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Criminal Law at the Limit: Countering False Claims in Elections and Referendums

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When should the criminal law intervene to deter and punish the promulgation of falsehoods that are intended to influence political – electoral or referendum - campaigns? I will scrutinise the protection that UK criminal law provides for the interests of candidates, referendum campaigners and voters, from the (potential) effects of damaging falsehoods. I suggest that neither the protection of candidates' or campaigners' reputations, nor the promotion of the public good of collective decision-making by voters based on accurate and adequate information, in themselves provide sufficient reasons for criminal law intervention. Falsehoods must normally be intended to threaten, undermine or prevent effective participation in the political process before the intervention of the criminal law is justified.

INTRODUCTION

On 29 May 2019, a private prosecution for misconduct in public office was launched against Boris Johnson MP, by Marcus Ball and his crowdfunded company Brexit Justice Ltd.[1] The allegation at the heart of the prosecutor's case was that, whilst holding the public offices of Mayor of London (until 9 May 2016) and MP for Uxbridge and South Ruislip, Johnson had misconducted himself by repeatedly endorsing a (supposed) lie central to the case for the 'leave' campaign he supported, in the run-up to the referendum held in 2016 on the UK's continued membership of the EU. The supposed lie took the form of an allegedly false claim made by 'Vote Leave', an organisation promoting the case for the UK's withdrawal from the EU.[2] Vote Leave had claimed that leaving the EU would see an end to the practice of 'sending' £350m per week to the EU, a claim given prominence by being printed on the side of the 'leave' campaign bus.[3]

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1 Ball's organisation is now more broadly aimed at the criminalisation of lying in politics: https://www.stoplyinginpolitics.org/ (all URLs were last visited 13 January 2021).
2 www.voteleavetakecontrol.org/.
3 For the claims and counter-claims involved in relation to the supposed lie (not further analysed here), see for example the exchange of letters between Johnson and Sir David Norgrove, chair of the UK Statistics Authority: https://uksa.statisticsauthority.gov.uk/wp-content/uploads/2017/09/Letter-from-Sir-David-Norgrove-to-Foreign-Secretary.pdf; https://osr.statisticsauthority.gov.uk/wp-content/uploads/2017/09/FS-letter-to-Sir-David-Norgrove-17-September-2017.pdf.

Initially, Ball's application for a summons against Boris Johnson was accepted by District Judge Coleman, but the issuing of the summons was judicially reviewed and quashed by the High Court on 3 July 2019.[4] It is possible to base prosecutions for misconduct in public office on allegations that an official has lied.[5] However, this prosecution was doomed to failure. Even if Vote Leave's claims were false or misleading, Johnson's endorsement of them clearly did not come in his *capacity* as a public official, as an aspect of his functions in discharging the office of Mayor of London, or as an MP.[6] So, in that sense, it was not possible to show that he was guilty of misconduct 'in' public office.[7] In any event, the breadth and vagueness of the misconduct offence makes it a blunt instrument with which to try to deter wrongful political speech, even when such speech can be shown to involve statements known to be false or misleading.[8] Even if one puts such substantive legal points on one side, there are risks attending private prosecutions in relation to such a controversial matter. There may have been no professional investigation of the facts, no consideration of alternative remedies or charges, and no proper regard paid to the accused's right to free political speech.[9]

Nonetheless, the prosecution raises an important question about the role that criminal law should play in relation to false campaign statements, in both referendum and election campaigns. In what follows, I will be considering cases in which the courts currently can be called on to adjudicate on false claims made in political campaigns. I will argue that, even if some other legal remedy for a false claim (such as overturning an election) may in some instances be appropriate, criminalisation cannot be justified other than in restricted circumstances. Criminal liability is clearly justified only when a relatively distinct range or kind of individual voting freedoms is threatened by the false claim, although it may also be justified when such a claim is intended to undermine the integrity of the election process as a whole. I will begin by considering an overlooked offence of defrauding voters.

DEFRAUDING VOTERS AND THE ROLE OF THE COURTS

Ball could have brought his prosecution against Johnson under section 115 of the Representation of the People Act 1983 (the 1983 Act), a provision applied to the 2016 EU referendum by section 32 of Schedule 1 of the European Referendum (Conduct) Regulations 2016. Under section 115, it is an offence to

4 *Johnson* v *Ball* [2019] EWHC 1709.
5 https://www.thelawpages.com/court-cases/Keith-Wallis-12790-1.law. In 2017-18, 14,771 people signed a petition to Parliament demanding that, 'it should be made illegal, 'for any UK politician to lie or mislead the public'.
6 See the skeleton argument on behalf of Johnson: [2019] EWHC(QB) CO/2148.2019.
7 Law Commission, *Reforming Misconduct in Public Office: Issues Paper 1* (2016) para 2.116-2.117.
8 *ibid*, ch 4.
9 C. de Than and J. Elvin, 'Private Prosecution: A Useful Constitutional Safeguard or a Potentially Dangerous Historical Anomaly?' [2019] Crim LR 656, 668.

exercise 'undue influence' on a voter, including through the use of a 'fraudulent device or contrivance'.[10] The offence is committed by D:

> if, by abduction, duress or any fraudulent device or contrivance, he impedes or prevents, or intends to impede or prevent, the free exercise of the franchise of an elector [or voter] … or so compels, induces or prevails upon, or intends so to compel, induce or prevail upon, an elector [or voter] … either to vote or to refrain from voting.

Section 115 thus addresses two situations, where fraud is concerned: where D uses or intends a fraudulent device or contrivance to impede or prevent, 'the free exercise of the franchise', and where D uses – or intends to use – a fraudulent device or contrivance to 'induce or prevail upon' a voter (not) to vote. The supposed lie told by Vote Leave may not have been intended to, 'impede or prevent the free exercise of the franchise'; but did it, or was it intended to 'induce or prevail upon' one or more voters to vote? It might seem obvious that it was, in which case those knowingly involved in seeking to influence voters through the supposed lie were guilty of the corrupt practice set out in the section 115 offence. However, the answer one gives to the question depends on the breadth of understanding given to the notion of 'freedom' in voting, under section 115.

In its 2018 review of the fraud element in section 115, the Cabinet Office suggested that:

> This is intended to capture circumstances where a person 'tricks' a voter into voting in a particular way and so prevents them exercising their vote freely. For instance, a candidate could misrepresent themselves as standing for party A when in fact they are standing for party B; so they may think that they have voted freely, but the exercise of their vote has been impeded by the 'trickery'.[11]

This analysis of section 115 fraud links the offence with the denial through 'trickery' of voters' freedom in voting.[12] The denial of freedom is in fact only specifically mentioned in the first part of section 115, concerned with impeding or preventing the 'free exercise of the franchise'. As indicated above, the second part of the offence is concerned with cases in which the fraud 'induces or prevails upon' a voter (not) to vote. In the latter case, it is possible that a defrauded voter might still be acting freely in (not) voting. For example, if a fraud

10 In law, the acts prohibited by s 115 are called 'corrupt practices': see further, in the next section below. The antiquated wording of s 115 comes from its ancestor, the Corrupt Practices Act 1854, s 5. The wording, or something close to it, has been adopted in a number of countries around the world: see for example Election Act 1996 (British Columbia), s 256; Election Offences Act 1954 (Malaysia), s 9; Massachusetts, General Laws, Part 1, Title VIII, ch 56, s 42.

11 Cabinet Office, *Protecting the Debate: Intimidation, Influence and Information* (London: Cabinet Office, 2018) para 8.12. The example to which the Cabinet Office may be alluding here is *Sanders* v *Chichester* [1994] EWHC 9 (QB), in which D garnered 10,000 votes by standing for the 'Literal Democrat' party, in an election in which there was also a candidate for the Liberal Democrat party. For discussion of this case, see Law Commission, *Electoral Law: An Interim Report* (2016) para 11.33.

12 It is worth noting that 'trickery' ought generally not to be used as a synonym for fraud, because trickery is wider in scope, extending beyond fraud. See further, Law Commission, *Electoral Law: A Joint Consultation Paper* LCCP 218 / SLCDP 158 / NILC 20 (2014) para 11.50.

played only a very minor role in their deliberations, we might still conclude that their vote was 'free'. Even so, the offence would still rightly be regarded as having been committed in such a case, because the use of fraud to try to persuade people (not) to vote is a significant wrong. Such conduct is certainly a threat to people's freedom in voting; but what form of freedom is in issue in section 115 fraud?

The example of trickery used by the Cabinet Office – misrepresentation about which party a candidate represents – suggests that what it has in mind is a distinction between a more formal, procedural kind of freedom, and a substantive, merits-based kind. The procedural kind of freedom is concerned with a variety of related issues such as the accuracy and comprehensibility of a ballot paper, the maintenance of security and neutrality in the running of a polling station, or with secrecy in casting a vote. If, to use the Cabinet Office example, I am defrauded concerning who represents which political party on the ballot paper, then the accuracy of the ballot paper – in terms of what it represents – has, from my point of view, been compromised by the fraudster. That impinges on a key procedural kind of freedom, the freedom I am meant to have to distinguish between political parties when making my choice. This freedom is predominantly formal and procedural: being able to get the 'box ticking' part of the process right. By contrast, in interpreting the limits of section 115, one might employ a more substantive, merits-based understanding of freedom in voting and of what may threaten it. According to that more substantive understanding, voting should not be understood just as a box-ticking exercise, but an act of political self-realisation: a manifestation of valuable autonomy. Whilst such an act certainly pre-supposes the existence of the procedural conditions for voting freedom just mentioned, it also entails the fulfilment of certain substantive conditions.[13] In particular, the substantive, merits-based understanding of voting freedom insists that the authenticity and autonomous value of voting is diminished or undermined if the reasons the voter was persuaded to regard as significant or decisive when ticking the box ('How many 100s of millions will the UK save by leaving the EU?'), turn out to have been false or entirely misleading.[14] With the latter sense of freedom in play, Vote Leave's (supposed) falsehood could indeed be viewed as having been intended to 'induce or prevail upon' voters in a manner contrary to section 115. Such a view was at the heart of the Johnson prosecution.

However, there are reasons for the courts to interpret section 115 narrowly, as concerned almost exclusively (there might be rare exceptions) with frauds intended to impinge on the procedural kind of freedom. For example, the legitimacy of the role of the courts, and trust in the independence of the judiciary, may be undermined if courts are required to adjudicate on the truth or

13 On the link between procedural and substantive rights, see L. Alexander, 'Are Procedural Rights Derivative Substantive Rights?' (1998) 17 *Law and Philosophy* 19. The temptation to map the distinction between form and substance on to a distinction between negative and positive freedom should, at this point, be resisted. I return to the importance of the latter distinction in the section below headed 'How to Protect Campaigners, and Candidates'.

14 J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) 144, 'One does not help people to lead the lives they want to have by satisfying their false desires'.

falsity of substantive political claims. The courts may not forensically, let alone institutionally (in terms of the balance of powers), be well-placed to decide whether a false claim threatened the integrity of voting as an autonomous expression of a point of view, frustrating people's efforts to vote on the genuine (de)merits of candidates or of referendum proposals. The delicate constitutional balancing act involved was recognised when, putting criminal cases on one side, general authority to adjudicate in cases of election fraud, corruption and intimidation was first transferred by the Election Petitions and Corrupt Practices at Elections Act 1868 from a Committee of five MPs (who tended to vote on partisan lines), to a judge of the superior courts. Benjamin Disraeli described the move as involving a constitutional principle of 'vast importance'.[15] When consulted about taking over such a responsibility from Parliament, in a letter of 6 February 1868 to the Lord Chancellor, Chief Justice Cockburn complained that:

> The decision of the Judge given under such circumstances will too often fail to secure the respect which judicial decisions command on other occasions. Angry and excited partisans will not be unlikely to question the motives which have led to the judgment. Their sentiments may be echoed by the press. Such is the influence of party conflict, that it is apt to inspire distrust and dislike of whatever interferes with party objects and party triumphs.[16]

Similar points have been made in modern cases, strengthening the case for only a restricted role for the courts in this field.[17] I will now go on to consider other ways in which the law (both statute and judge-made) shapes the criminal law's reach, in relation to false campaign statements.

THREE STATUTES APPLICABLE TO FALSE STATEMENTS IN CAMPAIGNS

Under section 121 of the 1983 Act, a person entitled to vote in a general election may present a petition to a specially convened Election Court (presided over by two High Court Judges), claiming that another person – say, a

15 Benjamin Disraeli to Queen Victoria, 31 January 1868, in M.W. Pharand et al, *Benjamin Disraeli Letters: Volume Ten 1868* (Toronto, ON: University of Toronto Press, 2014) 40. An 'election court' – considered further below – is now comprised of two High Court judges. The court established to try parliamentary election petitions was constituted by two judges from 1879 onwards but was not referred to as an 'election court' until 1883: Law Commission Research Paper, *Legal Challenge to Elections* (London; TSO, 2012) para 1.10.

16 Cited by Thomas LCJ, in *R (on the application of Woolas)* v *The Parliamentary Election Court* [2010] EWHC 3169 (Admin) at [23]. In a debate on the Parliamentary Elections (Corrupt and Illegal Practices) Bill 1883, Patrick Martin, County Kilkenny MP for the Home Rule League, made a similar point, arguing in favour of a narrow reading of s 115's predecessor: 'What one [judge] considered permissible and fair, another held as an abuse and violation of the right of free speech … The vagueness in the words would lead to unpleasant and injurious comments as to the motives which influenced those election tribunals in their decisions': HC Deb 15 June 1883 vol 280 col 702-703.

17 *R (on the application of Woolas)* v *The Parliamentary Election Court ibid*.

successfully elected candidate – was guilty of a 'corrupt' or of an 'illegal' practice.[18] A fraud contrary to section 115 is an example of a corrupt practice, but the conduct I shall focus on here involves an illegal practice contrary to section 106 of the 1983 Act. In broad terms (I consider the detail in the section below headed 'The Crime of Making False Statements about Election Candidates'), section 106 creates the illegal practice of making a false statement, with intent to affect a rival candidate's electoral return, about the personal conduct or character of the rival candidate. If the Election Court reports that this illegal practice took place, then, amongst other things, under section 159 of the 1983 Act, the election of the successfully elected candidate is to be declared void. Most importantly, the commission of this illegal practice, contrary to section 106, is also a criminal offence.

Section 106 is not applicable to referendum campaigns (a position criticised, in due course), where there are no official individual 'candidates'. Even so, two other criminal laws may have an application in cases where falsehoods have been promulgated (or other improper statements made), in either elections or referendums. First, section 127(2) of the Communications Act 2003 applies in relation to improper use of a public electronic communications network:

> A person is guilty of an offence if he –
>
> (1) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character.
>
> (2) A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he –
>
> (a) sends by means of a public electronic communications network, a message that he knows to be false, [or]
>
> (b) causes such a message to be sent …[19]

There were 254 charges under section 127 in 2017.[20] Secondly, alongside this offence, should be set the more serious offence created by section 1(a)(iii) of the Malicious Communications Act 1988.[21] This makes it an offence to a send a letter, electronic communication or article of any description which conveys an indecent or grossly offensive message, which involves a threat, or which conveys, 'information which is false and known or believed to be false by the

18 Amongst other things, a corrupt practice may be punished by a term of imprisonment of up to two years (s 168), whereas an illegal practice is a summary offence punishable only by a fine (s 169).

19 The penalty upon summary conviction is a sentence of imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale, or both. See, further, Law Commission for England and Wales, *Abusive and Offensive Online Communications: A Scoping Report* Law Com No 381 (2018).

20 *ibid*, para 4.55.

21 See also the Public Order Act 1986, ss 4a and 5, as qualified by part IIIA, s 29J.

sender', in circumstances where one of D's purposes in communicating in the proscribed way was, 'that it should … cause distress or anxiety to the recipient or to any other person to whom he intends that its contents or nature should be communicated'.[22] There were 2626 charges under section 1(1)(a) in 2017,[23] most of these being likely to have concerned 'grossly offensive', or, 'threatening' communications. Section 1 specifically mentions that causing distress or anxiety need be only one of D's purposes (it could be a subsidiary purpose).[24] This means the section may clearly apply when D's main purpose in making the proscribed communication is to influence voting in an election or referendum (that will also be true of section 127(2) of the 2003 Act). In that regard, in what follows, I shall be concerned with the 1988 and 2003 Acts only in so far as they apply to false statements.

I will argue, first, that there is insufficient justification for making it a criminal offence to engage in the illegal practice contrary to section 106 of the 1983 Act, as it stands. It is simply not enough that someone made a false statement about the personal conduct or character of an election candidate, with intent to affect an electoral return; although, as we will see, it perhaps ought to be a different matter if someone makes such a statement intending to undermine the integrity of the election as a whole. Secondly, I will argue that there needs to be modification to the conditions under which the offences in the 1988 and 2003 Acts apply, in election and referendum campaigns, at least so far as falsehoods are concerned.[25] The application of those offences should be restricted to cases in which the falsehood is (a) made in circumstances giving the candidate or campaigner no adequate opportunity to counter the effect of the statement or material, and (b) is intended to have so serious an effect on V's mind as to be liable to undermine their effective participation in the process.

POLITICAL SPEECH DILEMMAS AND CRIMINALISATION

Understandably, the proper limits to the protection of political speech in human rights jurisprudence are contested. On the one hand, even in a highly political election context, English courts have made it clear that 'dishonest' statements – by which the courts have meant statements the content of which is not believed to be true – may fall outside the protection for speech offered by Article 10 of the ECHR.[26] On the other hand, the ECtHR has made it clear that when

22 See the discussion in Law Commission, n 19 above, ch 4. An offence may be met with a fine and or a sentence of imprisonment for up to two years.

23 *ibid*, para 4.7.

24 That would be the position at common law, in any event, because liability does not in general depend on whether it was D's main or dominant intention to bring about harm or risk: *R* v *Hales* [2005] EWCA Crim 1118.

25 I do not have space to address the issues raised by offensive, threatening or indecent statements made in order to influence election campaigns. The Cabinet Office, n 11 above, has proposed that the offences contrary to the 1988 and 2003 Acts should be made 'election offences', on which see 'How to Protect Campaigners, and Candidates' below.

26 *R (Woolas)* v *Parliamentary Election Court* n 16 above; *Reynolds v Times Newspapers* [2001] 2 AC 127 (HL), 238, discussed in J. Rowbottom, 'Lies, Manipulation and Elections – Controlling

controversial political words and speech can be made subject to criminal prosecution, the existence of a background political context to the words or speech makes it possible that the court will find that criminalisation is inconsistent with Article 10, even if the words or speech involve insult, exaggeration, error, or possibly even some element of known falsehood:

> There is little scope under Article 10 for restrictions on freedom of expression in the area of political speech or debate – where freedom of expression is of the utmost importance – or in matters of public interest. While freedom of expression is important for everybody, it is especially so for an elected representative of the people.[27]

Against this background uncertainty, a political falsehood dilemma concerning the making of false statements may arise in a variety of circumstances. Legal uncertainty over the applicability of criminal sanctions may itself, of course, pose a dilemma for would-be publishers of information that may come to be regarded as 'fake news;' but such a dilemma may also arise in other instances. One example is when someone knows that if they make a political statement that turns out to be false, their claim that they honestly believed in its veracity when the statement was made is – perhaps because they are widely disliked or distrusted – unlikely to be believed. Another instance of a political falsehood dilemma arising is when at least some – and perhaps all – of what the speaker intends to say is known by them to be untrue or misleading, but they nonetheless believe that there is sufficient reason to make the statement: in other words, when they may not be acting 'dishonestly' in a broad sense of that term.[28] An example might involve the publication of falsely exaggerated figures for a particular MP's parliamentary expenses, for the purpose of spurring the MP into complying with a legal obligation to account for their actual expenses. In all these instances, the existence of the political falsehood dilemma raises the worry that would-be contributors to political debate may be wrongly deterred by the prospect of sanctions from engaging in what is simply provocative, combative or attention-grabbing political speech. If that happens, any criminal law cure for lying in politics may turn out to be worse than the disease.

The political falsehood dilemma is part of a broader range of political speech dilemmas posed by the criminal law for speakers making controversial contributions to political debate.[29] The criminal prohibitions, discussed in the last section, on the distribution of grossly offensive, indecent or threatening

False Campaign Statements' (2012) 32 OJLS 507, 519-520. Article 10 of the ECHR provides that, 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers …'

27 *Otegi Mondragon* v *Spain* 15 March 2011 (Application no 2034/07) at [50]. For a First Amendment discussion, see J. Weinstein, 'Participatory Democracy as the Central Value of American Free Speech Doctrine (2001) 97 Virginia LR 491; Rowbottom, *ibid*, 521-522.

28 J. Gardner, 'Wrongs and Faults' in A.P. Simester (ed), *Appraising Strict Liability* (Oxford: OUP, 2005) 51, 67-70.

29 See further, Rowbottom, n 26 above; C. Walker, 'Reforming the Crime of Libel' (2005-2006) 50 *New York Law School Law Review* 169, 180.

statements or material are an example (not further considered here).[30] So far as false statements are concerned, as we saw in the last section, the 1988 and 2003 Acts restrict the prohibitions on making such statements to instances in which the maker had the specific purpose of causing, 'annoyance, inconvenience or needless anxiety' (2003 Act), or, 'distress or anxiety' (1988 Act).[31] In certain circumstances (considered in 'How to Protect Campaigners, and Candidates', below), it may be legitimate to use the law to deter the making of statements embodying a purpose or intent of one of these kinds, even in political campaign contexts. However, neither the 1988 Act nor the 2003 Act addresses the particular problem of false statements made in political contexts. In that regard, the Law Commission has rightly cast doubt on whether the purpose-based restrictions in the two Acts are consistent with a robust commitment to free speech in political contexts:

> Strictly speaking, [section 127(2)] could, for example, cover a politician or political commentator who regularly posts social media messages in order to annoy others – perhaps those with whom they disagree politically. The implications for the freedom of expression would be particularly acute if the offences were prosecuted and enforced in this way.[32]

The debate in Parliament on the Bill that became the 1988 Act in fact made it clear that MPs accepted that they should themselves be expected to tolerate a higher level of malicious communication than ordinary members of the public.[33] Further, the CPS guidance for prosecutors indicates that a prosecution will not be necessary or proportionate if:

> the communication was not intended for a wide audience, nor was that the obvious consequence of sending the communication; particularly where the intended audience did not include the victim or target of the communication in question; or the content of the communication did not obviously go beyond what could conceivably be tolerable or acceptable in an open and diverse society which upholds and respects freedom of expression.[34]

Whilst adherence to such restraining principles is admirable, the need for such principles raises the question whether the criminal law has been excessively shaped in this context by the authoritarian principle.[35] The authoritarian

30 See J. Rowbottom, 'Crime and Communication: Do Legal Controls Leave Enough Space for Freedom of Expression?' in D. Mangan and L. Gillies (eds), *The Legal Challenges of Social Media* (Cheltenham: Edward Elgar, 2017) ch 3.

31 I turn my attention to the prohibition on false statements in the 1983 Act, s 106 in the section below headed 'The Crime of Making False Statements about Election Candidates'.

32 Law Commission, n 19 above, para 4.103.

33 https://hansard.parliament.uk/Commons/1988-02-12/debates/d3b2943e-f864-48e4-8fc5-0f286d2dd5d3/MaliciousCommunicationsBill?highlight=poison%20pen#contribution-01e2b681-787b-4b29-9bff-a2467c6e2ed1.

34 https://publications.parliament.uk/pa/ld201415/ldselect/ldcomuni/37/3705.htm#n28. The Human Rights Act 1998, s 3 also, of course, imposes an obligation on courts to interpret such legislation in way that is compatible with convention rights. I owe this point to an anonymous referee.

35 See J. Horder, *Ashworth's Principles of Criminal Law* (Oxford: OUP, 9th ed, 2019) 86-93.

principle stands for the view that broad and flexible offence definitions are preferable to narrower, clearer ones, because it is better to provide prosecutors and courts with the discretion to apply open-textured offences to new manifestations of wrongs, than it is to tolerate gaps in the law's protective scope simply in order to provide citizens with greater clarity on the limits to their obligations. Yet, in few contexts could it be more important to guard against an authoritarian approach to criminal liability than in the case of political speech.[36]

Under the heading 'How to Protect Campaigners, and Candidates' below, I will suggest some reforms to the scope of the offences under the 1988 and 2003 Acts that are aimed at creating a better balance between the protection of free campaign speech, and the protection of election candidates (and leading referendum campaigners). First, we should consider the alternatives to deterrence through law.

THE 'MORE SPEECH' SOLUTION AND ITS LIMITS

What is sometimes referred to as a 'more speech' solution has generally been regarded in democratic legal systems as preferable to legal (and *a fortiori*, criminal law) intervention, as a counter-weight to lying in the public sphere. A 'more speech' solution involves, for example, an information campaign – or publicised 'fact checking' – to correct opinions or impressions formed on a false or contentious basis.[37] As Justice Brandeis famously put it in *Whitney* v *California*:

> To courageous, self-reliant men [*sic*], with confidence in the power of free and fearless reasoning applied through the processes of popular government … [i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.[38]

In so framing his argument, Justice Brandeis draws implicitly on an account of republican political philosophy which places emphasis on the display by concerned citizens of shared civic responsibility for maintaining the moral character of politics.

On the republican account, citizens feel obligated to defend the moral integrity of the polity through the display of what Habermas aptly calls 'constitutional patriotism,' an inclusive political identity which can motivate citizens to feel, 'politically responsible for each other'.[39] As Laborde and Maynor put it, this is a:

36 P. Petit, 'Criminalisation in Republican Theory' in R. A. Duff et al (eds), *Criminalisation: The Political Morality of the Criminal Law* (Oxford: OUP, 2014) 132, 138.

37 See for example https://www.factcheck.org/; https://fullfact.org/.

38 *Whitney* v *California* (No 3) 74 U.S. 357 (1927), 377 *per* Brandeis J.

39 J. Habermas, *Between Facts and Norms* (Cambridge, MA: MIT Press, 1996) 286, cited by C. Laborde and J. Maynor (eds), *Republicanism and Political Theory* (Oxford: Blackwell, 2008) 14.

> Tocquevillian patriotism where democratic citizens view their contribution to the maintenance of the political community as being part of a common endeavor that they share with others and one in which they have part ownership.[40]

For republican thinkers, the issue is not, or not solely, whether 'more speech' solutions negate or counter the harm of lying and dishonesty in politics more effectively than legal restrictions or threats of punishment, although there is certainly some evidence that reputational risk from having one's falsehoods or distortions exposed does deter politicians from engaging in such conduct.[41] The issue is whether, by relying too much on the one-way, top-down projection of authority constituted by the law (with all its gaps, ambiguities and inconsistencies in enforcement), to silence abhorrent or lying speech and speakers, we give up on the very idea of a self-sustaining culture of uninhibited and vigorous but respectful public debate.[42]

A 'more speech' solution is closely allied to what might be called a 'better speech' ideal. Voluntary agreement on self-denying ordinances, in relation to biased or inaccurate media presentation of politicians and their policies[43] or in relation to the conduct of an election campaign,[44] may do more to enhance the quality of public debate than the spectre of legal coercion. An important example of the continued significance of the republican 'more speech' ideal is the rise of a vibrant culture of the aforementioned practice of fact-checking, and what might be called 'falsehood shaming'.[45] Since their emergence 20 years ago, fact-checking organisations world-wide have increased in number by 90 per cent since 2010, and now operate in more than 50 countries world-wide.[46] Such voluntary, 'more speech' initiatives have some crucial advantages over more formal, legal means by which to deter lying and falsehood in politics – such as a right of reply, or legal prohibitions on false statements.[47] That is so, even though there is evidence that so-called fact checking is regarded in some quarters as a

40 Laborde and Maynor (eds), *ibid*, 15.

41 B. Nyhan and J. Riefler, 'The Effect of Fact-Checking on Elites: A Field Experiment on US State Legislators' (2015) 59 *American Journal of Political Science* 529.

42 For discussion, see C.V. Ward, 'The Limits of "Liberal Republicanism": Why Group-Based Remedies and Republican Citizenship Don't Mix' (1991) 91 *Columbia Law Review* 581.

43 P. Wardle, *The Westminster Foundation for Democracy and the UK's Election Experience* (London: Westminster Foundation for Democracy, 2019) para 44: 'The media in the UK generally takes seriously its responsibility to cover politicians' policies and opinions, and to provide an arena in which candidates can debate, and/or exercise the right of reply to statements or media reports that they consider to be inaccurate or offensive.'

44 See for example Committee on Standards in Public Life, 'Intimidation in Public Life', 17th Report, CM 9543 (London, 2017) ch 5; https://democrats.org/who-we-are/what-we-do/disinfo/campaign-and-state-parties/; Rowbottom, n 26 above, 531.

45 https://www.bbc.co.uk/news/blogs-trending-39779338; HL Select Committee on Democracy and Digital Technologies, *Digital Technology and the Resurrection of Trust* Report of Session 2019-2021 HL, Paper 77 (29 June 2020) paras 41-55.

46 L. Graves and F. Cherubini, 'The Rise of Fact-Checking Sites in Europe' 2016 at http://www.digitalnewsreport.org/publications/2016/rise-fact-checking-sites-europe/#fn-5637-1; Commission Communication, 'Tackling Online Disinformation: A European Approach' COM(2018)236 final, 9.

47 Under the 1983 Act, s 106(3) makes it possible for an individual to obtain an injunction to restrain the publication of defamatory (political) speech, and such measures have been used in political campaign cases. See for example https://www.bbc.co.uk/news/election-2019-50565209.

predominantly 'liberal' political enterprise, and hence not politically neutral.[48] As a less formal practice, fact-checking can operate highly effectively without having to confront the definitional problems characteristic of legal solutions, solutions that remain highly sensitive to rule-of-law demands for certainty and predictability. Even so, formal, top-down approaches are becoming popular. In France, a law passed in 2018 (amending earlier legislation) made it possible for the National Audio-visual Regulatory Authority to prevent, suspend or prohibit TV or radio broadcasts controlled by a foreign state, if they are judged, 'to harm the fundamental interests of the nation … particularly by disseminating false information'.[49]

A strategy of tackling political lying through the use of legal prohibitions faces disadvantages, as compared with less formal 'more speech' solutions, thanks in part to the positivity of law. First, there will be the problem of arbitrariness. For example, if lying in politics is so serious a wrong as to call for prohibition, what about true but seriously misleading statements that are just as damaging? Suppose that, just before polling day, X spreads widely a claim about political rival Y that Y has been convicted of rape, with disastrous consequences for Y at the polls. Suppose further that, whilst true, X's claim conveniently omitted to mention that Y's conviction many years ago was later quashed and Y completely exonerated when someone else confessed to having committed the crime. Should such true-but-misleading claims come within the scope of any prohibition?[50] Secondly, even a prohibition restricted to lying will require the legislature or the courts to draw difficult distinctions, with important implications for the kinds of claims that can be made in politics. We saw above that the issue of wrongdoing can be made to turn on whether or not a false statement knowingly made was made 'dishonestly'. In that regard, a legal prohibition on disseminating political falsehoods *simpliciter* would require the courts to grapple with the problem of disinformation and 'half-truths': content that contains an element of truth, but which is packaged in accompanying mistruths (or vice versa).[51] A third problem likely to arise would be: is it enough that D asserts something (statement P), knowing or believing that P is false (a lie), or should it also be necessary to show that D intended to *deceive* someone through the assertion of P (a fraud)? If it is the former view, then a legal prohibition covers the practice of manipulating people through issuing false statements. This is a broader phenomenon than deception, in that it covers instances in which, for

48 See C.T. Robertson et al, 'Who Uses Fact-Checking Sites? The Impact of Demographics, Political Antecedents, and Media Use on Fact-Checking Site Awareness, Attitudes, and Behaviour' [2020] 5 *International Journal of Press Politics* 217.

49 French Law no 2018-1202 on the, 'fight against the manipulation of information,' amending the Freedom of Communication Act No 86-1067, September 1986. For a detailed analysis, see R. Craufurd-Smith, 'Fake news, French Law and democratic legitimacy: lessons for the United Kingdom?' (2019) 11 *Journal of Media Law* 52. See also Singapore's Protection from Online Falsehoods and Manipulation Act 2019, and Elections Modernization Act (Canada) 2018, s 61.

50 For a defence of the view that misleading statements should not come within the scope of political lying offences, see R.L. Hasen, 'A Constitutional Right to Lie in Campaigns and Elections? (2013) 74 *Montana Law Review* 53, 71-72.

51 See for example K. Jones, 'Online Disinformation and Political Discourse: Applying a Human Rights Framework' 2019 at https://www.chathamhouse.org/sites/default/files/2019-11-05-Online-Disinformation-Human-Rights.pdf.

example, the aim of the statement is to enrage people when they realise – as they were meant to do – that the statement was false. When it is known that legal uncertainties of these kinds may arise, people may – as indicated above – find themselves facing a political falsehood dilemma, and could be deterred from making valuable but controversial political claims, to the detriment of a free speech polity.[52] Finally, the success of formal measures will depend on maintaining what may be only a fragile trust in the capacity of independent bodies to identify when there has been a falsehood or inaccuracy of such a nature as to bring the preventative or prohibitive power into operation.[53]

The recent rise of more formal deterrent and preventative approaches may reflect the fact that reliance on 'more speech' solutions to the problem of false information in public life itself faces a number of challenges. Inequality of communicative power or credibility may skew the benefits of the solutions in favour of some people, whilst leaving others behind.[54] So-called 'micro-targeting' of individual voters with false or distorted messages tailored to fit the voters' profile may effectively by-pass fact-checking mechanisms.[55] Perversely, a 'more speech' reaction may also be deliberately provoked by liars in order to raise the public profile of the initial lie: to rebut is also to reiterate. As Hannah Arendt remarked, '[l]ies are often much more plausible, more appealing to reason, than reality, since the liar has the great advantage of knowing beforehand what the audience wishes or expects to hear'.[56]

Moreover, as Justice Brandeis indicates, in the passage cited above, a particularly important problem with the more-speech solution comes when there is (in his words) no, 'time to expose through discussion … falsehoods and fallacies, to avert the evil by the processes of education.' We can call this the 'Brandeis gap' in the protection offered by a more-speech solution. Can the existence of such a gap plausibly be regarded as providing one set of circumstances in which the law – whether civil or criminal – may more justifiably intervene to deter lying, if the harm that might otherwise be done is sufficiently significant, in spite of the problems with formal solutions identified above? An example is where a potentially influential lie is intentionally given publicity not long before voting commences in an election or referendum, giving no proper opportunity to opponents of the lie-teller's viewpoint, or to fact-checkers, to correct its effects on the victim of the falsehood. I will say more about this key example in due course, but its importance – and the importance of the Brandeis gap, more generally – is that when a lie is propagated in such circumstances, in threatening legal consequences we might not be so troubled by the fact that a political falsehood dilemma (described above) is thereby raised. Putting it bluntly, if one is relatively free to lie, distort and misrepresent for most of the course of a

52 Rowbottom, n 26 above, 513-514; 525.

53 See text at n 16 above; A. Renwick and M. Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK be Improved?* (London, University College London Constitution Unit, 2019) ch 2.

54 See L. Tirell, 'Toxic Misogyny and the Limits of Counterspeech' (2018-19) 87 *Fordham Law Review* 2433.

55 See for example M. Harker, 'Political Advertising Revisited: Digital Campaigning and Protecting Democratic Discourse' (2020) 40 *Legal Studies* 151, 157, 171.

56 H. Arendt, *Crises of the Republic* (San Diego, CA: Harvest, 1972) 6.

campaign – for so long as one's opponents (and others) have the chance to counter one's claims – there might be thought to be little hardship or threat to free speech in facing restrictions on the worst examples of such activities only right at the end of the campaign.

Should the *criminal* law, though, really have a place in the maintenance of ethical standards in politics, even in such limited circumstances? It is in fact quite common for jurisdictions world-wide (including the UK[57]) to threaten the use of criminal sanctions to deter lying in politics, where the falsehoods are issued during election campaigns.[58] In some such cases, the damage done or threatened to the integrity of the electoral process by potentially influential falsehoods[59] has been considered to be such that criminal liability for issuing the falsehoods is not necessarily confined to the 'Brandeis gap', but applies at any point during a political campaign.[60] By way of contrast, the focus of the election-related offence may indeed be the 'Brandeis gap', a gap which is at its most glaring when a false statement is made just before the close of the polls. An example is to be found in section 81 of New Zealand's Electoral Amendment Act 2002:

> Every person is guilty of a corrupt practice who, with the intention of influencing the vote of any elector, at any time on polling day before the close of the poll, or at any time on any of the 2 days immediately preceding polling day, publishes, distributes, broadcasts, or exhibits, or causes to be published, distributed, broadcast, or exhibited, in or in view of any public place a statement of fact that the person knows is false in a material particular.[61]

By making criminalisation dependent on a false statement falling within (an interpretation of) the 'Brandeis gap,' section 81 is meant to target instances in which it may prove difficult or impossible adequately to rebut false claims in the time available. However, Rowbottom has rightly observed that such time limits are not only necessarily somewhat arbitrary, but perhaps over-generous, given the instantaneous nature of claim and counter-claim in the internet age.[62] It is, perhaps, highly significant that New Zealand has not seen a single prosecution under section 81 of the 2002 Act.[63] That suggests, even if it does not prove, that

57 For a comprehensive examination, to which I am much indebted, see Rowbottom, n 26 above.
58 For discussion, see Renwick and Palese, n 53 above.
59 Rowbottom identifies three ways in which the electoral process may be compromised by lies: the manipulation of voters in relation to their choices, the distortion of the outcome, and a more general 'lowering of the tone' that may disengage voters and reduce turnout: Rowbottom, n 26 above, 511-519.
60 See, for example, Singapore's Protection from Online Falsehoods and Manipulation Act 2019.
61 Renwick and Palese, n 53 above, ch 2. As Jacob Rowbottom points out (n 26 above, 533), until 1999, the UK's Advertising Standards Authority was prepared to apply its provisions on taste and decency to political advertisements, but political advertisements are now excluded from the Authority's remit. The Authority's Chair, Lord Rodgers, justified this move by saying, 'The free flow of argument in the cut and thrust of open debate is the best antidote to political advertising that misleads or offends': Advertising Standards Authority, Annual Report 1999, 2 at https://www.asa.org.uk/asset/40D37406-BDD0-48A4-BF46C68DE81C1E39/.
62 See Rowbottom, *ibid*, 523-524.
63 Renwick and Palese, n 53 above, at 36.

the criminal law – however carefully crafted – is not especially well suited to the regulation of substantive political debate.

THE CRIME OF MAKING FALSE STATEMENTS ABOUT ELECTION CANDIDATES

As indicated in the section above headed 'Three statutes applicable to false statements in campaigns', section 106 of the 1983 Act prohibits the making of a false statement about the personal conduct or character of a candidate, with intent to affect a rival candidate's electoral return:

> A person who, or any director of any body or association corporate which –
>
> (a) before or during an election,
>
> (b) for the purpose of affecting the return of any candidate at the election, makes or publishes any false statement of fact in relation to the candidate's personal character or conduct shall be guilty of an illegal practice, unless he can show that he had reasonable grounds for believing, and did believe, that statement to be true.

This offence is punishable upon summary conviction by a fine up to level 5 on the standard scale. The offence has been carefully scrutinised by Rowbottom, and I will endeavour not to replicate his analysis here.[64] Nonetheless, as outlined above, section 106 was not transposed from the election to the referendum context in 2011 or in 2016, because there are no 'candidates' in referendum campaigns.[65] In so far as there is a justification for retaining the section 106 offence, I will argue that this leaves leading referendum campaigners wrongly exposed to malicious falsehood.

In *The North Division of the County of Louth*, Madden J said, in construing section 106's predecessor,[66] 'the Act was passed for the protection of constituencies from being misled by falsehoods of a certain kind, and is also a protection to candidates'.[67] We need to disentangle the elements in these two justifications for what is now section 106: the elements concerned with the protection of public goods,[68] and the elements concerned with the protection of individual rights, whether those are the rights of candidates or the rights of individual voters. Couched in such terms, there is a range of general justifications that could

64 Rowbottom, n 26 above.

65 See, by way of contrast, the equivalent Singapore provisions, n 60 above, and Wis Stat, s 12.05, cited by Rowbottom, n 26 above, 522.

66 The Corrupt and Illegal Practices Prevention Act 1895, s 1.

67 (1911) 6 O'M & H 103, 171.

68 On the criminal law's role in the protection of public goods, see Horder, n 35 above. A public good is a good the benefit of which is non-excludable and which can be shared non-rivalrously. See further Rowbottom, n 26 above, 511 and 534. Rowbottom helpfully suggests some other public goods protected by s 106: n 26 above, 516-519, such as maintaining a high level of political engagement amongst voters, and a respectful tone to campaigns.

cover the prohibition on the making of false statements contrary to section 106:

(a) The prevention of attacks on, amongst other public goods, the good of collective political decision-making shaped by adequate and accurate information;
(b) The protection of the right of electoral candidates to be free from wrongful statements about them;
(c) The protection of electoral candidates from a potential cause of unfair diminution of their electoral returns;
(d) The protection of the right of one or more voters not to be led to cast their vote on the basis of false information.
(e) A combination of two or more of these justifications.

On the face of it, section 106 appears to make it clear that, at a minimum, (b) and (c) must be proved against a defendant, through evidence that he or she made a false statement about a candidate's personal conduct or character in order to affect that candidate's electoral return. In itself, though, such a combination of justifications ought not to be sufficient. That a lie about a candidate might be in a broad sense defamatory (falling within (b) above) cannot on its own justify the offence in section 106, given that one of the main reasons for abolishing the crime of defamatory libel in 2009 was to prevent the use of the criminal law to stifle provocative and uncompromising political speech.[69] Even when such a lie is intended to diminish a candidate's electoral return, thus bringing justification (c) into play, the case for criminalisation is not much enhanced. It may be the whole point of hard-hitting speech about a candidate to deter people from casting their vote in the candidate's favour: that may be the very thing that makes the speech in a broad sense 'political'. So, justifications (b) and (c) must in practice be combined with justifications (a) or (d), if the offence is to be consistent with English law's de-criminalisation policy in relation to political speech in recent years.[70]

As between (a) and (d), which is the most significant? It ought to be (a). Under section 106, the maker or publisher of the false statement must act, 'for the purpose of affecting the return of any candidate at the election'. However, this criterion could be satisfied by the making of a false statement intended to influence the way a single voter casts their vote, meaning that whilst justification (d) is satisfied, justification (a) is not. For example, to adapt the facts of the unreported case of Miranda Grell,[71] suppose D says to a fellow voter (Y) about a particular candidate (Z), 'You'd better not vote for that paedophile!' If at the time of making the statement D knew that Z was not a paedophile, but intended the exhortation to lead Y to vote for an alternative candidate, the defendant is guilty of the offence contrary to section 106. Justifications (b), (c) and (d) are all

69 Coroners and Justice Act 2009, s 73. https://publications.parliament.uk/pa/ld200809/ldhansrd/text/90709-0013.htm.
70 See, more broadly, Council of Europe, *Defamation and Freedom of Expression: Selected Documents* (Strasbourg: Council of Europe, 2003) Part B.
71 http://news.bbc.co.uk/1/hi/england/london/7006231.stm.

satisfied in this example, even though justification (a) is not. Reliance, without more, on a combination of justifications (b), (c) and (d) makes the protection offered by section 106 a protection of the individual rights of candidates and voters. Yet, with the net cast in that fashion, the section 106 offence does not get far beyond protecting candidates and individual voters only by keeping alive a species of the discredited criminal libel offence, albeit a version confined to the course of election campaigns.

By contrast, if justifications (b) and (c) were instead to be combined with justification (a), the function of (b) and (c) could change. Instead of having a mainly 'permissive' role, legitimising criminalisation, justifications (b) and (c) might then take on a subsidiary, 'restrictive' role, keeping the scope of criminalisation based on (a) in check. In other words, they would set limits to the way in which justification (a) – the protection of an important public good in politics – can legitimately be pursued. Such a subsidiary role would not run counter to the law's de-criminalisation policy respecting defamatory statements, precisely because that role is only restrictive in relation to a different, 'permissive' justification with a different focus, such as (a). At the end of the following section a reform of section 106 is considered that would tie it to the pursuit of permissive justification (a), rather than justification (d), whilst retaining the restrictive role of justifications (b) and (c). Why not, though, allow permissive justification (a) to be pursued in a relatively unrestricted way, by prohibiting all knowingly false and misleading statements that are intended to affect the election result as a whole? Courts in some jurisdictions have taken the law some distance down this route, through expansive statutory interpretation of provisions similar to section 115 of the 1983 Act (considered earlier).[72] We should not rule out the possibility that the effect of a suitably limited range of false statements in undermining (a) might be sufficient to justify criminalisation. An example – considered briefly in the next section – might be where such statements were intended to undermine the credibility and integrity of the election as a whole. However, there are important arguments against a sweeping approach to countering all manner of false election or referendum statements, under the banner of justification (a).

The concentration in section 106 only on a narrow range of instances in which (a) is at stake – when a false statement intended to affect a candidate's vote return has been made or published about a candidate's *personal* conduct or character – has an 'institutional' purpose. It is meant to ensure that the courts are at least able to pass judgment on the maker of the statement, without being necessarily and consistently drawn into controversy over the merits of (party) 'political' claims, either about candidates or more broadly. As we saw earlier,[73] judges themselves regard this as an important issue. Further, we should note that some American courts have cast doubt on whether the importance of the public good at stake in (a) – collective political decision-making shaped by adequate and accurate information – will in itself bear the weight of justifying

72 See for example *Friesen* v *Hammell* (1997) 28 BCLR (3d) 354 (BCSC); *Cameron* v *Becker* (1995) 64 SASR 238 (South Australia SC (Full Court).

73 Text at n 16 above.

legal restrictions on lying in campaigns generally.[74] In so doing, they have contrasted the dubious constitutionality of such legal restrictions with what they regard as the constitutionally more acceptable role under the First Amendment of defamation law in protecting, 'the property of an individual in his or her good name'.[75] That contrast resonates in this context, because section 106 is confined to false statements about a candidate's 'personal' character or conduct. However, there have been problems with the use of this criterion as basis for restricting the reach of section 106.

PROBLEMS WITH SECTION 106 AND THE CHALLENGE OF DECRIMINALISATION

In practice, the courts have found it hard to draw the line between false statements about a candidate's personal conduct or character, and statements about a candidate's political conduct or character.[76] Yet, it has been considered essential to do so. Otherwise, with the threat of criminal proceedings hanging over campaigns, 'it would be difficult to see how the ordinary cut and thrust of political debate could properly be carried on'.[77] For that reason, the High Court has said that 'mixed' statements, bearing both on a candidate's personal and political conduct and character, fall outside the scope of the protection provided by section 106.[78] In so saying, of course, the court thereby narrows the scope of the protection from false claims offered by section 106 not only to candidates, but also to voters. However, seemingly mixed statements, such as an accusation that a candidate holds racist views,[79] or an accusation of corruption in office,[80] have been held to be accusations about the candidate's personal conduct or character. In *R (on the application of Woolas)* v *The Parliamentary Election Court*,[81] an accusation that a candidate was courting extremists was found to be political in nature, whereas an accusation that the candidate was wooing extremists who advocate violence was said to be (*ex hypothesi*, wholly) personal in character.[82] It is hard to resist the conclusion that, in such cases, the courts are in reality ruling substantively on what they regard, in broad terms, as unfair campaign

74 *Commonwealth* v *Lucas* (2015) 34 NE 3rd 1242 (Mass); *Rickert* v *Public Disclosure Commission* 168 P 3d 826, 827 (Washington 2007). See the discussion in Rowbottom, n 26 above, 521-522. See also *R* v *Zundel* [1992] 2 SCR 731.

75 *The State of Washington on the Relation of Public Disclosure Commission* v *119 Vote No! Committee* (1998) 135 Wn 2nd 618, 629, cited by Rowbottom, *ibid*, 521.

76 Rowbottom, n 26 above, 526-529.

77 *R (on the application of Woolas)* v *The Parliamentary Election Court* n 16 above at [113], cited by Rowbottom, *ibid*, 527.

78 *R (on the application of Woolas)* v *The Parliamentary Election Court ibid* at [111], disapproving of, in that respect, dicta suggesting otherwise in *The North Division of the County of Louth* n 67 above, 163 *per* Gibson J.

79 *Pirbhai* v *DPP* [1995] COD 259 QBD; https://www.localgovernmentlawyer.co.uk/governance/314-governance-a-risk-articles/26861-false-statements-and-election-law.

80 *The North Division of the County of Louth* n 67 above.

81 *R (on the application of Woolas)* v *The Parliamentary Election Court* n 16 above.

82 *ibid* at [21], discussed by Rowbottom, n 26 above, 528.

speech about a candidate's fitness for office that is nonetheless tolerable, and unfair campaign speech of this nature that is intolerable.

Let us assume, though, that amongst false election statements, a workable distinction between the personal and the political (and the mixed) ones can be drawn. Even so, in analysing section 106, we must also contend with the fact that, in the *Carmichael* case,[83] the courts abandoned any notion that section 106 is designed exclusively to provide 'protection' for candidates (justification (b) above). Carmichael admitted lying during an election campaign. He conceded that he had falsely denied leaking a politically sensitive Scotland Office memo to the media. The Election Court was not persuaded beyond reasonable doubt that the lie amounted to a statement wholly about Carmichael's personal conduct or character. In the Court's view, it was better characterised as a 'mixed' statement, involving Carmichael's political as well as his personal credibility. It would, said the Court, have been a different matter – a claim solely about personal character and conduct – had Carmichael falsely claimed that he was not the sort of person ever to leak a confidential memo in order to gain a personal political advantage.[84] Fair enough, so far as it goes; but in so saying, the Court found (albeit *obiter*) that section 106 covers falsely *positive* statements about a candidate's personal conduct and character. Hence, the section covers statements made by a candidate about his or her own personal conduct or character, in order to affect his or her own return. What should we make of this development?

There are powerful reasons not to confine the scope of section 106 to negative statements. Someone might make a highly significant false statement comprised of both negative and positive elements, that it would be artificial to have to separate out for legal purposes into its positive and negative aspects. For example, in a constituency with a large number of current and former service personnel, a candidate might seek to swing voters by saying, entirely falsely, 'I saw active service as a soldier, but my opponent was an army deserter.' The legal effect of such a doubly false statement should be considered in its entirely, or not at all. Even so, if that seems correct, then, in relation to the section 106 offence, the restriction on the pursuit of justification (a) is no longer one necessarily tied to a wrong done to – a damaging statement about – a candidate, even as a means of restricting the scope of the offence. Section 106 thus covers, for example, the kind of conduct that, when criminalised, has proved constitutionally controversial in the United States: falsely claiming to be a US army veteran (so-called,

83 Petition of Timothy Denis Morrison and Others against Alistair Carmichael MP and Alistair Buchan, in Respect of the Election for the Orkney and Shetland County UK Parliamentary Constituency Held on 7 May [2015] ECIH 90 at https://www.theguardian.com/uk-news/2015/dec/09/alistair-carmichael-lib-dem-election-court-throws-out-attempt-to-unseat-mp. In this particular case, though, albeit with some reluctance, the Election Court found that the defendant did not make a falsely positive statement about his own personal character. See Rowbottom, *ibid*, 511.

84 *ibid*; https://www.bbc.co.uk/news/uk-scotland-scotland-politics-35050691. A prosecution in this case under s 115 was also discussed: https://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/5663/Heather-Green-The-Alistair-Carmichael-Election-Petition-the-Leak-the-Lie-and-Legal-Remedies.aspx. I am grateful to an anonymous referee for this reference.

'stolen valour' cases) or falsely claiming to have been endorsed by a prominent person.[85] Few theorists have argued that the harm done or threatened, when justification (a) above is in issue, is sufficient in itself to justify criminalisation of the making of false campaign statements, when those statements do not also involve wrongs done to individuals. Yet, expanding the scope of section 106 to include positive statements involves just such a move.

A re-evaluation of section 106 is required.[86] To begin with, the law currently seems caught between the pursuit of at least two goals it is hard to reconcile. On the one hand, there is the desire to give voters, and those active in politics more broadly, protection from the spread of false information. On the other hand, there is the wish – when falsely negative statements are in issue – to stick by the principle that *criminal* defamation has no place in politics.[87] The importance of the latter principle is underscored by the fact that it is always open to someone to apply under section 106(3) of the 1983 Act for a court order preventing the repetition of a false statement, a matter further considered below. Further, a candidate can sue in private law for defamation[88] (and if need be, seek to crowdfund the action).[89] Moreover, if the threat of criminal sanctions were to be removed, someone guilty of an illegal practice, such as false statement-making contrary to section 106, would still automatically be debarred for three years from holding elected office, under section 160(4) of the 1983 Act.[90] That is a significant penalty, even if most people have no intention of standing for office. By analogy, even if most people were atheists, that would not make it any less monstrous for the state to prohibit them from practicing a religion. I suggest that the existence of these measures to deal with a section 106 violation satisfies the need for a proportionate response, in the case of elections.

As I just indicated, under section 106(3), there is a power to ban repetition of (*ex hypothesi*) false statements – including through interlocutory proceedings.[91] It is strongly arguable that this power should be extended, in the case of negative statements of a personal nature, to cover leading campaigners in referendums.[92] It does not take much imagination to see that, for example, in a referendum on the scope of abortion, leading campaigners on either side of the debate might well find themselves exposed to unacceptable forms of lie about them personally. In such circumstances, campaigners are as deserving as

85 *United States* v *Alvarez* 567 US 709 (2012); Stolen Valor Act 2013; Massachusetts General Laws, Part 1, Title VIII, ch 56, s 41A.

86 See, further, the sceptical and cautious approach of both Rowbottom, n 26 above, 525, and Renwick and Palese, n 53 above.

87 See text at n 69 above.

88 In Oregon, electoral law gives a candidate a right to bring a private law damages suit, when there is 'clear and convincing evidence,' that someone has knowingly or recklessly published a document that, 'contains a false statement of material fact relating to any candidate, political committee or measure': Election Offences (Oregon) 2019, chapter 260, 260.532.

89 See for example https://www.lawgazette.co.uk/features/strength-in-numbers/5066950.article.

90 Although there is a power under the 1983 Act, s 174(2) to mitigate this penalty, in a case where someone has gone on to be convicted of the criminal offence.

91 Something rarely permitted at common law in cases where the truth of the allegation is contested: see the discussion in Rowbottom, n 26 above, 508-509.

92 Someone who wished to take advantage of such a provision, as a 'leading campaigner,' would be required to pre-register themselves as such with the Electoral Commission, upon proof that they are a *bona fide* representative of a relevant organisation.

election candidates of at least some enhanced protection from damaging personal attacks through false claims. What, though, about the protection of the interests of voters (as opposed to the interests of candidates or leading campaigners) from false information generally?

Whether they may have been misled by falsely negative or by falsely positive statements (or by other corrupt and illegal practices), the interests of voters *collectively* are currently protected, in the case of elections at least, by the Election Court's powers under section 164 of the 1983 Act. Section 164 empowers the Court to declare an election void when, amongst other things, illegal or corrupt practices – including, but not confined to, section 106 fraud – have so extensively prevailed that they may reasonably be supposed to have affected the result: what can be called a 'section 164 effect'.[93] The basis for declaring elections void for fraud is further considered in the next section, but mention of a section 164 effect raises a final possibility canvassed earlier, bearing on restriction rather than abolition of section 106. If it is to be retained as an offence in some form, one might seek to restrict the scope of section 106 to cases in which a false statement about a candidate's personal conduct or character was intended to have a section 164 effect. A section 164 effect is quantitatively more serious than that contemplated by the current low bar, of merely affecting a candidate's vote return; but the effect is also qualitatively different, in that it concerns an impact on voters collectively, not as individuals. There is a plausible case for criminalisation when the intention of fraudulent statement-making about a candidate's personal conduct or character was to undermine the political meaningfulness of collective voter participation in the election as a whole (an instance of justification (a) for criminalisation, set out above[94]).

VOIDNESS AND VOTING: THE EFFECT OF FALSE STATEMENTS

In politics, the primary remedy for political (as opposed to personal) fraud or corruption ought ordinarily to be a public law remedy of 'negation', denying the wrongdoer the benefit of the fraud or corruption.[95] There is no space to consider here precisely how to re-shape sections 159[96] and 164 of the 1983 Act, which determine the grounds on which an election can be considered negated – rendered void for fraud – in the light of reforms described above. However, three points are worth making.

93 There is, by contrast, no statutory power to declare a national referendum void, even if voters were swayed by false claims. The proper remedy lies – subject to what will be said in the next section below – in Parliament's power not to implement the result of the referendum.

94 See text following n 69 above. Justification (a) was the good of collective political decision-making shaped by adequate and accurate information.

95 See J. Horder, *Criminal Misconduct in Office: Law and Politics* (Oxford: OUP, 2018) ch 5.9.

96 Under the 1983 Act, s 159 if a candidate him or herself is found guilty of a corrupt or illegal practice, his or her election is *automatically* to be declared void. That might be considered potentially disproportionate and inflexible in (say) a case in which the candidate was returned with an overwhelming majority, but is discovered by a rival suffering from sour grapes to have made a false statement about the personal conduct or character of the rival with a view to influencing just one other voter (such as his or her spouse); but I will not pursue the point here.

First, it would be right to confine such cases to instances in which someone (including the candidate him or herself) has made a statement about a candidate knowing or believing it to be false. Section 106(1) currently extends liability beyond this, to include cases in which the maker of the false statement believed it was true, but did not have reasonable grounds for that belief: liability based on negligence. That is going too far, even when the issue is the validity of an election rather than criminal responsibility and is not consistent with rights to freedom of speech under Article 10.[97] Secondly, in so far as section 106 provides the grounds on which an election may be declared void, we have seen that the current law employs an 'inclusionary' test for voidness: the issue is whether the false statement was about a candidate's personal conduct or character. It would be possible to replace this controversial approach by employing an 'exclusionary' test, as has been done under the Corporate Manslaughter and Corporate Homicide Act 2007 to limit the scope of the duty of care owed by public authorities.[98] Such a test might involve considering whether the allegedly false statement concerned a matter of (a candidate's view on) economic, political or social policy, in which case it would *not* be justiciable. For, as Schauer has remarked, '[i]nherent in the ideal of self-government is the proposition that it is for the people alone to distinguish between truth and falsity in matters relating to broad questions of government policy'.[99] Non-excluded statements about candidates known or believed to be false would remain justiciable.

The exclusionary approach would mean that courts would no longer be forced to decide whether, for example, a false claim that a rival candidate had reneged on a promise to live in the constituency was a claim exclusively about 'personal' conduct or character (and was hence justiciable).[100] The point ought to be that such a claim is not a claim about political, social or economic policy, and should thus be justiciable. Such a change would bring the law more into line with theories of free speech that place emphasis on the importance to a flourishing public culture of treating political speech as a no-go area for official censorship and prohibition:

> [R]ights protect various spheres or domains from government intrusion on the basis of reasons the constitution treats as impermissible reasons for government acting in those spheres … Rights were not designed to protect individuals in their atomistic

97 See Rowbottom, n 26 above, 529-530.

98 Corporate Manslaughter and Corporate Homicide Act 2007, s 3(1): 'Any duty of care owed by a public authority in respect of a decision as to matters of public policy (including in particular the allocation of public resources or the weighing of competing public interests) is not a "relevant duty of care"'.

99 F. Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982) 39, cited by Rowbottom, n 26 above, 524.

100 The Election Court and the High Court have disagreed on this question. The Election Court finding that the false claim was about personal conduct was overturned by the High Court: *R (on the application of Woolas)* v *The Parliamentary Election Court* n 16 above at [117]. See further, *Fairbairn* v *Scottish National Party* (1979) SC 393, in which a false allegation that an MP did not collect his mail from the House of Commons was held to be an allegation about D's political conduct, and not his personal conduct. On the analysis provided here, as it was not an allegation about political, social or economic policy it ought to have been regarded as justiciable, but quite possibly trivial and insubstantial.

> interests in, for example self-expressiveness; rather, rights were designed to sustain a political culture in which public liberty was enhanced by recognising certain domains as relatively autonomous. This conception meant defining certain domains as off limits to state action that rested on particular impermissible purposes.[101]

Thirdly, it is suggested that the provision for declaring an election void has rightly not been extended to the case of non-binding national referendums. If a non-binding national referendum is suspected or found to have been influenced by fraud (as many believe, in relation to the Brexit referendum), it should simply be given less – or no – weight, as the basis for possible reforms.[102] In any event, the sheer number of voters involved, taking their decisions on the basis of what may be a varied range of considerations assigned differing weight,[103] would set an Election Court an unacceptably political task in coming to a conclusion on whether or not to declare the election void. A knife-edge *binding* national referendum result has been declared void (in Switzerland) in the light of misleading figures provided by government on a key issue in the referendum,[104] but the circumstances in which such a process might gain traction in the UK – if at all – cannot be considered here.[105] At best, any reformed version of section 164 of the 1983 Act should be made applicable only to binding local referendums (when the issues liable to influence voters may be narrower in scope), such as referendums which must be held in relation to raising the level of council tax.[106]

HOW TO PROTECT CAMPAIGNERS, AND CANDIDATES

Finally, I return to the limits of the broad-ranging false statement offences considered earlier. I argued above under the heading 'Defrauding voters and the role of the courts' that the prohibition in section 115 of the 1983 Act on using a fraudulent device or contrivance to deceive voters ought to be confined to frauds impacting on a procedural, rather than on a substantive, understanding of liberty. That limitation is not only meant to protect freedom of political speech in so far as it concerns opinions and viewpoints (even fabricated ones),[107] but also to protect courts from becoming embroiled in adjudication of all manner of alleged political falsehoods in such a way as to endanger their reputation for independence and impartiality. What, though, about the possibility that such

101 F. Shauer and R.H. Pildes, 'Electoral Exceptionalism and the First Amendment' (1999) 77 *Texas Law Review* 1803, 1812 and 1814.

102 For a contrary view, see E. McGaughey, 'Could Brexit be Void?' (2018) 29 *King's Law Journal* 331.

103 See further, M. Goodwin, S. Hix, and M. Pickup, 'For and against Brexit: A Survey Experiment of the Impact of Campaign Effects on Public Attitudes toward EU Membership' (2000) 50 *British Journal of Political Science* 481.

104 https://www.bger.ch/files/live/sites/bger/files/pdf/de/archive/1C_315_2018_yyyy_mm_dd_T_d_13_11_34.pdf; https://www.google.co.uk/amp/s/amp.theguardian.com/world/2019/apr/11/switzerland-court-overturns-referendum-as-voters-were-poorly-informed.

105 See further, McGaughey, n 102 above.

106 https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05682.

107 See for example Shauer and Pildes, n 101 above.

issues may arise in relation to the offences in the 1988 and 2003 Acts, discussed in the third section, 'Three statutes applicable to false statements in campaigns', above?

In considering the direction of reform of the scope of liability for online communication of false (or grossly offensive) statements, the Law Commission has emphasised the need for reforms in which, 'legitimate speech that should not be criminalised would be more clearly excluded'.[108] That objective can be achieved, whilst still permitting these offences to apply to political campaign statements.[109] To being with, the application of these offences to campaign statements is legitimate, because the statements prohibited by the 1988 and 2003 Acts are false statements aimed at doing damage that is not essentially reputational in nature (by way of contrast with the now abolished offence of criminal libel). The 1988 and 2003 Acts apply only to false statements aimed at having a negative impact on the victim's mind: by causing (say) distress or needless anxiety. That being so, it is arguable that, at least in serious cases, these offences can justifiably be used to protect the interests of an election candidate or leading referendum campaigner. It is important not to under-estimate the risk that some people or groups within society may be deterred from participating in politics because of the fear of exposure to vilification and threats when they do. For example, evidence suggests that women more frequently make reference to the risk of being the target of public attack on their dignity as a deterrent to entering politics.[110] Such attacks may come through malicious falsehood, as well as by other means. A thorough critique of the breadth of the 1988 and 2003 Acts is beyond the scope of this article. Such a critique would involve asking whether, for example, in the absence of public nuisance or criminal harassment, it should really be enough to justify criminalisation under the 2003 Act that a false statement was simply intended to cause 'annoyance or inconvenience'.[111] However, putting such criticisms on one side, there is a way to create space for protected campaign speech under the 1988 and 2003 Acts.

An amendment could indicate, first, that a relevant statement – one that is known or believed to be false, *and* is intended to cause annoyance or inconvenience (2003 Act) or distress or needless anxiety (1988 Act) – will fall in principle *outside* the scope of the 1988 and 2003 Acts if it was directed at an election candidate or (registered[112]) referendum campaigner during the course of a campaign. That would do something to meet the Law Commission's aim of protecting free speech in principle from the application of the criminal law in political campaign cases. Such a change would bring to the 1988 and 2003 Acts something of the policy of section 29J of the Public Order Act 1986, which is designed to protect those who are intemperate in their language, or

108 Law Commission, n 19 above, para 13.21.

109 This is recognised by the Cabinet Office proposal (n 11 above) to make the commission of these offences an electoral offence, opening up the range of sanctions and remedies discussed in 'Three statutes applicable to false statements in campaigns' above.

110 Atalanta, *[Anti]Social Media* (2018), 37 at https://static1.squarespace.com/static/595411f346c3c48fe75fd39c/t/5aa6fa310d9297a484994204/1520892494037/%28Anti%29Social_Media_Report-FINAL2-lowres.pdf; Cabinet Office, n 12 above, para 4.1.6.

111 See Law Commission, n 19 above.

112 See n 92 above.

simply outspoken, from victimisation by a criminal law in thrall to over-sensitive people:

> Nothing in this Part [hate offences] shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.

However, secondly, there should be an exception, where the 1988 and 2003 Acts should apply, if a relevant statement was directed at an election candidate or referendum campaigner, and:

i. The statement was intended to have a serious effect on the victim's state of mind, and
ii. there was no opportunity adequately to counter the effect of the statement.

The point of (ii) is to accommodate the Brandeis gap, discussed above.[113] The point of (i) is to link the criminality of making a false statement with a threat to 'negative' political freedom, the freedom from obstacles to doing as one wishes (including certain internal obstacles, such as fear).[114] Criminalisation is justified when a false statement threatens, through the effect it is meant to have on V's mind, to undermine V's effective participation in the campaign. Some defamatory statements might have such an effect but would only stand to be criminalised because they were intended to have such an effect (and not because they were defamatory). An example might be a false claim that a candidate or campaigner was a child sex offender.[115] However, a case could fall within the proposed amendment without the false statement being defamatory. An example might be a false but credible statement, sent at a crucial point in the campaign, suggesting that a candidate or campaigner's only child has been killed in an accident (in circumstances, perhaps, where the truth was difficult to ascertain). The recent proposal from the Committee on Standards in Public Life for an offence of intimidating parliamentary candidates or campaigners follows

113 See 'The 'more speech' solution and its limits' above. It would probably be right to provide that the defendant should bear the evidential burden, in relation to (ii). Prosecution guidance should indicate that a prosecution should not be undertaken when the absence of an adequate opportunity to counter the effect of the statement came from a spreading of the statement through the public domain that D could not reasonably have foreseen as the effect of his or her conduct.

114 See the discussion in G. Crowder, 'Negative and Positive Liberty' (1988) 40 *Political Science* 57. It is important to note that negative liberty is not the same concept as the procedural kind of liberty discussed in the second section above. The latter cuts across the negative-positive liberty distinction by incorporating some elements, such as robust voting procedures, from the domain of positive liberty.

115 See the Miranda Grell case, n 71 above.

this general line of argument.[116] Intimidation is defined by the Committee as words or behaviour intended or likely to block or deter participation, which could reasonably lead to an individual wanting to withdraw from public life.[117] The point is that criminalisation is not justified simply because, for example, a false statement is intended to make V needlessly anxious about whether or not the merits of his or her candidacy or arguments will be accurately understood by voters. To target such cases would involve the criminal law in protecting substantive political freedom, an inappropriate task (I argued in the second section above) for which it is ill-suited.

CONCLUSION

Political theorists divide sharply on whether coercive steps – or any legal steps at all – should be taken to deter lying in politics, whether or not the lies are told during campaign periods.[118] I have been concerned only with the existing criminal law, as it applies to false statements made in election and referendum campaigns. Although I have not defended the point in detail, it seems obvious that it may be necessary and proportionate to use the criminal law to prohibit the making of false statements about elections procedures. Without such prohibitions, the state may simply be unable to guarantee the observance of basic electoral principles, such as one person, one vote. By contrast, other than in cases tantamount to intimidation, I have been sceptical about the value of employing the criminal law to deter lying about substantive (as opposed to procedural) political matters – viewpoint politics – including lies about the personal reputations of election candidates and referendum campaigners.[119]

Even so, other avenues down which criminalisation of election or referendum-related speech might legitimately be pursued do exist. I have focused on what one might call the 'content-based' problem of falsehood. However, the explosion of internet-based politicking world-wide has given rise to a 'source-based' problem about falsehoods (and about unacceptable forms of speech generally). This problem is the ease with which messages likely to gain wide influence through on-line communication can be faked to look as if they come from a particular source.[120] It would be worth exploring the extent to

116 Committee on Standards in Public Life, n 45 above; Cabinet Office, n 11 above, ch 4.
117 *ibid*, 26.
118 See, generally, J. Meibauer (ed), *The Oxford Handbook of Lying* (Oxford: OUP, 2019) ch 41.
119 Although we have seen that criminalisation may possibly be justified when the intention in making a false statement of a personal nature about an election candidate was to threaten the integrity of the election as a whole.
120 See for example J.-B. Jeangène Vilmer, A. Escorcia, M. Guillaume, and J. Herrera, *Information Manipulation: A Challenge for Our Democracies* (Paris: Policy Planning Staff (CAPS) Ministry for Europe and Foreign Affairs, and the Institute for Strategic Research (IRSEM) Ministry for the Armed Forces, 2018) Part 2, II.

which, just as political parties face criminal liability if they fail properly to reveal the source of their donations,[121] they should face such liability if they fail to reveal (or falsely represent) the true source of political statements the making of which they have assisted or encouraged during campaigns.[122]

121 See Political Parties, Elections and Referendums Act 2000.

122 Facebook now requires sources to be disclosed in relation to advertisements, 'made by, on behalf of, or about a candidate for public office, a political figure, a political party or [where the advertisement] advocates for the outcome of an election to public office; or about any election, referendum, or ballot initiative, including "go out and vote" or election campaigns': https://www.facebook.com/business/help/167836590566506?id=288762101909005.