO_STU\(2021\)653635_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/653635/EXPO_STU(2021)653635_EN.pdf)

expectations are belied by AI systems, they diminish the citizens' trust in the Rule of Law. The rise of new public analytics is driven by efficiency considerations which do not adequately capture the complexity of the multi-faceted relationship between the citizen, her social context, and the government. Consequently, students from weaker economic background are judged on the basis of the past poor performance of their schools rather than their individual merit¹⁰⁷, members of already marginalized communities are denied rightful benefits¹⁰⁸ and saddled with wrongful debts¹⁰⁹. Existing scholarship in this area has tried to analyze the impact of AI systems on questions of governance and justice through the realm of automated decision making¹¹⁰, algorithmic governance¹¹¹, algorithmic justice¹¹² and data justice.¹¹³ Building upon these co-related strands of scholarship, in this section we identify the harm caused by algorithmic misgovernance.

We define algorithmic misgovernance as— a lack of procedural justice, unfair social structuring, inadequate/inaccurate representation of the citizens or violation of human rights occurring on account of the deployment of algorithms in governance. One may ask what is distinct about algorithmic misgovernance and what sets it apart from the more “traditional” forms of misgovernance. The answer is twofold. The first part of the answer lies in the wide chasm between stated aims and attained objectives. The introduction of algorithms in governance is often driven by efficiency claims and an optimization mindset. However, instead of helping achieve the aims of a welfare state, algorithmic misgovernance

¹⁰⁷ Kolkman *supra* note 10

¹⁰⁸ Doaa Abu Elyounes, “Computer Says No!”: *The Impact of Automation on the Discretionary Power of Public Officers*, 23 VAND. J. ENT. & TECH. L. 451 (2021).

¹⁰⁹ Valerie Braithwaite, *Beyond the bubble that is Robodebt: How governments that lose integrity threaten democracy*, 55 AUSTRALIAN JOURNAL OF SOCIAL ISSUES 242 (2020).

¹¹⁰ Automating Society 2019, ALGORITHMWATCH, <https://algorithmwatch.org/en/automating-society-2019/>.

¹¹¹ Christian Katzenbach & Lena Ulbricht, *Algorithmic governance*, 8 INTERNET POLICY REVIEW (2019), <https://policyreview.info/concepts/algorithmic-governance>.

¹¹² Aleš Završnik, *Algorithmic Justice: Algorithms and Big Data in Criminal Justice Settings*, 18 European Journal of Criminology 623 (2021).

¹¹³ Linnet Taylor, *What is data justice? The case for connecting digital rights and freedoms globally*, 4 BIG DATA & SOCIETY 1 (2017).

ends up entrenching the existing social biases and criminalizing poverty.¹¹⁴ In her book, *Race after Technology*, Ruha Benjamin defines the *New Jim Code* as

The employment of new technologies that reflect and reproduce existing inequities but that are promoted and perceived as more objective or progressive than the discriminatory systems of previous era.¹¹⁵

As per Dobson,

Traditional methods for tracking welfare fraud are being supplemented with new tools and technological platforms, drawing on informal data streams and large databases to detect possible instances of fraud and take away social assistance from flagged individuals[.] This is despite the fact that welfare fraud is rare. In Canada, for example, it is estimated at less than one percent of welfare recipients annually [.] and similarly low rates are found in the United States, Australia, and the U.K.[.] Yet governments in each of these countries are becoming more aggressive and punitive of welfare “cheats”[.]¹¹⁶

In the paragraphs below, we elaborate upon these harms of algorithmic misgovernance and address the questions of procedural justice, social structuring, representation and human rights through examples and analysis of scholarship on automated decision making, algorithmic governance, data justice and algorithmic justice respectively.

The second point of distinction between “traditional” forms of misgovernance and algorithmic misgovernance can be understood by asking the question—What is lost in transition from the Rule of Law to the rule of code? In order to address this question, we must take into account the existing technologies that have facilitated the implementation of the Rule of Law. Hildebrandt states,

The success of written legal rules as a means to steer and control a population can be attributed in part to their alliance with the technologies of the written script and the printing press, which extended the reach of law both in time and space, allowing an ever more detailed regulation of human intercourse. These technologies were preconditions of modern law in the

¹¹⁴ Sarah Valentine, *Impoverished Algorithms: Misguided Governments, Flawed Technologies, and Social Control Artificial Intelligence and Predictive Algorithms: Why Big Data Can Lead to Big Problems*, 46 FORDHAM URB. L.J. 364 (2019). Kathy Dobson, *Welfare Fraud 2.0? Using Big Data to Surveil, Stigmatize, and Criminalize the Poor*, 44 CANADIAN JOURNAL OF COMMUNICATION 331 (2019).

¹¹⁵ Ruha Benjamin, RACE AFTER TECHNOLOGY 5-6 (2019). On algorithmic regulation and big data’s worsening impact on existing socio-economic inequalities see generally: Virginia Eubanks, AUTOMATING INEQUALITY (2017)

¹¹⁶ Kathy Dobson, *Welfare Fraud 2.0? Using Big Data to Surveil, Stigmatize, and Criminalize the Poor*, 44 CANADIAN JOURNAL OF COMMUNICATION 331 (2019). (Internal references omitted)

sense that they ‘afforded’ or ‘made possible’ the rise of positive, deliberately enacted and imposed legal code, to be authoritatively applied by courts of law. The proliferation especially of legal text that resulted from the uptake of the printing press has vastly extended the distantiation that written text generates between author (the legislator, the courts), reader (legal subjects) and text (legislation and case law). Such distance evokes the need for interpretation, since the author can no longer control the meaning of her text. The author is absent, speaking from another place and possibly from another time.¹¹⁷

The distantiation brought about by facilitation of the Rule of Law through written script and printing press introduced its own interpretation,¹¹⁸ normativity,¹¹⁹ anticipation¹²⁰ and legal certainty¹²¹ all of which get impacted by the transition to the rule of code. We address these changes with the aid of relevant examples below.

Automated decision-making, procedural justice and legal certainty

For many decades now, the governments world over have been focused on making their processes more efficient, with technology being regarded as the key enabler. While the efficient use of taxpayers’ money is worth pursuing, when efficiency becomes too dominant, other values such as transparency, accountability, and justice are at risk of being compromised. In their 2019 report on automating society, Algorithmwatch defines automated decision making as,

¹¹⁷ Mireille Hildebrandt, *The force of law and the force of technology* 597, 599 in THE ROUTLEDGE HANDBOOK OF TECHNOLOGY, CRIME AND JUSTICE (2017). In her article Law as Information in the Era of Data-Driven Agency, Hildebrandt observes,

The deep structure of modern law has been built on the affordances of the printing press: on the linearity and sequential processing demands of written text, which evokes the need for interpretation, reflection and contestation. The study and practice of law have thus been focused on establishing the meaning of legal norms and their applicability to relevant human interactions, while establishing the meaning of human action in the light of the applicable legal norms. Data-driven agency builds on an entirely different grammar, its building blocks are information and behavior, not meaning and action. We need to face the possibility that this will drain the life from the law, turning it into a handmaiden of governance (that fashionable term meaning anything to anybody), devouring the procedural kernel of the Rule of Law that enables people to stand up for their rights against big players, whether governmental or corporate or otherwise.

Mireille Hildebrandt, *Law as Information in the Era of Data-Driven Agency*, 79 (1) *The Modern Law Review* 1, 2 (2016).

¹¹⁸ Hildebrandt (2017) *supra* note 117 at 599.

¹¹⁹ *Id* at 602-605.

¹²⁰ Mireille Hildebrandt, *Boundary Work between Computational ‘Law’ and ‘Law-as-We-Know-it’*, in *Data at the Boundaries of European Law* 30 (Deirdre Curtin & Mariavittoria Catanzariti eds., 2023)

¹²¹ *Id* at 62. See also: Mireille Hildebrandt, *The adaptive nature of text-driven law*, *JOURNAL OF CROSS-DISCIPLINARY RESEARCH IN COMPUTATIONAL LAW* 1, 3 (2020). Laurence Diver, Tatiana Duarte, Gianmarco Gori, Emilie van den Hoven and Mireille Hildebrandt, *Research Study on Text-Driven Law*, COHUBICOL (Brussels 2023))

Algorithmically controlled, automated decision-making or decision support systems are procedures in which decisions are initially—partially or completely—delegated to another person or corporate entity, who then in turn use automatically executed decision-making models to perform an action.¹²²

This delegation and consequent automation raise concern regarding maintenance of the status quo in the context of social reform and the further strengthening of existing social biases. As Waldman states “[A]lgorithmic decision-making hides the fact that engineers and their corporate employers are choosing winners and losers while steadfastly remaining agnostic about the social, political, and economic consequences of their work.”¹²³ These algorithmic choices that are never revealed to the stakeholders are a quintessential part of the rule of code. However, this non-disclosure undermines the legitimacy of the decision on account of a lack of transparency and the difficulty of challenging the algorithmically-determined outcomes. This has a bearing on the citizens’ trust in the Rule of Law.

The questions of trust, legitimacy, procedural justice and compliance are intricately interlinked. People are more likely to comply with those decisions that they consider legitimate.¹²⁴ Legitimacy in turn requires legal authorities to be trustworthy and adhering to procedural justice¹²⁵ In his celebrated work on procedural justice, legitimacy, and the Rule of Law, Tyler states, “[P]eople’s willingness to accept the constraints of the law and legal authorities is strongly linked to their evaluations of the procedural justice of the police and the courts.”¹²⁶ A poignant example of how the search for efficiency does not necessarily lead to increased legitimacy emerges in the conclusion of Tyler’s paper when he refers to COMPSTAT-“ a performance management system that is used to reduce crime and achieve other police department goals”¹²⁷. This system is considered as an example of an innovative practice by the New York Police Department that resulted in crime

¹²² Algorithmwatch *supra* note 110

¹²³ Ari Ezra Waldman, *Power, Process, and Automated Decision-Making Symposium: Rise of the Machines: Artificial Intelligence, Robotics, and the Reprogramming of Law*, 88 FORDHAM L. REV. 613 (2019).

¹²⁴ See generally: Tom R Tyler, *Why people obey the law?* (1990)

¹²⁵ Jonathan Jackson et al., *Why Do People Comply with the Law?: Legitimacy and the Influence of Legal Institutions*, 52 *The British Journal of Criminology* 1051 (2012). Tom R. Tyler, *Trust and Legitimacy: Policing in the USA and Europe*, 8 *European Journal of Criminology* 254 (2011).

¹²⁶ Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 *CRIME AND JUSTICE* 283, 284 (2003).

¹²⁷ Police Executive Research Forum, *Compstat: Its Origins, Evolution, and Future In Law Enforcement Agencies*

reduction. It, however, did not enhance the department's legitimacy amongst the members of the minority community.¹²⁸ The introduction of automated decision-making undermines the procedural justice requirement prescribed under the Rule of Law thus reducing its legitimacy. The impact on legitimacy is most prominent when algorithmic black boxes are involved and a lack of meaningful explanation makes it difficult for those affected to contest adverse outcomes.¹²⁹ The lack of contestation opportunities also has a bearing on legal certainty which is an integral aspect of the Rule of Law. As regards legal certainty, Hildebrandt argues,

[L]egal certainty is contingent upon a specific type of ambiguity that is inherent in human language, amplified in written and printed speech, and connected with the multi-interpretability of legal norms that implies both their inherent adaptiveness and their contestability.¹³⁰

She further states, “[L]egal certainty thrives on the contestability of facts and norms, not on the mechanical application of logical rules.”¹³¹ The migration from the Rule of Law to the rule of code limits contestation opportunities and reduces legal certainty. If citizens are not able to evaluate the procedural fairness of a decision, they are less likely to consider it legitimate and consequently less likely to trust it.

Algorithmic governance, changing norms and the structuring power of algorithms

Katzenbach and Lena define algorithmic governance as “a form of social ordering that relies on coordination between actors, is based on rules and incorporates particularly complex computer based epistemic procedures.”¹³² The structuring power of algorithms has also been highlighted by Farrell & Fourcade who emphasize the dual characteristics of algorithms in terms of their bureaucratic power of classification and market like self-adjusting allocation through feedback loops.¹³³ Algorithms, “assemble and sort- people, events, things. They distribute material opportunities and social prestige.”¹³⁴ What

¹²⁸ Tyler *supra* note 126 at 351.

¹²⁹ Francesca Palmiotto, *The Black Box on Trial: The Impact of Algorithmic Opacity on Fair Trial Rights in Criminal Proceedings*, in *Algorithmic Governance and Governance of Algorithms: Legal and Ethical Challenges* 49 (Martin Ebers & Marta Cantero Gamito eds., 2021). Archie Drake et al., *Legal Contestation of Artificial Intelligence-Related Decision-Making in the United Kingdom: Reflections for Policy*, 36 *International Review of Law, Computers & Technology* 251 (2022).

¹³⁰ Hildebrandt (2020) *supra* note 121 at 3.

¹³¹ Hildebrandt (2023) *supra* note 120 at 62.

¹³² Katzenbach & Ulbricht *supra* note 111

¹³³ Henry Farrell & Marion Fourcade, *The Moral Economy of High-Tech Modernism*, 152 *DAEDALUS* 225 (2023).

¹³⁴ *Id.*

distinguishes algorithms from the traditional form of classification systems is their invisible feedback mechanism which limits our agency in resisting them.¹³⁵ As per Farrell & Fourcade,

[C]onscious agency is only possible when people know about the classifications: the politics of systems in which classifications are visible to the public, and hence potentially actionable, will differ from the politics of systems in which they are not.¹³⁶

While reflecting on the structuring power of algorithms, boyd states,

Algorithms not only produce power but reflect the power arrangements within which they operate. Algorithms, like bureaucracy, structure things, making the categories through which they exercise power over society. Their category-making is entangled with the categories that the state creates for its own power-making purposes. Algorithms appear to turn disorganized data into seemingly coherent networks, but the product of this process often reifies and amplifies existing power arrangements.¹³⁷

Algorithms' structuring power does not extend just to opportunities and materials but they also restructure identities. An apt example of the unjust impact of the structuring power of algorithms arises out of the childcare benefits scandals in the Netherlands where thousands of families were wrongfully targeted for fraud, primarily on the basis of their dual nationalities.¹³⁸ The algorithmic misgovernance which had a disproportionate impact on racial minorities was the subject matter of intensive investigations and eventually led to the resignation of the government.¹³⁹ The Dutch childcare benefits scandal arose out of an optimization mindset that was aimed at streamlining the awarding of social benefits, ultimately resulting in thousands of people being forced into wrongfully paying back money that they never owed. This has led to tremendous financial and emotional hardship.¹⁴⁰ The power of an algorithmic system to freeze and adjudicate a person's identity behind a black box poses an enormous challenge for the Rule of Law. The people affected by the algorithmic determination, prior to the adverse outcome were living their lives in

¹³⁵ *Id* at 228.

¹³⁶ *Id*

¹³⁷ danah boyd, *The Structuring Work of Algorithms*, 152 DAEDALUS 236 (2023).

¹³⁸ Geiger and Virginia *supra* note 8

¹³⁹ *Id*.

¹⁴⁰ *Id*.

accordance with multiple identities- personal, social, professional etc. As a result of algorithmic determinations, their identities got restructured from the perspective of governance and the aspects of their dual nationality became the salient and defining attribute of their existence. The impact of this change in norm on account of the shift from the Rule of Law to the rule of code would last long after the resolution of the dispute in question. When an individual loses control over her informational self-determination, it has an existential impact; the boundaries of her self-management are redrawn perpetually. This lasting impact of algorithmic restructuring is not accounted for while introducing algorithms in governance. What distinguishes a legal norm from a technological norm is its dependency on the State's authority and the possibility of coercive sanction for its violation.¹⁴¹ *Au contraire*, "Technological normativity depends on the affordances of artefacts or infrastructures, and on the way they are taken up in human society."¹⁴² This point of origin firstly makes technological norms susceptible on grounds of legitimacy from a legal perspective. Secondly, the technological norms that have been created on the basis of affordances of artefacts lack constitutive democratic safeguards that are integral to legal norms arising in a State governed by the Rule of Law. These distinctions are important because as Hildebrandt highlights,

[T]echnological normativity is capable of reconfiguring the normative force of legal norms, for instance by turning them into paper dragons, automating and enforcing their implementation or by eroding the substance they mean to protect.¹⁴³

Hence, the transition from Rule of Law to rule of code doesn't augur well for the underlying legal interests. When an individual's identity is arbitrarily restructured by algorithmic misgovernance, it also redraws the contours of her relationship of trust with the Rule of Law. This restructuring belies her expectation of good governance and fair adjudication of her interests, thus undermining her trust in the Rule of Law.

¹⁴¹ *Id* at 602-603.

¹⁴² *Id* at 605.

¹⁴³ *Id* at 606.

Algorithmic justice, lack of interpretive safeguards and the impact on human rights

Algorithmic justice can be understood in terms of the impact of AI systems on human rights¹⁴⁴ and the injustice meted out on account of algorithmic bias,¹⁴⁵ algorithmic discrimination,¹⁴⁶ and “issues of datafication, ongoing technological inscribing, and the systemic nature of algorithmic justice”.¹⁴⁷ Stark examples of algorithmic injustice include predictive policing¹⁴⁸, facial recognition¹⁴⁹ and the use of algorithms in sentencing.¹⁵⁰ The “robodebt” case from Australia is a particularly troubling example of violation of rights on account of algorithmic injustice.¹⁵¹ The Online Compliance Intervention (OCI) program that was initiated in Australia as an automated “system for raising debts against people who had received government assistance and allegedly been overpaid” ended up with the government pledging to “pay back \$721 million that it stole from nearly 400,000 of the

¹⁴⁴ Filippo A. Raso et al., *Artificial Intelligence & Human Rights: Opportunities & Risks*, (2018), <https://papers.ssrn.com/abstract=3259344>.

¹⁴⁵ David Danks & Alex John London, *Algorithmic Bias in Autonomous Systems*, in PROCEEDINGS OF THE TWENTY-SIXTH INTERNATIONAL JOINT CONFERENCE ON ARTIFICIAL INTELLIGENCE 4691 (2017), <https://www.ijcai.org/proceedings/2017/654>. The challenge in removal of algorithmic bias can be understood through boyd’s observations,

Contemporary debates around the power of algorithms often highlight how biases in underlying data can affect the model. Yet the response to these critiques is often a call to “de-bias” the data, as though an idealized “neutral” data set were possible. Once an algorithmic system is situated as a powerful social actor, those seeking to configure the system to their advantage shift their attention to shape the data infrastructure upon which those systems depend. Algorithms do not make a system more neutral; they simply reconfigure the site of manipulation.

boyd *supra* note 137 at 238.

¹⁴⁶ Benjamin Eidelson, *Patterned Inequality, Compounding Injustice, and Algorithmic Prediction* 1 American Journal of Law and Equality 252 (2021).

[A]lthough the algorithms’ predictions may be equally accurate for members of different groups, the ways in which they err (when they do) differ: The algorithms tend more strongly toward mistaken pessimism when it comes to members of disadvantaged groups but more strongly toward mistaken optimism when it comes to members of advantaged groups. *Id.*

See also: Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification* and Jon Kleinberg et al., *Discrimination in the Age of Algorithms*, 10 JOURNAL OF LEGAL ANALYSIS 113 (2018). As per boyd, “The real danger of algorithmic systems-and their network-making power-is that they can be used to produce a new form of discrimination, one that cannot easily be mapped onto categories but can help enable and magnify social inequity all the same.” boyd *supra* note 137 at 237. .

¹⁴⁷ On a theoretical framework for algorithmic justice see Olivera Marjanovic, Dubravka Cecez-Kecmanovic & Richard Vidgen, *Theorising Algorithmic Justice*, 31 EUROPEAN JOURNAL OF INFORMATION SYSTEMS 269, 284 (2022).

¹⁴⁸ Andrew Guthrie Ferguson, *Policing Predictive Policing*, 94 WASH. U. L. REV. 1109 (2016).

¹⁴⁹ Legal Challenge: Ed Bridges v South Wales Police, LIBERTY, <https://www.libertyhumanrights.org.uk/issue/legal-challenge-ed-bridges-v-south-wales-police/>. Inioluwa Deborah Raji et al., *Saving Face: Investigating the Ethical Concerns of Facial Recognition Auditing*, in PROCEEDINGS OF THE AAAI/ACM CONFERENCE ON AI, ETHICS, AND SOCIETY 145 (2020), <https://doi.org/10.1145/3375627.3375820>.

¹⁵⁰ Julia Angwin, Mattu Jeff Larson, Lauren Kirchner, Surya, *Machine Bias*, PROPUBLICA, <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.

¹⁵¹ Paul Henman, *The computer says ‘DEBT’: Towards a critical sociology of algorithms and algorithmic governance*. (2017)

country's most vulnerable people.”¹⁵² However, this attempt at a course correction came too late for many of the victims who suffered enormous financial and emotional hardship, with some of them even attributing the suicides of their loved ones to the robodebt.¹⁵³ Automated debacles and instances of algorithmic injustice such as robodebt highlight the loss of legal safeguards and deliberative spaces that were considered integral interpretive components of the Rule of Law. While addressing the question “how we can sustain the legal protections based on the technologies of the script and the printing press, in the face of an epistemic shift towards a digital age”, Hildebrandt states,

The problem is that the condensation of space-time inherent in real time communications and interactions renders invisible that communication and interaction is always a matter of interpretation, a fact that is apparent when using ‘slow’ technologies like the script or the printing press. As interpretation becomes less visible or even invisible, the scope for reflection and contestation is diminished if not annulled, thus favoring the dominant or customized frames of interpretation supplied by the digital environment.¹⁵⁴

While the possibility of misgovernance cannot be ruled out in conventional settings, the dilution of the deliberative safeguards and contestation opportunities afforded by the textual approach to law as opposed to computational law increases the risk and scale of such debacles in algorithmic misgovernance. Such acts of algorithmic injustice occur at the community level and result in mass erosion of trust in the Rule of Law.

Data Justice, anticipation and the quest for fair representation

Taylor defines data justice as “fairness in the way people are made visible, represented and treated as a result of their production of digital data”¹⁵⁵, and identifies its three pillars as “visibility, digital (dis)engagement and countering data-driven discrimination.”¹⁵⁶ As per

¹⁵² Pearson *supra* note 9

¹⁵³ *Id.*

¹⁵⁴ Mireille Hildebrandt, *Law at a Crossroads: Losing the Thread or Regaining Control? The collapse of distance in real-time computing*, in Dimensions of technology regulation 167, (Goodwin *et al* 2010). Hildebrandt focuses on highlighting the loss of legal safeguards in transition from text based law to computational law. *Cf.* Diver focuses on the “legitimacy of the design of digital artefacts that have regulative effect on human behavior”. See: Laurence Diver, *Digisprudence: the design of legitimate code*, 13 LAW, INNOVATION AND TECHNOLOGY 325, 352 (2021). See generally: Laurence Diver, CODE AS LAW REBOOTED (2022). For a brief comparison of Hildebrandt’s and Diver’s scholarship see: Hildebrandt (2020) *supra* note 121 at 10.

¹⁵⁵ Taylor *supra* note 113 at 1.

¹⁵⁶ *Id* at 8.

Taylor, the key question that data justice seeks to address “is how to balance and integrate the need to be seen and represented appropriately with the needs for autonomy and integrity.”¹⁵⁷ The problem of data injustice arises out of inadequate and inaccurate representation of data subjects in governance as well as an optimization mindset¹⁵⁸ that seeks to reduce every complex governance issue to a problem of data analytics. During the course of the Covid-19 pandemic, the question of representation acquired prominence as part of the A grade level exams controversy in the United Kingdom. On account of the Covid-19 pandemic, the students could not sit for their A grade level exams, which would determine their chances to secure admission in a university.¹⁵⁹ On the basis of government’s directive, the Office of Qualifications and Examinations Regulation (Ofqual) decided to assess the performance of the students on the basis of a grade assigned by their teacher, which was then moderated by an algorithm on the basis of the past performance of the school.¹⁶⁰ This led to students in economically weaker neighborhoods getting unfairly penalized on account of the past years performance of their school.¹⁶¹ The algorithmic moderation was reversed after massive protests, with the students seeking justice through slogans of “Trust Our Teachers”¹⁶² and “Grade my work, not my postcode”.¹⁶³ The unfair and inadequate representation of the students in grading assessment is a stark example of the impact of algorithmic misgovernance. The existing institutional structures of the Rule of Law fail to account for this new reality where determination of individual interests is being done algorithmically in a collective setting.¹⁶⁴ In order to ensure fair and accurate algorithmic representation, the institutional structures of the Rule of Law and the language of rights have to evolve to account for collective interests in algorithmic governance.¹⁶⁵ The current set up results in a mismatch between

¹⁵⁷ *Id.*

¹⁵⁸ See generally Reich *et al supra* note 95

¹⁵⁹ Helen Smith, *Algorithmic Bias: Should Students Pay the Price?*, 35 AI & Soc 1077 (2020).

¹⁶⁰ Anthony Kelly, *The great algorithm fiasco*, BERA (2021) <https://www.bera.ac.uk/blog/the-great-algorithm-fiasco>

¹⁶¹ *Id.* Kolkman *supra* note 10

¹⁶² Sean Coughlan, *Why did the A-level algorithm say no?*, BBC NEWS, Aug. 14, 2020, <https://www.bbc.com/news/education-53787203>.

¹⁶³ Fabio Chiusi, *Automating Society Report 2020*, AUTOMATING SOCIETY REPORT 2020, <https://automatingsociety.algorithmwatch.org>.

¹⁶⁴ Anuj Puri, *Rule of Law, AI, and “the Individual,”* VERFASSUNGSBLOG (2022), <https://verfassungsblog.de/roa-individual/>.

¹⁶⁵ *Id.*

individualistic anticipation of justice and the collectivistic determination of interests,¹⁶⁶ thus eroding trust in the Rule of Law. The transition from the Rule of Law to rule of code impacts “anticipation” in another distinct manner. As per Hildebrandt, when it comes to the establishment of positive law, the difference between human and machine anticipation “denotes the boundary between human and machinic agency.”¹⁶⁷ Further relying on Ricoeur’s work, Hildebrandt asserts that law’s anticipation is one of qualitative probability as opposed to the quantitative probability of the anticipation induced by machine learning.¹⁶⁸ Emphasizing the distinction between human and machine anticipation, Hildebrandt notes,

Data-driven prediction engines can trace, mine, and ‘read’ our anticipatory interactions in the domain of legal decision making, but their anticipations are of another kind than our own. They are mathematical mappings, not a way to navigate their own institutional environment. They simulate our past behaviors, they scale our past, but do not face their future (let alone ours). They have no future, no past, and no present. They have nothing to lose. Whereas some might think that that makes ‘them’ more objective, in point of fact it makes them dangerously unreliable because they have no clue as to what matters.¹⁶⁹

While making the transition from “the assumptions of text-driven anticipation to those of data-driven predictions, we run the risk of reducing “human interaction to mathematical relationships.”¹⁷⁰ The UK A grade level controversy is an apt example of the inadequate mathematical mapping impairing human agency. While it is beyond the purview of this article to explore this in-depth, the contrasting realities of the human world and its algorithmic simulation do raise the question whether such mappings can be considered trustworthy at all. These issues are likely to become of pressing importance and increased complexity with the adoption of Generative AI in governance as envisaged by the recent announcement of a pilot program between Pennsylvania government and Open AI that “will help Commonwealth employees explore use cases for generative AI that can be

¹⁶⁶ Condé Nast, *The lessons we all must learn from the A-levels algorithm debacle*, WIRED UK, <https://www.wired.co.uk/article/gcse-results-alevels-algorithm-explained>.

¹⁶⁷ Hildebrandt 2023 *supra* note 120 at 33.

¹⁶⁸ *Id* at 55.

¹⁶⁹ *Id* at 60-61.

¹⁷⁰ *Id* at 61.

incorporated into their service to Pennsylvanians.”¹⁷¹ The avalanche of scandals concerning algorithmic misgovernance makes it conspicuously clear for citizens that the Rule of Law does not adequately protect them from arbitrary algorithmic decision-making. It is hard for the Rule of Law to counter the opaqueness of these decision-making processes resulting in a weakened position of citizens who want to successfully oppose unjust decision-making. In addition to the detrimental impact of algorithmic misgovernance highlighted in this chapter, the introduction of AI systems in governance has also altered the landscape of democratic engagement which we address in the next section in the form of the digital social contract.

VII. Digital Social Contract

In our networked world, one must not only be careful about what one wishes for, but also what those at the helm of Big Tech corporations hope for, lest those hopes come true. In 2012, as Facebook announced its Initial Public Offering, Mark Zuckerberg published a statement of intent expressing “hope to change how people relate to their governments and social institutions.”¹⁷² Eleven years after Zuckerberg’s statement of intent, the combined impact of social media and automation of governance has disrupted the temporal-spatial aspects of governance.¹⁷³ We term this phenomenon digitalization of the social contract¹⁷⁴ and understand it in terms of the change of democratic expectations

¹⁷¹ Pennsylvania Pressroom, Shapiro Administration and OpenAI Launch First-in-the-Nation Generative AI Pilot for Commonwealth Employees (January 9, 2024). <https://www.governor.pa.gov/newsroom/shapiro-administration-and-openai-launch-first-in-the-nation-generative-ai-pilot-for-commonwealth-employees/>

¹⁷² Facebook’s letter from Mark Zuckerberg - full text, THE GUARDIAN, Feb. 1, 2012, <https://www.theguardian.com/technology/2012/feb/01/facebook-letter-mark-zuckerberg-text>.

¹⁷³ By the temporal-spatial aspects of governance we refer to the time and space in which democratic expectations of citizens are addressed.

¹⁷⁴ The digital social contract has been the focus of recent scholarship. While our focus in studying the digitalization of the social contract is the change in democratic expectations, various scholars understand the term “digital social contract” differently and have expounded on different aspects of the need for change in the social contract in view of emerging technologies. The IE University Center for the Governance of Change in its report on a new social contract for the digital economy notes,

The digital revolution must be correctly managed to design a new social contract in accordance with the new social and technological realities. Democracy needs to regain that trust through the legitimacy of both the input, throughput and output that go into its decision-making and digital policymaking.

IE CGC, *A New Social Contract for the Digital Economy*, REPORT (November 2022).

The report further states,

of the citizens through a significant increase in consumerist and activist tendencies, which is not coupled with a corresponding increase in opportunities for meaningful civic engagement in participatory governance.

Temporal

As regards time, in the slipstream of rapidly digitizing and service-oriented companies, the digitalization of governance services has given rise to consumerist expectations, with citizens no longer engaging with government officials in a participatory manner. Instead, the role of government has been reduced to that of a service provider that engages with its consumers through apps for issuing passports, voter registration, school admissions, and other governance processes that hitherto required human interaction. The laudable efficiency gains have come at a participatory cost with citizens no longer been able to envisage their role in governance processes that are shrouded behind an algorithmic cloak. The introduction of technological advances in governance for increasing citizens' participation have been far and few. During the course of the pandemic, some courts conducted jury trial remotely.¹⁷⁵ However, the jury is out on whether such remote trials adequately capture the gravity of legal proceedings and uphold the procedural fairness prescribed under the law. Other notable initiatives in this regard include public engagement panels that are being used to seek citizens opinion while formulating public policy.¹⁷⁶ While expounding upon the role of e-participation in democratic governance, Hovik & Giannoumis state,

Digital tools can foster interaction between citizens and enable citizen self-organizations. It can also reduce the costs for city government to

Democracies are at a turning point where they must begin delineating a new social contract that is suitable for the digital age. The contract should contemplate citizens as active participants in the digital society, and in turn, citizens should be made adequately knowledgeable of their rights and duties.

Id.

While arguing for a new social contract for technology Srinivasan and Ghosh call on Corporations to “follow a ‘social contract’ with the rest of us so that we can continue to benefit from the services they provide to us, but in such a manner that their business is conducted respectfully, recognizing that their value has everything to do with the extraction of personal data and inference of consumer behavioral profiles.” Ramesh Srinivasan & Dipayan Ghosh, *A new social contract for technology*, 15 POLICY & INTERNET 117 (2023).

¹⁷⁵ Huo Jingnan, *To try or not to try — remotely. As jury trials move online, courts see pros and cons*, NPR, Mar. 18, 2022, <https://www.npr.org/2022/03/18/1086711379/as-jury-trials-move-online-courts-see-pros-and-cons>.

¹⁷⁶ Helen Davidson, *Introducing the Pilot Public Engagement Panel on the Use of Public Sector Data*, BLOG (2022), <https://blogs.gov.scot/digital/2022/11/11/introducing-the-pilot-public-engagement-panel-on-the-use-of-public-sector-data/>.

crowdsource and consult citizens, can reduce barriers to participation, promote equality and inclusion, and can create direct connections between citizens and politicians and other policymakers.¹⁷⁷

However, there is considerable room for improvement in this regard. As per Romero *et al*, “[P]olicy makers need to pay attention to the capabilities of e-governments tools to better facilitate the e-participation process and provide the necessary channels to get citizens’ feedback.”¹⁷⁸ As things stand today, the use of digital technologies to increase genuine participatory governance remains exception rather than the rule.

Spatial

An inadequate substitute to democratic participation in governance through use of digital technologies has emerged through social media. On the positive side, while social media have provided new avenues for activism,¹⁷⁹ its negative impact has resulted in reduced space for nuanced policy discussions and informed civic discourse.¹⁸⁰ So while social media provide a platform for protesting against racial injustice,¹⁸¹ the echo chambers that they also give rise to make it difficult to forge consensus over crucial societal issues, such as gun control.¹⁸² We live in a complex world whose demands for justice require a balance between activism and democratic deliberation.¹⁸³ The disruption of this

¹⁷⁷ Sissel Hovik & G. Anthony Giannoumis, *Linkages Between Citizen Participation, Digital Technology, and Urban Development*, in CITIZEN PARTICIPATION IN THE INFORMATION SOCIETY: COMPARING PARTICIPATORY CHANNELS IN URBAN DEVELOPMENT 1 (Sissel Hovik et al. eds., 2022), https://doi.org/10.1007/978-3-030-99940-7_1.

¹⁷⁸ Francisca Tejedo-Romero et al., *E-government mechanisms to enhance the participation of citizens and society: Exploratory analysis through the dimension of municipalities*, 70 TECHNOLOGY IN SOCIETY 101978 (2022).

¹⁷⁹ Marcia Mundt, Karen Ross & Charla M Burnett, *Scaling Social Movements Through Social Media: The Case of Black Lives Matter*, 4 (4) SOCIAL MEDIA + SOCIETY (2018).

¹⁸⁰ Shannon Vallor, *Social Networking and Ethics*, in The Stanford Encyclopedia of Philosophy (Edward N. Zalta & Uri Nodelman eds., Fall 2022 ed. 2022), <https://plato.stanford.edu/archives/fall2022/entries/ethics-social-networking/>. Joshua A. Tucker et al., *From Liberation to Turmoil: Social Media and Democracy*, 28 J. Democracy 46, 53-54 (2017).

¹⁸¹ Reilly Olson, *Roles of Social Media in the Black Lives Matter Movement During COVID-19*, Honors Projects (2021), <https://scholarworks.gvsu.edu/honorsprojects/838>.

¹⁸² Matteo Cinelli et al., *The Echo Chamber Effect on Social Media*, 118 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES e2023301118 (2021). Yini Zhang et al., *Reactive and Asymmetric Communication Flows: Social Media Discourse and Partisan News Framing in the Wake of Mass Shootings*, The International Journal of Press/Politics 19401612211072790 (2022).

¹⁸³ An example of the need to balance activism with deliberation emerges from Amartya Sen’s work. While writing on the need to strike a balance between the urgency of action demanded by human rights activists and the deeper conceptual justifications Sen states,

[I]t is not hard to understand their unwillingness to spend time trying to provide conceptual justification, given the great urgency to respond to terrible deprivations around the world ... However, the conceptual doubts must also be satisfactorily addressed, if the idea of human rights is to command reasoned loyalty and to establish a secure intellectual standing.

Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHIL. & PUB. AFF. 315, 317 (2004)

equilibrium works to the detriment of citizens and in favor of vested interests that benefit from surveillance capitalism.

On the space front, with the rise of social media, the individual identity has transcended the geo-political limitations and is shaped by global trends. The cultural hegemony of the state has been weakened by global streaming platforms exposing the individual to multiple avenues of leading a meaningful life. These developments have marked the return to a nomadic mindset¹⁸⁴ with the individual no longer solely identifying with her immediate surroundings but instead her happiness and well-being becoming also impacted by developments in the global virtual realm that while not directly affecting her in the physical world do steer her perspective and interpretation of every-day life. This poses a unique challenge to the Rule of Law, which often reflects a social consensus forged within specified geographical boundaries.

The disruption caused by digitalization of the social contract in the temporal spatial aspects of governance challenges trust in the Rule of Law in different ways. By increasingly transforming into a digitized service provider, the government becomes one of the many service providers available to citizens, undermining the unique trust relation that underpins its existence. Values of efficiency, rationalization and automation become dominant, diminishing the co-constitutive role of citizens in governance. Consequently, citizens also start judging government and public policies as if these are completely detached from them, leading to indifference, alienation, and sometimes even violent opposition. These tendencies are further strengthened by an online world where interaction and discussion take place on a global level, on the one hand providing the possibility to find like-minded people, but on the other hand, also enforcing the idea that there are insurmountable differences between groups of people. As a result, the familiar backdrop which acts as a phenomenological landscape for the trust in the Rule of Law might erode. Digitization transforms the social contract—a collective agreement to balance individual rights with collective order and security—into a contract merely for efficient, individual public service delivery, negatively impacting trust in the rule of law. Whereas the rule of law should ensure

¹⁸⁴ Balaji Srinivasen, *THE NETWORK STATE* (2022)

that everyone is equal before the law, this increasingly becomes less likely, when citizens turn into customers, who, based on their financial, digital, and cultural literacy are able (or not) to negotiate for themselves the best service. In the next section, we highlight the roadmap to regain this trust.

VIII. In the Rule of Law we must trust

This article on trust and the Rule of Law began at the doors of Janus. And in the end, there we return. The term Janus-faced is often interpreted in a negative light as someone who is duplicitous and two-faced, which would ironically make them less trustworthy.¹⁸⁵ We would however like to propose an alternative interpretation for the *Janusque* characteristic of Rule of Law that works in a positive manner to provide stability in the modern society. With one face turned towards the past and another towards the future, the Rule of Law in a *Janusque* manner guards over present interests. It seeks to balance the competing claims of continuity and change in a harmonious manner. The law's jurisprudential embodiment is often traced back to the Roman Goddess *Justitia* and the Greek Goddesses *Themis* and *Dike*.¹⁸⁶ These allegorical symbols are meant to convey the virtuous and prudential aspects of Law. The conventional understanding of the Rule of Law is usually couched in these terms as well. In order to restore the primacy of the Rule of Law, we need to add Law's *Janus* like characteristics to the pantheon. Trust requires familiarity and predictability.¹⁸⁷ One of the Rule of Law's underappreciated characteristics is its ability to draw from the lessons of the past and apply them towards the future. It ensures familiarity and reduction of contingencies thus enhancing trust in society. When the Rule of Law weakens, we close our eyes both to the lessons of the past as well as the aspirations for the future and in the process the present darkens. To strengthen the Rule of Law in an age of systemic disinformation, algorithmic misgovernance and the digitalization of the social contract, we need to appreciate and safeguard its role in our existential continuation. This requires better enforcement and reinterpretation of existing

¹⁸⁵ Definition of JANUS-FACED, <https://www.merriam-webster.com/dictionary/Janus-faced>.

¹⁸⁶ Jacques de Ville, *Mythology and the Images of Justice*, 23 LAW & LITERATURE 324 (2011).

¹⁸⁷ See generally Luhmann *supra* note 42

rights as well as the formulation of new collective interest-based legal and ethical solutions. However, before we turn to this new framework, it would be helpful to understand why the rule of code is displacing the Rule of Law. The answer lies in the mediating role played by law and technology in social interaction.

A mediating relation of law and technology

In order to reduce the conflict between the Rule of Law and the rule of code at a conceptual level, we need to take a step back. Instead of formulating the debate as law versus technology, we need to examine the Rule of Law and technology as both strategies to deal with the complexity of social life.¹⁸⁸ Over the course of human evolution, technology has proven to be an ontological necessity for human beings to shape their identity, their relations, their world. As inherently social beings, the Rule of Law has emerged as a valuable instrument, facilitating our peaceful co-existence through just resolution of disputes. Although of course different in shape and form, each coming with their specific advantages and challenges, technology and the Rule of Law share, to a certain extent, the same function: the coordination of social life. Phenomenologically speaking, the development of both technology and the Rule of Law cannot be detached from the intentional experience human beings have of the world. We perceive the world as governable by law. The fact that we experience the world as a shared world, a collective molded by mutual normative expectations about who needs to do what, when, and where,

¹⁸⁸ Our focus is on the mediating role played by law and technology. This is different from analyzing the underlying technologies that facilitate the functioning of law. Hildebrandt (2017) *supra* note 117. Other scholars have even sought to analyze law as technology in different ways. On analysis of law as technology in view of its constructive impact on demarcation of what constitutes as an invention for the purposes of intellectual property see Mario Biagioli & Marius Buning, *Technologies of the law/ law as a technology*, 57 *Hist Sci* 3 (2019). Tranter has argued for qualification of law as technology in view of its ability to make the future. See: Kieran Tranter, *FROM LAW AND TECHNOLOGY TO LAW AS TECHNOLOGY* 18, 33-34 (2018). According to Wiener,

[I]f technology is understood in its broad sense—as not just hardware or equipment or sprockets or chips, but as any device or system for converting inputs into outputs, for changing the production function—then regulation is itself a technology. Regulation is a set of techniques for changing production functions to produce fewer of some outputs, such as pollution, or more of others. Regulation is the technology of governance.

Jonathan B. Wiener, *The regulation of technology, and the technology of regulation*, 26 *TECHNOLOGY IN SOCIETY* 483, 484 (2004). As per Cockfield, “[W]here legal reform or policy change results directly from technological developments, it could be said that ‘law is technology.’” Arthur J. Cockfield, *Towards a Law and Technology Theory*, 30 (30) *MANITOBA LAW JOURNAL* 383, 402.

opens the space for a society ruled by law.¹⁸⁹ This is not dissimilar to our intentional experience of technology.¹⁹⁰ The act of viewing the world through the prism of a necessity such as cutting things gives rise to the technology of the knife. The idea that the world can be connected gives rise to the internet. But this is not unidimensional. Human beings shape technology and in turn, are shaped by it. Or even more so, through the mediating relation of technology, human beings and the world are co-constituted.¹⁹¹ Our smartphones are now an extension of us and in turn have shaped the way with which we interact with the world- from clicking photographs to seeking directions and communicating with each other.¹⁹² Viewed through this post-phenomenological lens¹⁹³, the Rule of Law also emerges as a mediating phenomenon shaping us and in turn getting shaped by us.

As our democratic societies increasingly are imbued with data-driven applications, law and technology as complexity-reducing strategies are fundamentally getting intertwined in their mediating roles. Once this realization settles in, we can adopt a more integrated approach towards the adoption of new data-driven technologies under the aegis of Rule of Law. Then the rule of code is not so much about replacing the Rule of Law as it is about updating the Rule of Law, boosting its coordinating functionality in society. For this update to succeed, the moral standards for what makes law a ‘good’ law should inform the moral standards for what makes technology a ‘good’ technology. These standards should no longer be seen as belonging to separate realms but must be applied in an integrated manner. As Hildebrandt states, “To the extent that algorithmic regulation becomes part of legislative, judicial or other practices of law, we need to make sure that it is not merely

¹⁸⁹ See generally Hans Lindahl, *FAULT LINES OF GLOBALIZATION: LEGAL ORDER AND THE POLITICS OF A-LEGALITY* (2013); Triantafyllos Gkouvas and Patricia Mindus, *Trust in Law* in *ROUTLEDGE HANDBOOK OF TRUST AND PHILOSOPHY* 271-282 (Judith Simon 2020 ed.).

¹⁹⁰ Lucas Introna, *Phenomenological Approaches to Ethics and Information Technology*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., Fall 2017 ed. 2017), <https://plato.stanford.edu/archives/fall2017/entries/ethics-it-phenomenology/>; Don Ihde, *TECHNOLOGY AND THE LIFEWORLD: FROM GARDEN TO EARTH* (1990); Peter-Paul Verbeek *Expanding Mediation Theory* 17 *FOUNDATIONS OF SCIENCE* 391-395 (2012)

¹⁹¹ *Id.* See also: Peter-Paul Verbeek, *Toward a Theory of Technological Mediation*, in *TECHNOSCIENCE AND POSTPHENOMENOLOGY: THE MANHATTAN PAPERS* 189 (Friis and Crease ed. 2016).

¹⁹² Galit Wellner, *A POSTPHENOMENOLOGICAL INQUIRY OF CELL PHONES: GENEALOGIES, MEANINGS AND BECOMING* (2015).

¹⁹³ Robert Rosenberger and Peter-Paul Verbeek, *PHENOMENOLOGICAL INVESTIGATIONS. ESSAYS ON HUMAN-TECHNOLOGY RELATIONS* (2015).

compatible with the Rule of Law, but actually integrates its core principles.”¹⁹⁴ Once the adoption of technology in governance is seen as a continuum, we can adopt technologies that promote human values rather than replace them.¹⁹⁵ In order to ensure that the prevalent mindset no longer is shaped by merely optimization and efficiency gains, which are values predominantly introduced through the means of technology, it is necessary to identify and set boundaries to the way in which these technology-induced values interact with those of the Rule of Law. In our current era, an election and the consequent transition of power can be seen as a system update of the Rule of Law. Any disruptive technology that promotes systemic disinformation and interferes with this system update must be held accountable and either modified or discontinued. Any automated decision-making system promising future efficiency gains would also need to account for the democratic values held dear in the past. This conceptual engineering can help us stem the rise of technocratic tendencies in democracy and introduce democratic tendencies in technology. The operating code for governance thus no longer remains binary but turns pluralistic.

An opponent might argue that adoption of this going back-and-forth between the mediating relations of law and technology may lead to the further adoption of an optimization mindset in governance that currently plagues the technological world. After all, we have witnessed how strong the steering force of technology can be. To answer this, we must rely on the continuum mindset that the two faces of Rule of Law’s *Janusque* features represent. Currently, the optimization mindset is operating in the background of the interface between law and technology. An example of this is the gamification of our public values by social media platforms that reduce complex value judgments to simplified options of like, dislike, retweet and share.¹⁹⁶ The recognition of the mediating role of law

¹⁹⁴ Mireille Hildebrandt, *Algorithmic Regulation and the Rule of Law*, 376 PHILOSOPHICAL TRANSACTIONS OF THE ROYAL SOCIETY A: MATHEMATICAL, PHYSICAL AND ENGINEERING SCIENCES 9 (2018). On designing code in a democratically legitimate manner see generally Diver *supra* note 154.

¹⁹⁵ As Lessig had presciently observed in 1999,

We can build, or architect, or code cyberspace to protect values that we believe are fundamental.
Or we can build, or architect, or code cyberspace to allow those values to disappear. There is no middle ground. There is no choice that does not include some kind of building. Code is never found; it is only ever made, and only ever made by us.

Lessig (1999) *supra* note 46 at 6.

¹⁹⁶ C. Thi Nguyen, *How Twitter Gamifies Communication*, in APPLIED EPISTEMOLOGY 0 (Jennifer Lackey ed., 2021), <https://doi.org/10.1093/oso/9780198833659.003.0017>.

and technology can help bring this interaction to the foreground and help provide the necessary social space for a meaningful discussion on the incorporation of technology in governance. When we acknowledge the mediating relation of law and technology, we can give primacy to those values that promote just and peaceful co-existence rather than those that solely introduce efficiency considerations. Our acceptance of the mediating relation of law and technology can offer us the opportunity of developing a framework where efficiency considerations operate within the broader framework of social values, thus enhancing trust in the Rule of Law. While the rule of code promotes a sectarian mindset and divisive tendencies, the Rule of Law can work in favor of the “exhausted majority” which does not associate with the polarizing online discourse.¹⁹⁷ The framing of debate in terms of the mediating role played by law and technology can provide the conceptual landscape to resolve contentious issues currently plaguing the debate between the Rule of Law and rule of code. In terms of trust, this means that bringing up the question of trust in the rule of law should intrinsically be intertwined with the question of trusting technology. And looking into the trustworthiness of technology should immediately bring along the question if the safeguards provided by the rule of law are strong enough to keep the technology in check. With acknowledgment of this mediating role played by law and technology, we can now turn towards the framework that can strengthen trust in the Rule of Law in the age of AI.

Better enforcement of existing rights

Before looking at the need for a formulation of new collective interest-based rights, it would be helpful to see how we can marshal our existing legal resources to counter the challenges posed by the rule of code. In this regard, an interesting example of better enforcement of existing rights against automated decisions for enhancing trust in the Rule of Law-making emerges from the Netherlands *SyRI* case.¹⁹⁸ In a landmark judgment, the Hague District court held that *Systeem Risicoindicatie* (SyRI) “a legal instrument used by the Dutch government to detect various forms of fraud, including social benefits, allowances,

¹⁹⁷ Stephen Hawkins, Daniel Yudkin, Miriam Juan-Torres, Tim Dixon, *Hidden Tribes: A Study of America’s Polarized Landscape*, MORE IN COMMON 109 (2018)

¹⁹⁸ *NCJM et al. and FNV v The State of the Netherlands* ECLI:NL:RBDHA:2020:1878 <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2020:1878>

and taxes fraud... does not comply with Article 8 of the European Convention on Human Rights (ECHR), which protects the right to respect for private and family life, home and correspondence.” From the perspective of citizens’ trust in the Rule of Law in face of automated decision-making, the following observations of the court stand out,

[T]he development of new technologies also means that the right to the protection of personal data increasingly gains in significance. The existence of adequate statutory privacy protection in the exchange of personal data by government or other bodies contributes to citizens’ trust in the government, as much as preventing and combating fraud do... Without trust in sufficient privacy protection, citizens will be less likely to be willing to provide data or there will be less support for doing so.¹⁹⁹

The Hague District Court’s decision in SyRI case also provides useful insights towards the need for transparency in automated decision-making in order to enhance legitimacy and trust. While striking down the SyRI legislation, the court also called into question the defense strategy adopted by the State, which in the absence of adequate disclosure did not provide the court with an opportunity to judicially review the working of SyRI,

6.49. The court finds that it is unable to assess the correctness of the position of the State of the precise nature of SyRI because the State has not disclosed the risk model and the indicators of which the risk model is composed or may be composed. In these proceedings the State has also not provided the court with objectively verifiable information to enable the court to assess the viewpoint of the State on the nature of SyRI. The reason the State gives for this is that citizens could then adjust their conduct accordingly. This is a deliberate choice of the State. That choice also coincides with the starting point of the legislator regarding the provision of information on SyRI. The SyRI legislation does not show how the decision model of SyRI functions and which indicators are or can be used in a SyRI project... i.e. which factual data make or can make the presence of a certain situation plausible.²⁰⁰

Amongst the key concerns raised by the court in relation to SyRI were necessity, proportionality, and transparency²⁰¹. In the court’s opinion, SyRI did not strike a fair

¹⁹⁹ Para 6.5 *Id*

²⁰⁰ Para 6.49 *Id*.

²⁰¹ 6.87 The principle of transparency is the leading main principle of data protection that underlies and is

balance between privacy interests and the prevention of fraud.²⁰² The following observations from the court's decision stand out in context of meaningful protection of human rights against automated decision making,

A great amount of data qualifies for processing in SyRI. The risk model and indicators that make up the model and the data which are used in a particular SyRI project are not public nor are they known to the data subjects. Furthermore, there is room in the legal framework to adjust the risk model based on the feedback outcome. Finally, there is the fact that the data subject is unaware of the existence of a risk report, while the submission of a risk report has a significant effect on them.²⁰³

The SyRI case is a good example of how meaningful enforcement of existing rights might reaffirm the trust in the Rule of Law. However, certain cases, particularly those involving enforcement of fundamental rights against private corporations may require the reinterpretation of existing rights.

Reinterpretation of existing rights

In Part I, we explained how the Rule of Law has ceded governance space to the rule of code by failing to protect fundamental rights such as the freedom of expression. Recent developments suggest two ways in which this space can be reconquered through reinterpretation of existing rights. The first method is an *indirect* one that concerns those cases where the State might be involved in some manner in the infringement of

laid down in the Charter and the GDPR... The court is of the opinion that in view of Article 8 paragraph 2 ECHR this principle is insufficiently observed in the SyRI legislation. The court finds that the SyRI legislation in no way provides information on the factual data that can demonstrate the presence of a certain circumstance, in other words which objective factual data can justifiably lead to the conclusion that there is an increased risk.

In para 6.90, the court observed

[I]t is difficult to comprehend how a data subject could be able to defend themselves against the fact that a risk report has been submitted about him or her. It is just as difficult to see how a data subject whose data were processed in SyRI but which did not result in a risk report, can be aware that their data were processed on correct grounds. The fact that in the latter situation the data did not result in a risk report and furthermore must be destroyed no later than four weeks following the analysis does not alter the requirement of transparency in respect of that processing. The right to respect for private life also means that a data subject must reasonably be able to track their personal data. *Id.*

²⁰² 6.83. The court weighs the substance of the SyRI legislation in light of the aims it pursues against the violation of private life the SyRI legislation brings about. The court is of the opinion that the SyRI legislation, insofar as it concerns the application of SyRI, does not strike the 'fair balance' required for the conclusion that there is a justified interference within the meaning of Article 8 paragraph 2 ECHR.

²⁰³ Para 6.82 *Id.*

fundamental rights along with the private corporation. For instance, in the aftermath of the release of the “Twitter Files”,²⁰⁴ commentators argued that involvement of the government agencies in the censorship on Twitter or coercion by government agencies leading to censorship by Twitter can be a ground for invoking First Amendment rights.²⁰⁵ The second, a more *direct* approach has been advocated by Julie Cohen,

If legal protection for fundamental rights are to remain relevant and meaningful in the networked digital age...institutions for recognizing and enforcing fundamental rights should work to counterbalance private economic power rather than reinforcing it. Obligations to protect fundamental rights must extend enforceably-to private, for profit entities if they are to be effective at all.²⁰⁶

The question concerning enforcement of fundamental rights against private actors has become increasingly important as the Rule of Law has ceded space to the rule of code. The scale of these private actors and their significant impact on fundamental rights has earned them the moniker of “New Governors of Online Speech”.²⁰⁷ Klonick states,

These New Governors are private self-regulating entities that are economically and normatively motivated to reflect the democratic culture and free speech expectations of their users. But these incentives might no longer be enough.²⁰⁸

Through fundamental rights, constitutions world over seek to protect important interests of the citizens that are considered an integral part of being human. Traditionally, these interests were seen to be under threat only from the unbridled power of the state and consequently fundamental rights were interpreted as constitutional safeguards against State

²⁰⁴ Aimee Picchi, *Twitter Files: What they are and why they matter*, CBS NEWS, <https://www.cbsnews.com/news/twitter-files-matt-taibbi-bari-weiss-michael-shellenberger-elon-musk/>.

²⁰⁵ Jed Rubenfeld, *Opinion | How to Take the Twitter Files to Court*, WALL STREET JOURNAL, Jan. 4, 2023, <https://www.wsj.com/articles/how-to-take-the-twitter-files-to-court-class-action-federal-agents-censorship-monetary-damages-tech-11672846719>. David French, *Elon Musk and Tucker Carlson Don't Understand the First Amendment*, THE ATLANTIC (2022), <https://www.theatlantic.com/ideas/archive/2022/12/elon-musk-and-tucker-carlson-dont-understand-the-first-amendment/672352/>.

²⁰⁶ Julie E. Cohen, BETWEEN TRUTH AND POWER THE LEGAL CONSTRUCTIONS OF INFORMATION CAPITALISM 267 (2019)

²⁰⁷ Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech* 131 Harv. L. Rev. 1598,

²⁰⁸ *Id* at 1669-1670

actors.²⁰⁹ However, increasingly the threat to these human interests is not limited to just the unbridled power of the State. The fundamental rights for some time now have been impacted by non-State actors, consequently various jurisdictions with varying degree have been extending protection of fundamental rights against private actors as well.²¹⁰ Stephen Gardbaum refers to the dichotomous relationship of constitutional rights vis-à-vis governmental actors and private individuals as the vertical and horizontal effect.²¹¹ As per Gardbaum, “These alternatives refer to whether constitutional rights regulate only the conduct of governmental actors in their dealings with private individuals (vertical) or also relations between private individuals (horizontal).”²¹² Article 14 of the Digital Services Act, which places an obligation on the intermediary service providers to have due regard to fundamental rights of the users as part of its terms and conditions is a step in this direction.²¹³ However, the extent to which this outsourced horizontal enforcement of fundamental rights can work remains to be seen. The enforcement of fundamental rights against Big Tech firms will help the Rule of Law regain the governance space ceded to the rule of code and will act as a catalyst in restoring trust in the Rule of Law. While the extension of enforcement of fundamental rights against Big Tech firms can offer

²⁰⁹ “The First Amendment only limits governmental actors—federal, state, and local—but there are good reasons why this should be changed. Certain powerful private entities—particularly social networking sites such as Facebook, Twitter, and others—can limit, control, and censor speech as much or more than governmental entities.” David L. Hudson, *In the Age of Social Media, Expand the Reach of the First Amendment*, 43 HUMAN RIGHTS 2 (2018). *Id.*

²¹⁰ Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 Mich. L. Rev. 387 (2003).

²¹¹ *Id.*

²¹² *Id.* at 388.

²¹³

Article 14

Terms and conditions

1. Providers of intermediary services shall include information on any restrictions that they impose in relation to the use of their service in respect of information provided by the recipients of the service, in their terms and conditions. That information shall include information on any policies, procedures, measures and tools used for the purpose of content moderation, including algorithmic decision-making and human review, as well as the rules of procedure of their internal complaint handling system. It shall be set out in clear, plain, intelligible, user-friendly and unambiguous language, and shall be publicly available in an easily accessible and machine-readable format.

[...]

4. Providers of intermediary services shall act in a diligent, objective and proportionate manner in applying and enforcing the restrictions referred to in paragraph 1, with due regard to the rights and legitimate interests of all parties involved, including the fundamental rights of the recipients of the service, such as the freedom of expression, freedom and pluralism of the media, and other fundamental rights and freedoms as enshrined in the Charter.

See also: João Pedro Quintais, Naomi Appelman & Ronan Ó Fathaigh, *Using Terms and Conditions to Apply Fundamental Rights to Content Moderation*, 24 GERMAN LAW JOURNAL 881 (2023).

protection against arbitrary actions, the challenge of systemic disinformation requires formulation of new collective interest-based solutions.

The creation of a new regulatory structure based on collective interest

The AI driven systemic disinformation campaigns undermine democratic participation and trust in the Rule of Law. In order to safeguard our shared socio-political reality, we need to counter the behavioral targeting model that is deployed by Big Tech firms to panoptically sort individuals in epistemic bubbles.²¹⁴ A key reason behind the regulatory failure to tackle disinformation is to treat it as an individual harm.²¹⁵ The epistemic harms of systemic automated disinformation campaigns are felt not only at the individual but also extend to the collective level.²¹⁶ The Rule of Law and an epistemically secure society share a mutually symbiotic relationship.²¹⁷ The Rule of Law facilitates an epistemically secure society by reducing disinformation and an epistemically secure society strengthens Rule of Law by acting on the basis of correct information. In order to tackle epistemic harms, we need to treat disinformation campaigns as societal harms and formulate ethical as well as legal responses that are steeped in collective interests to mitigate the impact of AI driven disinformation.

Recognition of the collective normative interest against disinformation will help balance these interests against Big Tech Corporations' commercial interests and formulate restrictions on behavioral targeting. In order to countermand their substantial influence, from a regulatory perspective, social media firms should be treated as discharging a public

²¹⁴ Puri *supra* note 83

²¹⁵ House of Lords Joint Committee on the Draft Online Safety Bill, *Report of Session 2021-22 HL Paper 129 - HC 609* (2021) https://publications.parliament.uk/pa/jt5802/jtselect/jtonlinesafety/129/12906.htm#_idTextAnchor043 Lee Edwards, *Media literacy in the Online Safety Bill: Sacrificing citizenship for resilience?*, LSE (2021), <https://blogs.lse.ac.uk/medialse/2021/11/09/media-literacy-in-the-online-safety-bill-sacrificing-citizenship-for-resilience/>.

²¹⁶ Lisa Hill, Max Douglass & Ravi Baltutis, *Disinformation as a Democratic Collective Action Problem or Why a Legal Solution Is Warranted*, in *How and Why to Regulate False Political Advertising in Australia* 23 (Lisa Hill, Max Douglass, & Ravi Baltutis eds., 2022), https://doi.org/10.1007/978-981-19-2123-0_3. Nathalie A. Smuha, *Beyond the individual: governing AI's societal harm*, 10 *Internet Policy Review* (2021), <https://policyreview.info/articles/analysis/beyond-individual-governing-ais-societal-harm>.

²¹⁷ Seger *et al* define an epistemically secure society as “one that reliably averts threats to the processes by which reliable information is produced, distributed, acquired and assessed within the society.” Elizabeth Seger, Shahar Avin, Gavin Pearson, Mark Briers, Seán Ó Heigeartaigh, Helena Bacon, *Tackling threats to informed decision-making in democratic societies*, THE ALAN TURING INSTITUTE (2020),

<https://www.turing.ac.uk/research/publications/tackling-threats-informed-decision-making-democratic-societies>.

function²¹⁸ and should be placed under a fiduciary duty which would be enforceable through formulation of collective rights against disinformation. On the ethical front, we need to reimagine the collective moral ownership of social media platforms in form of a social license. This license will promote the development of collective norms invested in fact-based online discourse, which is particularly relevant from the perspective of minority social groups. Admittedly, the call for new ways to check disinformation on social media platforms will give rise to tensions with the plea to extend enforcement of fundamental rights against Big Tech corporations.²¹⁹ The resolution of these tensions can only take place under the deliberative discourse facilitated by the Rule of Law and not under the operational opacity that is the hallmark of the rule of code.

The recognition of collective interests is also the way forward against algorithmic misgovernance. Our existing legal framework barring a few exceptions such as linguistic or cultural rights²²⁰ is heavily geared towards protecting individual interests. This is also reflected in our expectations from the legal system and also in our broader engagement with democratic institutions. However, unlike traditional governance and judicial institutions, automated decision-making systems do not rely solely on the individual facts of the case. As the earlier stated examples of algorithmic misgovernance reveal, these acts of injustice are targeted at community or social group level. If the injustice occurs at a group level, then individualistic legal solutions are bound to fall short.²²¹ Hence we need to revamp the Rule of Law to take into account collective interests while formulating regulations.²²² This would require the adoption of a relational ethics approach to

²¹⁸ Matthew P. Hooker, *Censorship, Free Speech & Facebook: Applying the First Amendment to Social Media Platforms via the Public Function Exception*, 15 Wash. J. L. Tech. & Arts 36 (2019).

²¹⁹ On the challenge of tackling disinformation through the Digital Services Act and the horizontal enforcement of fundamental rights see: Sharon Galantino, *How Will the EU Digital Services Act Affect the Regulation of Disinformation?* (20) 1 SCRIPTED 89 (2023).

²²⁰ Anna Moltchanova, *Group Rights*, in ENCYCLOPEDIA OF GLOBAL JUSTICE 464 (Deen K. Chatterjee ed., 2011), https://doi.org/10.1007/978-1-4020-9160-5_76.

²²¹ Jenni Hakkarainen, *Naming something collective does not make it so: algorithmic discrimination and access to justice*, 10 INTERNET POLICY REVIEW (2021), <https://policyreview.info/articles/analysis/naming-something-collective-does-not-make-it-so-algorithmic-discrimination-and>.

²²² Puri *supra* note 164

algorithmic governance²²³, a formulation of group privacy solutions,²²⁴ and collective interest-based algorithmic impact assessments²²⁵. Such interventions may result in a delay or an embargo on the adoption of immature biometric technologies.²²⁶ The formulation of collective interest-based solutions can be an effective way to regain trust in the Rule of Law as it acknowledges the fact that through data-driven technologies such as AI, the individual interests of citizens are inherently becoming intertwined. Genuinely taking these interests at heart -which is the core of trust- requires to address the vulnerability of citizens on a collective level.

The need for new collective interest-based regulatory measures becomes further clear in face of the regulatory entrepreneurship²²⁷ attempts by Big Tech Firms. As part of their regulatory entrepreneurship strategies, the Big Tech firms have previously sought to exert undue influence on policy making either by lobbying for change in regulations²²⁸ or threatening to cease operations.²²⁹ In the aftermath of the launch of the ChatGPT, past few months have seen a slew of global regulatory measures ranging from the Executive Order in the US²³⁰ to the draft EU AI Act²³¹ aimed at the development of safe and

²²³ Abeba Birhane, *Algorithmic injustice: a relational ethics approach*, 2 PATTERNS 100205 (2021).

²²⁴ GROUP PRIVACY: NEW CHALLENGES OF DATA TECHNOLOGIES, (Linnet Taylor, Luciano Floridi, & Bart van der Sloot eds., 2017), <http://link.springer.com/10.1007/978-3-319-46608-8>. See also: Anuj Puri, *The Group Right to Mutual Privacy*, 2 DISO 22 (2023).

²²⁵ Hakkarainen *supra* note 221

²²⁶ 'Immature biometric technologies could be discriminating against people' says ICO in warning to organisations, (2022), <https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2022/10/immature-biometric-technologies-could-be-discriminating-against-people-says-ico-in-warning-to-organisations/>.

²²⁷ Elizabeth Pollman & Jordan Barry, *Regulatory Entrepreneurship*, 90 S. Cal. L. Rev. 383 (2017). Pollman and Barry define regulatory entrepreneurship as "pursuing a line of business in which changing the law is a significant part of the business plan." *Id* at 383.

²²⁸ *Id* at 386.

²²⁹ For instance see the flip-flop by Open AI over plans to withdraw from Europe in face of the impending implementation of the EU AI Act. Shiona McCallum and Chris Vallance, *ChatGPT-maker U-turns on threat to leave EU over AI law*, BBC NEWS, May 25, 2023, <https://www.bbc.com/news/technology-65708114>.

²³⁰ Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (October 30, 2023). <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/>

²³¹ Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (ARTIFICIAL INTELLIGENCE ACT) and Amending Certain Union Legislative Acts COM/2021/206 final <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206>. See also: Council of Europe, *Artificial intelligence act: Council and Parliament strike a deal on the first rules for AI in the world* (December 9, 2023). <https://www.consilium.europa.eu/en/press/press-releases/2023/12/09/artificial-intelligence-act-council-and-parliament-strike-a-deal-on-the-first-worldwide-rules-for-ai/>

trustworthy AI.²³² Progress is also being made on the Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law.²³³ These are welcome measures, however if the past regulatory entrepreneurship attempts of the Big Tech firms is anything to go by, the efforts to restore trust in the Rule of Law would require prolonged coordinated global regulatory efforts. For instance, the draft EU AI Act was almost derailed on account of last minute lobbying efforts by some member countries seeking exemption of foundation models from regulation in a bid to boost the AI corporations based in their jurisdictions.²³⁴ The US has similarly lobbied for exemption for private sector from the AI convention.²³⁵ The recognition of collective interest against systemic disinformation and algorithmic misgovernance can help thwart regulatory entrepreneurship attempts thus paving way for effective AI regulation and restoration of trust in the Rule of Law.

IX. Conclusion

Trust in the rule of law is a necessary condition for the citizens to continue to abide by the rule of law. In this article, we have examined how new data-driven technologies are eroding the citizens' trust in the rule of law by weakening the epistemic justifications of trust in the rule of law, belying expectations of good governance, and disrupting the temporal-spatial aspects of governance through systemic disinformation which is likely to worsen with the advent of Generative AI, algorithmic misgovernance, and the digitalization of the social contract respectively. We have further highlighted a roadmap by which the Rule of Law can regain citizens' trust as well as the governance space ceded to the rule of code through acknowledgment of the mediating relation of law and technology, better

²³² Danny Tobey *et al*, *Secure, safe, and trustworthy: Common ground between the US AI Executive Order and the EU AI Act*, DLA PIPER, <https://www.dlapiper.com/en/insights/publications/ai-outlook/2023/secure-safe-and-trustworthy-common-ground>.

²³³ Committee on Artificial Intelligence (CAI), *Consolidated Working Draft of the Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law* (Strasbourg, 7 July 2023) <https://rm.coe.int/cai-2023-18-consolidated-working-draft-framework-convention/1680abde66>

²³⁴ Will Henshall, *E.U.'s AI Regulation Could Be Softened After Pushback*, TIME (2023), <https://time.com/6338602/eu-ai-regulation-foundation-models/>. Gian Volpicelli, *Power grab by France, Germany and Italy threatens to kill EU's AI bill*, POLITICO (Nov. 20, 2023), <https://www.politico.eu/article/france-germany-power-grab-kill-eu-blockbuster-ai-artificial-intelligence-bill/>.

²³⁵ Luca Bertuzzi, *EU Prepares to Push Back on Private Sector Carve-out from International AI Treaty*, WWW.EURACTIV.COM (2024), <https://www.euractiv.com/section/artificial-intelligence/news/eu-prepares-to-push-back-on-private-sector-carve-out-from-international-ai-treaty/>

enforcement and reinterpretation of existing rights and recognition of new collective interest-based rights. In conclusion, we once again turn to Ovid. In *Fasti* as well as in his poem *Metamorphoses*, Ovid reminds his readers that there was a time when Gods and Humans co-existed, but when distrust grew and virtues were abandoned, Gods left the earth.²³⁶ Justice was the last God to leave earth and her departure marked the end of the connection between the human and the divine-

*Faith flies, and piety in exile mourns;
And justice, here opprest, to Heav'n returns.*²³⁷

A more poignant ode to the end of the Rule of Law on account of an erosion of trust is hard to imagine. To keep the connection between the past and the future, to maintain the bond between the individual and the collective, to co-exist—in the Rule of Law we must trust.

²³⁶ John Benson Rose, *THE FASTI OF OVID* 10 (1866).

²³⁷ Ovid, *METAMORPHOSES* 3-4, (Translated by Sir Samuel Garth, John Dryden, Alexander Pope, Joseph Addison, William Congreve 2016 LG Classics)