PART II

Substantive Offences

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Criminal Fraud and the Toleration of False Political Speech

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I. Introduction

Not every fraud (the intentional or reckless use of false statements[1]) falls within the scope of a criminal wrong, even when harm is done by it. In itself, that is not controversial. After all, not every instance of harm done by intentional physical contact falls within the scope of a criminal wrong.[2] In the case of fraud, though, any harm done thereby is done through the medium of communication. In liberal democracies, this fact is in itself liable to make problematic the criminalisation of some (harm-causing) frauds. That is because, in some circumstances, people's Article 10 rights to freedom of expression may be unduly restricted or undermined if the threat of coercion – should harm come from their (fraudulent) speech – is allowed to deter them from speaking.[3] In that regard, my concern will be a particular kind of political fraud that is frequently subject to criminalisation world-wide, including in liberal democracies.[4] This is 'political viewpoint' fraud, fraud concerning facts about – for example – candidates for political office and their policies.[5]

[1] This definition is focused on the knowledge that a false statement is (or may indeed be) false. It thus differs somewhat from GR Sullivan's definition, which is focused on a particular kind of economic wrong: the intention to (or knowledge that one might) cause loss or make a gain through dishonest conduct. See GR Sullivan, 'Framing an Acceptable General Offence of Fraud' (1989) 53 *Journal of Criminal Law* 92.

[2] See the discussion in *Collins v Willcock* [1984] 3 All ER 374. So far as fraud is concerned, frauds committed without dishonesty may not warrant criminalisation: see Law Com No 276, *Fraud* (London, HMSO, 2002) part V.

[3] The opening words of Art 10(1) read: '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.'

[4] For a general discussion, see J Horder, *Criminal Fraud and Election Disinformation: Law and Politics* (Oxford, Oxford University Press, 2022).

[5] By contrast, I will not be concerned with 'electoral participation' fraud, fraud committed to gain an advantage or impose a disadvantage in the voting process (such as falsely telling someone they are not eligible to vote). For a full discussion, see Horder, ibid, ch 1. Further, I will not be concerned with

The dissemination of such frauds is very commonly unjustified and inexcusable,[6] in some instances as a violation of someone's right to their reputation: an interest protected, in so far as it is as an aspect of private life, under Article 8.[7] Societies have developed a number of means by which to deter the perpetration and spread of false political viewpoint claims;[8] but my aim here will be to make the case for protecting the dissemination of false political viewpoint claims from one means in particular: criminalisation.

This will not simply be an individual rights-based argument narrowly concerned with the requirements of Article 10. It is also a claim about the republican limits, in a democratic state, of the rights of officials' and election candidates to use coercion to dictate the terms on which other people describe and evaluate their fitness for office, the nature and merits of the policies they endorse and reject, and so on. As Shauer and Pildes put it:

> Rights were not designed to protect individuals in their atomistic 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.[9]

It might come as a surprise to discover that the criminal law becomes involved at all in seeking to deter and punish political viewpoint fraud directed at officials or election candidates, but it commonly does so. In some jurisdictions, an example is provided by criminal defamation cases involving statements it is known are or may be false. In German law, Article 188 of the Criminal Code creates an offence of defaming, 'a person involved in popular political life [in a way that] may make [the person's] public activities substantially more difficult'.[10] Another important case is where a fraud is intended to affect voting at an election. So, for example, section 106 of the Representation of the People Act 1983 creates a summary offence in circumstances where:

> (1) A person who, or any director of any body or association corporate which –
>
> (a) before or during an election,

the mere expression of unfounded 'opinion', which is commonly not subjected to criminal sanctions in liberal-democratic states.

[6] Although there may be some circumstances in which there is an excuse or justification: see the discussion in the Canadian case of *Zundel v R* [1992] 2 SCR 731.

[7] *Pfeifer v Austria* (2007) Appl No 12556/03.

[8] For example, defamation, as an action in private law, involves an element of victims' rights-based deterrent effect. Some examples of other less formal means by which the state expresses disapproval of false viewpoint statements are discussed in the conclusion. See generally, A Stone and F Schauer (eds), *The Oxford Handbook of Freedom of Speech* (Oxford, Oxford University Press, 2021).

[9] F Shauer and RH Pildes, 'Electoral Exceptionalism and the First Amendment' (1999) 77 *Texas Law Review* 1803, 1812, 1814.

[10] Compare, too, Art 32 of the Press Law 1881 (France), which defines criminal defamation as, 'any allegation or accusation of a fact that causes an attack on the honour or consideration of a person', and permits a maximum fine of €45,000 when the victim is a public official, as compared with €12,000 when the victim is a private individual. See Horder (n 4) ch 2.

> (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.[11]

We should note two important points about the scope of this offence. First, it covers some instances in which a false statement of the relevant kind is unwittingly made, if the statement was made in the absence of reasonable grounds for believing it to be true. Such extensive coverage is controversial.[12] Secondly, the speech-focused wrongdoing at the heart of this offence is a limited kind of defamation, a false claim about the *personal* conduct or character of a candidate.[13] The abolition, more generally, of criminal defamation in England and Wales[14] is something else that makes this offence controversial, albeit less controversial than the more expansive versions employed in other jurisdictions (as we shall see). These more expansive versions of the offence extend liability to false statements about a candidate's *political* conduct and character.

Even so, the section 106 offence is controversial, fundamentally because it clearly detracts from the important free speech principle that false or misleading speech should (especially in political contexts) be met and countered with counter-speech, and not with state sanctions. 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.[15]

In that regard, it is important to bear in mind that, even when concerned with falsely negative as opposed to falsely positive statements, the offence targets a somewhat different range of conduct from, say, crimes of hate or intimidation, although there will be overlaps. So, the justification for having crimes of hate or intimidation does not apply to this offence (and I will cast no doubt here on the justification for hate crimes or crimes of intimidation). For example, a false claim that a candidate has an unfortunate medical condition that will make them unfit for office may be a false statement falling within the scope of the prohibition; but it is not a statement aimed at intimidating or creating hate.

[11] Discussed in Horder (n 4) ch 3.

[12] It is controversial because it is strongly arguable that false statements of this nature should not be criminalised – if the criminal law is properly applied at all – unless the statements were fraudulent: made knowing that they were or might be false, as in the United States: see text at n 17 below.

[13] Although the offence extends to false positive claims made about a candidate to boost their vote return: *Morrison v Carmichael* [2016] SC 598. The significance of 'false positive' claims is discussed in J Horder, 'Criminal Law at the Limit: Countering False Claims in Elections and Referendums' (2021) 84 *MLR* 429.

[14] Coroners and Justice Act 2009, s 73.

[15] *Whitney v California (No 3)*, 74 US 357, 377 (1927) (Brandeis J).

In other jurisdictions, some versions of this offence are more restricted, and some less restricted, in different ways. An example that provides a convenient focus is to be found in Ohio's election law code. It is an offence to:

> Post, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate.[16]

In terms of its breadth, there are two important features of this example. First, in common with many similar provisions in US state codes, it is in one way narrower in scope than the equivalent UK provision: it requires what I term 'fraud', namely proof of intention or recklessness with regard to the falsity of the false statement made.[17] By way of contrast with the position under UK law, under Ohio law an honest belief (whether or not reasonable) in the truth of the false statement ensures that any such false statement. falls outside the scope of the offence. Secondly, though, the Ohio prohibition is significantly broader than UK law, in that there are no restrictions on the kind of false statement caught by it, so long as the false statement is intended to promote or defeat an election candidate. The equivalent provision in Minnesota is more explicit on this point, stating expressly that the false statement may concern, 'the personal *or political* character or acts of a candidate'.[18] I will come back to the latter point in section V.

II. Is Fraudulent Political Speech Constitutionally Protected?

We should first consider the strong view that frauds enjoy no special protection in virtue of being a form of speech. The strong view was expressed by Lord Hobhouse in the private law libel case of *Times Newspapers v Reynolds*:

> There is no human right to disseminate information that is not true. No public interest is served by publishing or communicating misinformation. The working of a democratic society depends on the members of that society being informed not misinformed. Misleading people and the purveying as facts statements which are not true is destructive of democratic society and should form no part of such a society. There is no duty to publish what is not true: there is no interest in being misinformed. These are general propositions going far beyond the mere protection of reputations.[19]

[16] Ohio Revised Code, § 3517.21(10).

[17] *Garrison v Louisiana*, 379 US 64, 75 (1964) (Brennan J): 'Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity.'

[18] Minnesota Statutes, § 211B.06.

[19] *Reynolds v Times Newspapers* [2001] 2 AC 127, 268.

In a US First Amendment context, similar sentiments have been expressed by the US Supreme Court, albeit with more care taken to confine the scope of constitutionally unprotected falsehoods to falsehoods intentionally or recklessly propagated,[20] something unfortunately left unclear in Lord Hobhouse's exposition of the matter, just cited. In *Garrison v Louisiana*, Brennan J said:

> That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. … Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.[21]

Do these statements imply that lying can, *as such*, justifiably be criminalised? They do not.

If it is to be justified, a criminal prohibition must be a necessary and proportionate step, in response to a wrong, even if the commission of the wrong does not enjoy constitutional protection. An illustration of this point from the United States is the striking down of criminal legislation in the case of *US v Alvarez*.[22] At his first meeting as a Board member of the Three Valley Water District Board, D falsely claimed to have received a Congressional Medal of Honour. The making of such a false claim was at that time expressly prohibited by the Stolen Valor Act of 2005, under which D was initially convicted.[23] The Supreme Court overturned D's conviction and struck the 2005 Act down as unconstitutional. In the Court's opinion:

> The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection. Our prior decisions have not confronted a measure, like the Stolen Valor Act, that targets falsity and nothing more.[24]

In the Supreme Court's view, that means that criminal – or indeed civil – measures to deter and punish lying must be targeted at, 'defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy'.[25] Most importantly, in the Supreme Court's view, the concern with intentional or reckless lying is a concern to *limit* the state's scope to prohibit or provide civil remedies for falsehoods in, say, the law of defamation. It is not a concern designed to justify the creation of new civil actions or offences.[26] In the wake of *US v Alvarez*, Congress passed the Stolen Valor Act 2013, which limits the

[20] See eg *Hustler Magazine Inc v Falwell*, 485 US 46 (1988).

[21] *Garrison v Louisiana*, 379 US 64, 76 (1964). See also *Herbert v Lando*, 441 US 153 (1979).

[22] *United States v Alvarez*, 132 S Ct 2537 (2012).

[23] 'Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States … shall be fined under this title, imprisoned not more than six months, or both.'

[24] *United States v Alvarez* 567 US 709, 711 (2012) (Kennedy J).

[25] ibid.

[26] ibid.

criminalisation of false claims to have received honours, or to have served in the military, to cases in which there was an intention thereby to obtain money, property or some other intangible benefit.[27]

A UK illustration comes from proposed reforms to the criminal law governing false communications. Hitherto, the offences in England and Wales concerned with malicious communication have been extraordinarily wide, breaching the general principle that such measures ought to be necessary and proportionate in their reach. This has been especially significant in their potential application to political debate and disagreement. For example, section 127(2) of the Communications Act 2003 says, in relation to improper use of a public electronic communications network:

> 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 …[28]

Can it really be right, say, in the context of a heated political contest between two embittered rival candidates wooing votes from an already highly polarised and partisan electorate, that it is a criminal offence for a politically engaged voter to send a message they know to be false over the internet about the policies of one candidate, solely with a view to 'annoying' that candidate? In as much as it extends so far, section 127 cannot possibly be consistent with a genuine commitment to Article 10 rights, and to proportionate use of the criminal law. The Law Commission recommended in 2020 that the sending of false messages should be an offence only when 'they are intended to cause non-trivial emotional, psychological, or physical harm to a likely audience; and the defendant sent the communication without reasonable excuse'.[29] The Online Harms Bill 2022 will turn that recommendation into law.[30] The need for the prosecution to prove that D's false message was intended to cause non-trivial harm to a likely audience makes criminalisation somewhat more proportionate, although it remains unclear why the offence is not based on non-trivial harm intentionally caused, with cases in which such harm was only intended left to the law of criminal attempts.[31]

Against that background, we can consider the UK case of *R (Woolas) v Parliamentary Election Court.*[32] In *Woolas*, Mr Woolas had very narrowly won a

[27] See, further, S Lieffring, 'First Amendment and the Right to Lie: Regulating Knowingly False Campaign Speech after *United States v Alvarez*' (2013) 97 *Minnesota Law Review* 1047.

[28] 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.

[29] LCCP No 248, *Harmful Online Communications* (London, HMSO, 2020) para 6.32.

[30] https://www.gov.uk/government/news/online-safety-law-to-be-strengthened-to-stamp-out-illegal-content- (last accessed 8 February 2022).

[31] For further discussion, see Horder (n 4) ch 3.

[32] *R (Woolas) v Parliamentary Election Court* [2010] EWHC 3169.

seat in a general election, having made a series of false claims about his Liberal Democrat opponent during the course of the campaign. Woolas was not charged with an offence contrary to section 106; instead, the issue was whether Woolas's election should be annulled in virtue of his breaches of section 106. A key question, thus, was whether Woolas's lies about his Liberal Democrat election opponent, Robert Watkins, were a protected kind of speech, especially given the bitterly contested electoral context in which the lies were told. Woolas, a Labour Party candidate, made three false claims during the election process:

(a) That Robert Watkins had attempted to woo the vote of 'extremist' Muslims who advocated violence towards Mr Woolas.
(b) That Robert Watkins had refused to condemn extremists who advocated violence against Mr Woolas.
(c) That Robert Watkins had reneged on his promise to live in the constituency.

Rejecting the argument that claims of this kind enjoyed some kind of constitutional protection, notwithstanding their falsity, the High Court invoked Article 17 of the European Convention on Human Rights (ECHR) to deny Article 10 protection to false and dishonest statements, even when those statements were made in a political context. Article 17 makes it clear that the Convention is not to be interpreted in such a way as to grant a right to 'engage in any activity or perform any act aimed at the destruction on any of the [Convention] rights and freedoms'.[33] The *Woolas* Court took the view that Article 17 was engaged when false political claims caused harm to a candidate's electoral prospects, in that:

> Dishonest statements are aimed at the destruction of the rights of the public to free elections (Article 3 of the First Protocol) and the right of each candidate to his reputation (Article 8(1)).[34]

The significance of the ruling in *Woolas* is that, as indicated above, the making of such false political statements is a criminal offence contrary to section 106 of the Representation of the People Act 1983, and not just a ground for invalidating an election result (as occurred in this case), if the statements concern a candidate's 'personal conduct or character', an issue addressed in due course. Clearly, in so far as they amount to an offence, the false statements made in *Woolas* are not criminalised merely because they are false. They will only pass the *Alvarez* test if and in so far as the false statements lead to (to use the *Alvarez* terminology) a 'legally cognizable harm'. In the *Woolas* Court's view, such a harm takes the form of an invasion of the rights of the public to free elections and of a candidate's right to their reputation. However, even if one accepts this as a basis for the decision in *Woolas*, and as an interpretation the scope of UK election law, is such harm really enough to justify criminalisation?

[33] See further the discussion in J Rowbottom, 'Lies, Manipulation and Elections – Controlling False Campaign Statements' (2012) 32 *OJLS* 507, 519–20.
[34] *Woolas* (n 32) [105].

III. Fraud that Causes Harm: An Adequate Case for Criminalisation?

In interpreting the scope of and weight to be attached to rights under the ECHR, the *Woolas* Court invokes Article 17 to deny that there can be a 'right to defraud' where the fraud threatens rights under the First Protocol to Article 3 (free elections), and under Article 8 (right to protection of reputation). The broader question this ruling raises is whether, and when, it is appropriate to use the criminal law to deter and punish such frauds if harm is caused. Bear in mind that the right to free elections is already protected from fraud by the courts' public law power to annul an election tainted by fraud,[35] and that the right to one's reputation is protected under the private law of defamation and, increasingly, through the right to have defamatory information posted online taken down by the internet provider under the provider's community rules. This might suggest that the most important cases in which a fraud aimed at causing harm may proportionately be criminalised are those cases where, inter alia, the invasion of Convention rights involved lacks such alternative (non-criminal) means of protection.

Suppose that X, who was adopted, contacts the private adoption agency that handled the adoption, saying she wishes to find out about and follow her birth parents' religion. An agency worker deceives her into believing that her parents were Christians when in fact they were Jewish, leading X to undergo baptism. No offence is committed in English law on such facts, even though the fraud is intended to infringe X's right to freedom of religion. Moreover, it is unclear whether any civil wrong is done to X that could form the basis of a compensation claim. Nonetheless, perhaps the possibility of such an event's occurrence is too remote to justify state intervention.[36] A general offence of 'fraudulently breaching another's Convention right' would meet that point by covering a much wider range of rights-invading frauds. However, such a broad offence would surely suffer unduly from vagueness in scope, thus putting the law in tension with the demands of Article 7.[37] In practice, there is no alternative to identifying a particular type of harm brought about by fraud, and asking whether its nature and (likely) prevalence are such as to justify the application of criminal sanctions rather than leaving any injured person to a private law or similar remedy.

An obvious case for criminalisation is where a false statement intentionally or recklessly made leads to physical harm. Suppose that I tell you that a path through

[35] Representation of the People Act 1983, s 164.

[36] After all, largely for such reasons, the United Kingdom does not criminalise forced conversion to another religion, in cases involving threats falling outside the scope of existing offences where the making of the threat (eg a threat of death) itself is criminalised.

[37] Bob Sullivan has, of course, been at the forefront of efforts to ensure that the law of criminal fraud is not beset by uncertainty, in the quest to ensure extensive coverage and the avoidance of technicality in application: see eg GR Sullivan, 'Fraud – The Latest Law Commission Proposals' (2003) *Journal of Criminal Law* 139.

the woods is safe to walk down in the dark, when I know it leads directly to a concealed cliff edge. Having followed my advice, you then fall over the cliff and are killed. I may be convicted of murder or manslaughter (depending on what I intended or foresaw). In this example, the fraud is no more than a means or instrument for causing your death. However, it is not in every case of an offence against the person that there will be nothing more than this to say. An important example is fraud instrumental in persuading another (V) to engage in a sexual act. Such frauds may indeed be a mere means by which V is inexcusably persuaded to surrender their sexual autonomy and submit to D's will. However, some scholars have raised the important point that the fraud may come about through D's ex hypothesi legitimate concern for privacy in relation to certain information, notwithstanding its importance to V.[38] Suppose D was trafficked into sex slavery when young. Years later, she is dating V, who tells D he would never agree to have sexual intercourse with someone who had been a sex worker. Ashamed of her past, D says she has never worked in the sex industry. D and V subsequently enjoy sexual intercourse together. One reason for thinking that D should not be regarded as committing a sexual offence here is that D is entitled to conceal her past, as a matter of privacy, and thus lacks what ought to be a key element of fault:

> The right to privacy is of paramount importance to human dignity, personhood, and communal life. It is essential to the free development of an individual's personality and identity because it allows us to think freely, to leave our past behind us, and to avoid unjust discrimination.[39]

In this example, the undermining of V's sexual autonomy by D's deception is something that we may say that D has a (privacy-based) liberty to do in the circumstances. Such cases are thus distinct from cases in which the inapplicability of a criminal sanction in a fraud case has a more excusatory basis, such as many (albeit not all) cases in which D admits causing some harm through fraud, but denies that their conduct was dishonest.[40] Nevertheless, a different analysis may be required to account for the examples that are my principal focus, political viewpoint frauds that lead to the loss of an election or a wasted vote. That is because, in such cases, it may be admitted that there was neither excuse nor justification for the fraud. Instead, the claim is that – unjustifiable and inexcusable though it may have been, morally speaking – the fraud is one that ought to be tolerated. In that regard, it is helpful to draw on Bernard Williams's distinction between toleration

[38] See eg the discussion in N Scheidegger, 'Balancing Sexual Autonomy, Responsibility, and the Right to Privacy: Principles for Criminalizing Sex by Deception' (2021) 22 *German Law Journal* 769.

[39] ibid, text at n 110.

[40] For a helpful discussion, see J Gardner, 'Wrongs and Faults' in AP Simester (ed), *Appraising Strict Liability* (Oxford, Oxford University Press, 2005) 51, 67–70. A denial of dishonesty may involve a claim of right or liberty – 'It is permissible to keep small sums of money found in the street' – but may also concede that an appropriation was wrongful whilst offering an excuse: 'My employer permitted a fellow employee to take unsold bread rolls home from the bakery, so I just assumed that it would be alright for me to do so too.'

as a political doctrine and toleration as a moral doctrine.[41] Toleration as a moral doctrine is in play when, although we may have doubts about the ethical propriety of certain conduct – or, indeed, disapprove of the conduct – we nonetheless think that it is up to the conscience of the individual whether or not to engage in it. This, I suggest, is the approach many would take to the example of the former sex worker's deception just given, in so far as we disapprove of her lying. Her liberty to deceive stems in part from a sense that it is just 'up to her' whether or not she should tell the lie.

By contrast, when toleration is instantiated purely as a political doctrine, the toleration is focused narrowly on the (permissive) legal approach to the conduct. In such cases it is not appropriate that the power of the state be used to deter and punish those who engage in the conduct in question. However, it is perfectly consistent with the adoption of tolerance as a political doctrine that, as Williams puts it,

> we should do everything we decently can to persuade [someone] to change his ways and to discourage other people from living like him. We may … discourage as many people as we can from thinking well of him so long as he lives in this way.[42]

Such a response, which JS Mill was almost certainly thinking of when speaking of his distaste for 'moral coercion',[43] would not be appropriate (being too harsh and condemnatory) in the former sex worker example, where toleration as a moral doctrine is in play. By contrast, it is submitted that what Williams says here about the political doctrine of toleration is the appropriate attitude towards false political statements about election candidates, even when such statements may lead to a candidate's losing the election, and to votes being cast on a false factual basis. We are, morally, free to shun and openly to condemn those who knowingly employ political falsehoods (indeed, perhaps we positively ought to adopt such attitudes), but we ought not to seek to deter and punish them through criminal prohibition. There are, to be sure, complexities that make this distinction less clear-cut in its application to non-state agencies than it might appear. For example, obligations of 'net-neutrality' may oblige internet platforms to adopt toleration as a moral doctrine in their own approach to political viewpoint falsehoods, since it is in general for platform users, not for platforms themselves, to call out liars in politics.[44] However, I will concentrate on the simple application of Williams's distinction, according to which, whilst individuals – including individual politicians – are entitled to criticise and condemn lying and liars in politics, the criminal law should stay its hand.[45]

[41] B Williams, *In the Beginning Was the Deed* (Princeton, NJ, Princeton University Press, 2007) ch 10.
[42] ibid 131.
[43] JS Mill, *On Liberty* (London, JW Parker & Son, 1859) 13.
[44] See Horder (n 4) ch 2, where the limits and complexities of this claim are discussed in detail. I am not suggesting, for example, that someone who persistently abuses a platform's morally tolerant approach to lying is entitled to remain on the platform to continue lying.
[45] I shall not be concerned here with the appropriate limits of private law, and in particular the law of defamation.

IV. Freedom of (Uncivilised) Speech: Mill's Complacency about the Law

Finding a breach of individual rights contrary to the ECHR is not necessary if one is to justify the imposition of criminal liability for instances of lying or misleading that may cause such breaches. It is not necessary because, for example, a prohibition on lying or misleading may be justified by the need to protect an important public good rather than individual rights. Indeed, public-good-focused prohibitions on false or misleading statements are by far the most common form of such prohibitions. A long-standing example is perjury, but far more numerous are examples in which the prohibition is designed to deter and punish acts that are liable to frustrate the achievement of a regulatory goal. An example (albeit expressed negatively as a failure to tell the truth) is the offence of failing to give a true name and address when asked to do so by a constable in connection with a demand to see a firearm certificate, contrary to section 48(3) of the Firearms Act 1968.[46]

Granting that, however, as indicated in the last section, my concern is with instances in which (as I argue) a breach of individual rights, whether or not contravening the ECHR, is not a sufficient basis to justify a criminal prohibition of the fraud that brings about that breach, because the doctrine of toleration requires that the state should stay its hand. In that regard, it is important to appreciate the different ways in which the nature of pluralism poses challenges for moral and political toleration, with implications for the law. The case for toleration, both moral and political, hinges on the rise of value pluralism in a society. Value pluralism may manifest itself in a variety of ways that pose different challenges to doctrines of toleration. For example, one might distinguish a 'mutual respect' model of pluralism from a 'rivalrous' model, and also distinguish a rivalrous model from a 'enmity' model of pluralism. Under the mutual respect model, tolerance as a moral doctrine will be widespread, because different groups mind their own business and pursue their own agenda largely in a way calculated not to come into serious conflict or competition with other groups. This is, perhaps, characteristic of modern sects or churches in the United Kingdom coming under the banner of, say, the Protestant faith. With the mutual respect model, the legal doctrine of toleration has relatively little work to do, other than securing permission for the different groups to emerge and establish themselves in society.

By contrast, when pluralism is rivalrous, groups will – typically – seek to gain advantages at the expense of other groups (perceived as competitors) and may much more strongly denounce or criticise their rivals to undermine the latter's perceived legitimacy. There may be some degree of moral toleration, as between

[46] Discussed in LCCP No 195, *Criminal Liability in Regulatory Contexts* (London, HMSO, 2010) para 3.126.

rival groups, but – depending on the nature and intensity of the rivalry between the groups – its existence will be far more fragile than under the mutual respect model. This is, of course, the normal position in the case of rival political groupings and parties in a democracy. In such circumstances, there will be more work for a legal doctrine of toleration to do. For example, germane to this chapter will be the need to decide whether potentially harmful public denunciation, criticisms and accusations by one group respecting another are to be permitted (and if so to what extent), when such public statements contain false or misleading claims. Finally, there is the 'enmity' model of pluralism. Under this model, there is little or no scope for moral toleration. Rival groups do not recognise each other as having any right to exist; indeed, each regards the existence of the others as a threat to the public good.[47] Under the enmity model, groups go beyond public criticism and advancing their own agenda, at the expense of other groups. They seek, in addition, to use – or to persuade officials to use – the power of the state to restrict the scope for their rivals' activities (and the activities of their supporters) or to prohibit them altogether. Historically, the enmity model characterised the attitude of the Protestant and Catholic branches of Christianity towards each other at the time of the reformation.[48] The model is in some ways also characteristic of the contemporary attitude of the US Republican Party towards its US Democratic Party rival. For example, Republicans have moved beyond simple political rivalry with Democrats within the existing adversarial electoral framework, to making concerted efforts to inhibit – both in law and in practice – the ability of likely democratic voters to cast their votes.[49] In the field of free expression, stringent criminal laws prohibiting the publishing of 'fake news' about officials or election candidates are especially apt to be used in a partisan way, whether by authoritarian governments[50] or by rivals in conditions of enmity pluralism. For obvious reasons, the enmity model of pluralism, and in particular, groups' attempts to use the legal system to disadvantage or to delegitimise their rivals, is likely simply to clash irreconcilably with any doctrine of toleration.

I will be concerned mainly with the 'mutual respect' and 'rivalrous' models of pluralism. I will seek to show how an assumption that value pluralism by its nature involves mutual respect may leave the legal system ill-equipped to confront the challenges of giving full effect to legal toleration in conditions of rivalrous pluralism. Such an assumption may also lead to the downplaying or neglect of residual powers within a legal system that could be exploited, in conditions of enmity pluralism, by groups intent on restricting or punishing the activities – and in particular, the free expression – of their rivals: widely drawn defamation laws, or law outlawing blasphemy or heresy, being examples. In that regard, it is helpful

[47] For further discussion, in terms of the distinction between adversaries and enemies, see C Mouffe, *On the Political* (London, Routledge, 2005).

[48] See the discussion in Williams (n 41).

[49] See the discussion in Horder (n 4).

[50] See ibid ch 2.

to examine what JS Mill had to say about the rise of religious toleration. As we shall see, his account (wrongly) understands religious pluralism as a non-rivalrous, mutual-respect-based phenomenon, characterised by the moral doctrine of toleration. In fact, different religious sects in Victorian England were rivalrous, and the law's Church of England-inspired response to this was to implement merely a 'thin' political doctrine of toleration. This was a doctrine that permitted only civilised or 'reverent' critique, a doctrine that was also applied in the political sphere to criticism of government. Yet, a commitment to republican freedom in the democratic state requires an approach that is more robustly supportive of free expression in conditions of rivalrous pluralism. Such a commitment is not consistent with a policy in which officials, electoral candidates and other political agents are shielded by the criminal law[51] from uncivilised speech: from biased, partisan, false or misleading attacks, however regrettable such attacks might be. The Victorians' thin doctrine of toleration, which still overshadows the modern law, has no place in a politically vibrant democracy.

The background to Mill's articulation of the harm principle is his concern – later echoed in Ronald Dworkin's development of the notion of rights as 'trumps'[52] – with the protection of a minority from the 'tyranny of the majority'.[53] In terms of liberal-democratic political progress, for Mill, it is not enough to have ensured the accountability through the democratic process of those who hold political office. Beyond that, Mill says:

> There is a limit to the legitimate interference of collective opinion with individual independence: and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against political despotism.[54]

The idea, implicit here, that the protection of individual independence is a separate (albeit related) goal from the elimination of political despotism, comes from Mill's primary focus in *On Liberty* on the individual's *moral* independence: the individual's freedom to form and act on their own conception of what is good in their personal and social lives.[55] However, the protection of 'individual independence' and the suppression of despotism become part of the same goal once one expands the notion of individual independence to include the individual's *political* independence. This is the freedom to form and act on one's own ideas of governance, alone or in combination with others, and to comment critically on the ideas of others, in what Habermas later refers to as the 'public sphere'.[56] The republican significance of this point has, of course, been expounded with great

[51] I am not concerned here with the proper scope of the private law of defamation.
[52] Ronald Dworkin, *Taking Rights Seriously* (London, Duckworth, 1977) ch 11.
[53] Mill (n 43) 9.
[54] ibid.
[55] See, similarly, R Dworkin, 'Is There a Right to Pornography?' (1981) 1 *OJLS* 177.
[56] See eg J Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (MIT Press, Cambridge, MA, 1989).

force and clarity in more recent times by Philip Pettit. In explaining what he calls the 'resilient property' of non-interference by the state,[57] Pettit says that, in a state that protects such non-interference,

> free persons can walk tall, and look each other in the eye. … [T]hey relate to one another in a shared, mutually reinforcing consciousness of enjoying this independence.[58]

I will come back to the significance of this claim at the beginning of section V. It is the foundation of any plausible defence of the citizen's liberty to lie in politics. First, though, we must turn to some of Mill's observations on moral independence, for they have a bearing on Pettit's claim.

For Mill, widely held suspicion about the benefits of government interventionism had hitherto ensured that the law was not as commonly used in England to suppress what he called 'individual independence' as it was in mainland Europe.[59] In England, Mill thought, the worst a moral or religious dissenter might ordinarily expect to face was social stigma and 'merely social intolerance',[60] a contentious view disputed below. Even so, Mill considered it to be a defect of the English approach that, other than in matters of religious belief, people were in general more concerned with what they (and others) ought to think and believe than with the principles that should guide law and public policy in circumstances where significant differences in thought and belief had emerged. For Mill, the 'harm principle' was to be the means by which this deficit would be remedied. It would act as a safeguard against the 'tyranny of the (democratic) majority'.[61] Nonetheless, in Mill's view, in the field of religious belief and practice one could *already* find that, 'the higher ground [respect for the right to moral independence] has been taken on principle and maintained with consistency'.[62] How did Mill think that the state's approach to religious belief had come to be characterised by such 'mutual respect' pluralism (as I have called it)?

In Mill's account, when the religious conflict of post-Reformation England ended, 'without giving a complete victory to any party':

> [E]ach church or sect was reduced to limit its hopes to retaining possession of the ground it already occupied; [and] minorities, seeing that they had no chance of becoming majorities, were under the necessity of pleading to those whom they could not convert, for permission to differ.[63]

[57] P Pettit, 'Negative Liberty, Liberal and Republican' (1993) 1 *European Journal of Philosophy* 15, 16.

[58] P Pettit, 'Criminalisation in Republican Theory' in RA Duff et al, *Criminalisation: The Political Morality of the Criminal Law* (Oxford, Oxford University Press, 2014) 138.

[59] Mill (n 43) 12.

[60] ibid 431.

[61] ibid 8.

[62] ibid 11. In that regard, so far as religious belief was concerned, he commended 'the great writers' on religious liberty, for articulating and making mainstream the view that 'freedom of conscience [is] an indefeasible right', and for 'den[ying] 'absolutely that a human being is accountable to others for his religious belief' (ibid 12).

[63] ibid 11–12. For further discussion of the example of religion, in the context of an analysis of toleration, see Williams (n 41).

Mill probably had in mind here the relatively recent expansion of the Toleration Act 1689 to include Unitarians in 1813 and Roman Catholics in 1832. However, Mill does not support his claims that mutual respect pluralism had at this time emerged in England (whatever the position may now be) with any empirical evidence concerning how major religions regarded their faith, or rival faiths, and the passage is misleading in a number of respects. For example, by 1851, far from resting content with their minority status, Nonconformists had expanded the number of their adherents to make up about half of those attending church on Sundays, the 1830s and 1840s having witnessed thousands of conversions.[64] Correspondingly, having failed in its attempt to maintain the denial of basic liberties to Nonconformists (such as the right to hold public office),[65] the Anglican church then embarked on an aggressive programme to attract believers, building over 600 new churches between 1818 and 1884 and nearly doubling the number of clergy.[66] There is precious little evidence here of Mill's notion that each church or sect was simply content to '[retain] possession of the ground it already occupied' (a classic feature of mutual respect pluralism). It is also incorrect to say that churches and their followers were primarily concerned with securing 'permission to differ' from their rivals, this being another typical feature of mutual respect pluralism. From the 1840s, high church Tractarians were causing outrage by introducing 'Catholic' elements to Anglican services, such as incense and vestments. Protestants reacted with lawsuits, legislation and in some instances violence, in a campaign to halt the 'ritualist plague'.[67] Such was the strength of feeling that, only a few years after the publication of *On Liberty*, Parliament passed the Public Worship Regulation Act 1874, in effect making it a criminal contempt of court for a Church of England cleric to refuse to abide by an order to avoid high-church rituals in conducting Church of England services.[68] Predictably, the move produced a number of 'martyrs' willing to undergo prosecution and imprisonment for their high-church practices.[69] What we see here, then, is clear evidence of rivalrous pluralism, and indeed enmity pluralism, in which state law is used to suppress the activities of rivals.[70]

This background is important because, in his defence of personal independence, in so far as it relates to religion, Mill's concern seems to be mainly with the

[64] DA Johnson, *The Changing Shape of English Nonconformity, 1825–1925* (Oxford, Oxford University Press, 1999) 77; S Mitchell, *Victorian Britain: An Encyclopedia* (London, Taylor & Francis, 2011) 23.

[65] GIT Machin, 'Resistance to Repeal of the Test and Corporation Acts, 1828' (1979) 22 *Historical Journal* 115.

[66] Mill may be referring to this when he speaks of the 'revival of religion': Mill (n 43) 31.

[67] N Yates, *Anglican Ritualism in Victorian Britain, 1830–1910* (Oxford, Oxford University Press, 1999) 82.

[68] http://etheses.dur.ac.uk/1581/1/1581.pdf. The Act was not abolished until 1965.

[69] See eg http://anglicanhistory.org/england/ecu/roberts/1884.html.

[70] Almost needless to say, even 'permission to differ' was at this time not tolerated in far as it might extend to anyone advocating atheism. See generally, NG Conrad, *The Marginalisation of Atheism in Victorian Britain: The Trials of Annie Besant and Charles Bradlaugh* (PhD thesis, Washington State University, 2009).

right to hold minority or controversial religious beliefs, to manifest or advocate one's faith (or the lack of it), and to pose challenges in argument to the foundations of rival faiths.[71] These are legal aspects of toleration associated largely with mutual respect pluralism. He says far less about what toleration demands under conditions of rivalrous religious pluralism, in which speakers are liable to go beyond 'civilised' limits by (say) traducing, denouncing or abusing other religions. So, how should the uncivilised speech associated with rivalrous pluralism be viewed, in the light of the harm principle? As Mill was well aware, the authoritarian and partisan common law gave no support to the freedom to engage in uncivilised speech, in so far as such speech might bring state religion into disrepute. In *Shore v Wilson*,[72] a case that concerned the right of Unitarians to receive trust funds reserved for 'Christians', Sir John Coleridge had said, 'there is nothing unlawful at common law in *reverently* doubting or denying doctrines part and parcel of Christianity, however fundamental'.[73] The precarious position in which vehement critics of state religion still at that time found themselves is only too well illustrated here by the need – spelled out by Sir John Coleridge – for sceptical criticism to be 'reverent' in character if it was to escape state censure. That position was underpinned at the time by the continuing legal significance of the offence of blasphemy (together with heresy[74]). As Mill himself points out in *On Liberty*,[75] in 1857 a well-digger named Thomas Pooley was convicted of blasphemy and sentenced to 21 months in prison for, amongst other things, shouting, 'if it had not been for the blackguard Jesus Christ, when he stole the donkey, police would not be wanted. … He was the forerunner of all theft and whoredom.'[76] Pooley was later found to be mentally disturbed, but luminaries such as Macaulay and Thomas Starkie more generally defended the view that, whilst casting doubt on Christian beliefs and practices was acceptable, contempt or ridicule, and in particular knowingly spreading (supposed) falsehoods, was not. Starkie wrote:

> [T]he law visits not the honest errors, but the malice of mankind. A wilful intention to pervert, insult, and mislead others, by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations or artful sophistry, calculated to mislead the ignorant or unwary, is the criterion and test of guilt.[77]

[71] See the discussion of religious liberty in Mill (n 43) 24–34.

[72] *Shore v Wilson* (1839, 1842) 9 Clark & Finnelly 359.

[73] ibid (emphasis added).

[74] At common law, Hawkins gave as an example of non-capital heresy, 'seditious words in derogation of the established religion [such] as these: "Your religion is a new religion and preaching is but prattling and prayer once day is more edifying"': W Hawkins, *A Treatise of the Pleas of the Crown*, vol 1, 2nd edn (London, Nutt and Gosling, 1724) ch 5, § 6.

[75] Mill (n 43) 29–30.

[76] GJ Holyoake, *The Case of Thomas Pooley, the Cornish Well Sinker* (London, Holyoake and Company, 1857) 12; cited by TJ Toohey, 'Blasphemy in Nineteenth Century England: The Pooley Case and its Background.' (1987) 30 *Victorian Studies* 315.

[77] T Starkie, *A Treatise on the Law of Slander and Libel*, 2nd edn (London, I and WT Clarke, 1830) vol II, 130.

Most importantly, in general, a similarly authoritarian approach guided the law's approach to seditious libel. Holdsworth cites Lord Ellenborough as authority for the view that, whilst 'it is competent for all the subjects of his Majesty [to discuss] every question connected with public policy', the law will step in when someone, 'makes this privilege a cloak to cover a malicious intention'.[78] In the famous trial for seditious libel of Thomas Paine, Sir Thomas Erskine (Paine's barrister) set out what he regarded as the limits of permissible political critique, as follows:

> That every man, *not intending to mislead* but seeking to enlighten others with what his own reason and conscience however erroneously, have dictated to him as truth, may address himself to the universal reason of a whole nation.[79]

At this time, of course, the law's understanding of what is 'intentionally misleading' or involves 'an intention to pervert' was suspiciously capacious. In 1817, there were more than twenty prosecutions of radical publishers for seditious libel, and many more publishers were imprisoned without trial.[80] In the 1820s, some 150 people were prosecuted for blasphemy for publishing and selling Paine's *The Age of Reason* (more prosecutions than for the whole of the eighteenth century),[81] in virtue of its claim that the Bible and Christianity themselves blasphemed God.[82] Mill's work was itself the subject of an inquiry made to the Law Officers whether a blasphemy prosecution could be brought against him.[83] But such vigorous assertions of legal authoritarianism, and Mill's knowledge of other infamous prosecutions for seditious libel,[84] did not lead him to change his view that, other than in exceptional circumstances, the law was not the main enemy of moral independence in England.[85] On his account, it is '*without* the unpleasant process of fining or imprisoning anybody', that the law, 'maintains all prevailing opinions outwardly undisturbed, while it does not absolutely interdict the exercise of reason by dissentients afflicted with the malady of thought'.[86] Accordingly, Mill misses the important republican point, rightly emphasised in recent times by Pettit, that to be subject to improper domination in the political sphere is wrongly

[78] Sir W Holdsworth, *A History of English Law* (London, 1903–72) vol X, 673 n i.

[79] *Rex v Paine* (1792) 22 How St Tr 357, 414 (emphasis added).

[80] Conrad (n 71) 22.

[81] Toohey (n 77) 318–19.

[82] LW Levy, *Blasphemy: Verbal Offence Against the Sacred from Moses to Salman Rushdie* (Chapel Hill, NC, University of North Carolina Press, 1993) 333.

[83] Toohey (n 77) 322.

[84] Such as the prosecution of the radical Edward Truelove for publishing William Edwin Adams's *Tyrannicide: Is it Justifiable?*: see https://newspapers.library.wales/view/3055061/3055063.

[85] About the Truelove prosecution (see n 84), Mill said: 'That ill-judged interference with the liberty of public discussion has not, however, induced me to alter a single word in the text, nor has it at all weakened my conviction that, moments of panic excepted, the era of pains and penalties for political discussion has, in our own country, passed away': Mill (n 43) 106. It would be right to point out that blasphemy prosecutions declined from the middle years of the nineteenth century (see Toohey, n 77), but Mill is not making an empirical point. His claim is about the disposition of the English more generally with regard to prosecution.

[86] Mill (n 43) 32 (emphasis added).

to find oneself subject to an arbitrary power, *whether or not* the person possessing that power is disposed or likely to exercise it.[87] That is why, for example, it was important that, in 2009, Parliament abolished the three notorious loci of arbitrary power in relation to controversial speech – the offences of seditious, obscene and defamatory libel – even though these offences had fallen into disuse.[88]

Mill's concern was, famously, with the possibility that erroneous but adequately thought-out opinion should be permitted to flourish, to aid the discovery and promotion of truth:

> Truth gains more even by the errors of one who, *with due study and preparation*, thinks for himself, than by the true opinions of those who only hold them because they do not suffer themselves to think.[89]

Further, he defended oppositional party politics, with one party advocating 'order or stability' and its opposite number advocating 'progress of reform' as 'necessary elements of a healthy state of political life', because 'it is in a great measure the opposition of the other that keeps each *within the limits of reason and sanity*'.[90] Mill does not address the question of whether or not the state has a role in promoting civilised disagreement of this kind, in relation to religious or political debate, by using coercion to deter and punish knowingly false or malevolent claims in either the religious or the political sphere (or both). Yet, this is a critical matter. The intensely rivalrous nature of both religious and political pluralism is liable to give rise to malicious criticism, conspiracy theories, (defamatory) caricatures of people and their views, and other damaging falsehoods liable to cause harm to – for example – religious and political careers and prospects.[91] Additionally, those persons effectively – or, indeed, legally – excluded from influence in the public domain, however much 'due study and preparation' (to use Mill's words[92]) is put into their advocacy of a political agenda, are liable to turn to so-called 'counter-public' speech.[93] This is dialogue with its own standards for truth and falsity, and for persuasive and unpersuasive lines of argument, that self-consciously rejects the dominant understanding of the acceptable limits to forms and styles of argument.[94] In that regard, emotionally charged religious or political

[87] See P Pettit, *The Common Mind: An Essay on Psychology, Society and Politics* (Oxford, Oxford University Press, 1996) 311.

[88] https://humanrightshouse.org/articles/uk-government-abolishes-seditious-libel-and-criminal-defamation/ (last accessed 16 March 2022).

[89] Mill (n 43) 33 (emphasis added).

[90] ibid 45 (emphasis added).

[91] An important example from a later period was the language used to associate strikers in industrial disputes in the inter-war period with 'Bolshevism': see L Beers, '"Is This Man an Anarchist?" Industrial Action and the Battle for Public Opinion in Interwar Britain' (2010) 82 *Journal of Modern History* 30.

[92] See text at n 90.

[93] For an early exploration of the subject, see M Warner, *Publics and Counterpublics* (New York, Zone Books, 2005).

[94] See, generally, J Marsh, *Word Crimes: Blasphemy, Culture, and Literature in Nineteenth-Century England* (Chicago, University of Chicago Press, 1998).

discourse is liable to gain significant traction in the battle for public opinion. For, as Lord Diplock memorably put it:

> In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognize the cogency of material which might cast doubt on the validity of the conclusions they reach.[95]

There is, indeed, at least some evidence in *On Liberty* that Mill would not have objected to measures being taken to suppress the intentional dissemination of religious and political falsehood. As indicated above, for Mill, what is wrong about coercing people into silence is that the silenced opinion, 'may, and very commonly does, contain a portion of truth'.[96] He goes on to say:

> When there are persons to be found who form an exception to the apparent unanimity of the world on any subject, even if the world is in the right, it is always probable that dissentients have something worth hearing to say for themselves, and that truth would lose something by their silence.[97]

This point about the importance of having 'something worth hearing' can scarcely be said of those who disseminate known falsehoods, baseless conspiracy theories and the like. So, such uncivilised discourse seems vulnerable, on Mill's account, to suppression at the hands of the state. For, as the Attorney General put it in his address to the jury in the Truelove case, when speaking of the offence of seditious libel, 'the people of England, of whom you form a part, would never tolerate or endure the dissemination of doctrines which ought to be rejected and denounced with disapprobation and disgust by every patriot in every country, and by every honest man throughout the world'.[98] Seemingly preoccupied with the benefits of giving free rein to sceptical intellectualism, Mill fails to acknowledge what Sir James Stephen was later to claim, that the English law of blasphemy and seditious libel had created one (repressive) law for 'the vulgar' and another (politically tolerant) law for 'the sophisticated', and hence violated what Stephen called the 'manly simplicity which ought to be the characteristic of the law'.[99]

The idea of uninhibited civic and discursive freedom as naturally allied to masculinity was later taken up by Parliament, when the predecessor to section 106 of the 1983 Act was enacted in 1895.[100] The increasingly contested and rivalrous

[95] *Horrocks v Lowe* [1975] 1 AC 135, 150.
[96] Mill (n 43) 50.
[97] ibid 46.
[98] *R v Truelove*, 25 June 1858, https://newspapers.library.wales/view/3055061/3055063.
[99] JF Stephen, 'Blasphemy and Blasphemous Libel' (1884) 27 NS *Fortnightly Review* 289, 307; cited by Toohey (n 77) 321, n 21.
[100] See text at n 11.

nature of elections had (as in the case of intense rivalry between religions) led to the widespread use of falsehoods to discredit opponents and their policies.[101] To police such developments came a new distinction, related to the legal distinction between 'reverent' criticism (permissible) and the 'wilful intention to pervert, insult, and mislead others' (impermissible).[102] This was the distinction between falsehoods used to discredit election candidates *politically* (permissible) and falsehoods used to make *personal* attacks on candidates (impermissible). Speaking of the use of election lies about candidates, Sir Frederick Milner, Conservative MP for Bassetlaw, fulminated:

> What right had a candidate, or his agent, to go fishing about and try to take up some rumour about the gentleman who was opposing him? They ought to fight their battles like men, on *purely political* issues, and if they did try to fish up scandals, whether they believed them or not, they ought to receive just retribution.[103]

This new distinction – between personal and political attacks – remains foundational today as part of the election law in many jurisdictions, including the United Kingdom. Its unsatisfactory nature as a basis for criminalisation of false information or claims made about candidates will be explored in the next section. More broadly, though, Mill's failure clearly to address the limits of toleration under conditions of rivalrous (as opposed to mutual respect) pluralism in religion and politics, is a flaw that has continued to characterise English law.

V. The Criminalisation of Political Speech

It may readily be granted that there are rights to be free from intimidation, harassment and hate, and that such is the nature of the threat to freedom posed by wrongdoing of this kind that criminalisation is a necessary and proportionate response.[104] However, those are rights that have no special connection or link to engaging in politics or seeking political office. By way of contrast, as indicated earlier, whatever they may think of 'uncivilised' rabble rousing, the spreading of unfounded conspiracy theories, character assassination (and other forms of counter-public speech), officials and election candidates – whether periodically replaceable or not – have only very limited moral scope to employ state coercion to dictate the terms on which citizens assess their political merits. In declaring unconstitutional a prohibition on the malicious publication of a false statement of material fact about a candidate for public office, the Washington Supreme Court

[101] For a historical examination, see Horder (n 4) ch 3.
[102] See text at n 78.
[103] HC Deb 01 May 1895 vol 33, 227 (emphasis added). He went on to complain of 'unmanly and un-English tactics' (such as revealing a candidate's wealth) now being deployed to discredit rival candidates.
[104] See, further, Horder (n 4) ch 3.

said the statute was unconstitutional because it caused 'the government, rather than the people, [to] be the final arbiter of truth in political debate'.[105] As another US court put it, the state cannot 'substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government'.[106] That captures the spirit of republican theories such as that of Pettit, with his emphasis on the right of citizens of the republic to 'walk tall' in speech and deed.[107]

How do these republican ideals fit with the existence of offences specifically concerned with false claims about election candidates? In the United States, some seventeen states have such provisions, and they may be found in many other jurisdictions as well as in the United Kingdom.[108] The criminalisation of the making of such claims is not a minor matter. It has been estimated that in the 2016 US Presidential election, false stories relating to the two candidates were shared at least 38 million times on Facebook, with just over half of Americans who recalled seeing these statements believing them.[109] We saw that, in *Alvarez*, the US Supreme Court cast doubt on the constitutional propriety of criminalising lying, in the absence of a sufficiently substantial aggravating factor connected to the lying such as the occurrence of a legally recognised harm the lie was meant to bring about.[110] It is commonly assumed, in a number of jurisdictions including the United States and the United Kingdom, that where the aim of someone's false statement was the reduction of a candidate's vote share, having such an aim is an aggravating factor sufficient to justify criminalisation.[111] But how consistent is that assumption with a republican emphasis on the need for political toleration of robust, uninhibited and generally uncivilised election-related speech? The problem with regarding the possession of this aim as an aggravating factor in electoral viewpoint fraud is that, in political debate at election time, a very large proportion of election-related political speech – whether or not it involves falsehoods – will be aimed at increasing or reducing a candidate's vote share. Unless it might have that effect, for many people, it would hardly be worth engaging in the relevant speech

[105] *Rickert v Public Disclosure Commission*, 168 P 3d 826, 827 (2007).

[106] *Riley v National Federation of the Blind*, 487 US 781, 791 (1988).

[107] Text at n 60. This claim does not imply that there should be no private law remedy for defamation in appropriate cases, even in political and electoral contexts: see, for example, the Arlene Foster case: https://www.bbc.co.uk/news/uk-northern-ireland-57268308. Even so, there is a strong case for saying that where what officials or election candidates seek is a form or prior restraint (in the form of an injunction), as opposed to damages after the event, it should be necessary to prove that the person who engaged in the defamatory speech knew that it was false. For the requirement to prove knowledge or recklessness, when public figures are defamed, see *New York Times Co v Sullivan*, 376 US 254 (1964). For further discussion of private law rights in this context, see Rowbottom (n 33).

[108] See Lieffring (n 27); Horder (n 4), ch 3.

[109] See H Allcot and M Gentzkow, 'Social Media and Fake News in the 2016 Election' (2017) 31 *Journal of Economic Perspectives* 211.

[110] See text at n 22.

[111] See the helpful discussion in SP Green, 'Lying and the Law' in J Meibauer (ed), *The Oxford Handbook of Lying* (Oxford, Oxford University Press, 2018).

in the first place. So, the mere fact that false political speech has that aim does not really enhance the argument for prohibition, assuming one takes seriously the right provided in Article 10 to engage in (hate-)free political debate.

Moreover, the existence of such criminal prohibitions may cause as many problems as it solves. One problem is that, as is the case in defamation law, such prohibitions provide a way for the powerful and influential to silence or simply punish their (intemperate) critics.[112] Another problem is that these prohibitions have opened up a new means by which election candidates can be tarred by a false accusation that they – the candidates – have themselves lied, thus requiring the candidates to divert attention from their campaign to deal with that issue. As one US court put it:

> Complaints can be filed at a tactically calculated time so as to divert the attention of an entire campaign from the meritorious task at hand of supporting or defeating a ballot question, possibly diffusing public sentiment and requiring the speaker to defend a claim … thus inflicting political damage.[113]

This is not just a hypothetical possibility. In Ohio, where an Election Commission hears cases under its false statement statute, whilst between 2001 and 2010 the Commission upheld 90 complaints, no less than 420 were dismissed, with the biggest single proportion of the failed cases being ones in which no 'probable cause' was found.[114] Ironically, then, it seems likely that election fraud statutes themselves encourage the commission of a species of election fraud, namely the generation of fraudulent (politically motivated) complaints. So, even if it is true that there is a compelling state interest in the public good of honest and truthful debate in politics,[115] it is unclear that statutes criminalising viewpoint fraud do much to promote that interest or to protect the public good.

In the United Kingdom, as in some US states and in other jurisdictions,[116] viewpoint fraud statutes have been restricted to the criminalisation of, in effect, knowingly defamatory statements about candidates in the run-up to elections.[117] However, in the United States, defamation remains a general criminal offence in some fifteen states,[118] and such offences reinforce the chilling effect on speech of more specifically election-focused offences. For example, in 2002, a false claim that a mayor standing for re-election did not live – as required by law – in the county in which they held office was held to be a criminal libel under the Kansas

[112] An example is provided by the facts of *Rickert v Public Disclosure Commission (Rickert I)*, 168 P 3d 826 (Wash 2007), discussed in Horder (n 4) § 1(6)(i), and SA Rodell, 'False Statements v Free Debate: Is the First Amendment a License to Lie in Elections?' (2008) 60 *Florida Law Review* 947.

[113] *281 Care Comm v Arneson*, No 13-1229 (8th Cir Sep 2, 2014) para 25.

[114] ibid para 27.

[115] See eg *281 Care Comm v Arneson*, 638 F 3d 621, 633 (8th Cir 2011).

[116] See eg Canada Elections Act 2000, s 91.

[117] I have already pointed out that UK law (in common with the law in jurisdictions with similar provisions) extends more widely than this. See text following n 11.

[118] EP Robinson, 'Criminal Libel' (2009) www.mtsu.edu/first-amendment/article/941/criminal-libel.

law of criminal defamation.[119] In the United Kingdom, the continued existence of an 'election defamation' offence is more of an anomaly, given the abolition of the broader offence of criminal defamation.[120] Its continued existence must therefore be justified in virtue of the unique combination of defamatory content and the aggravating element[121] – the intent to influence voters – but, as I have already argued, that justification will not suffice in a free speech culture.[122] Moreover, an attempt to narrow the focus of electoral viewpoint fraud offences to frauds consisting of defamatory content involves the law in making arbitrary and politically controversial distinctions.

In the case of *Woolas* (discussed earlier),[123] for example, the Election Court had found that a false claim that a candidate had betrayed a promise to live in the constituency was a claim that related directly to the candidate's *personal* character: 'a person who breaks his promise is untrustworthy'.[124] The Election Court thus found that the false claim fell within the scope of section 106. The difficulty with that argument is that politicians commonly politicise matters of personal trustworthiness and moral integrity, in order to gain electoral advantage. As the US Supreme Court said of this link between the personal and the political, in *Monitor Patriot Co v Roy*:

> A candidate who, for example, seeks to further his cause through the prominent display of his wife and children can hardly argue that his qualities as a husband or father remain of 'purely private' concern.[125]

Similarly, the High Court overturned the part of the Election Court's decision in *Woolas* relating to the 'living in the constituency' claim, on the grounds that the claim related to the candidate's trustworthiness in relation to a *political* position, and thus it fell outside the scope of section 106. The High Court went on to observe that, were such a statement to be held to fall within section 106, that would have a significant inhibiting effect on ordinary political debate.[126] No doubt that is right, but the differing views of the judges in *Woolas* on the point are very understandable. For, as the Supreme Court put it, in *Garrison v Louisiana*:

> Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.[127]

[119] https://ajrarchive.org/Article.asp?id=2606&id=2606.
[120] See text following n 11.
[121] This is the *Alvarez* point about the minimum content of fraud offences, namely that the fraud must have some aggravating element: see text at n 22.
[122] See text at n 112. See, further, Horder (n 4) ch 3.
[123] See text at n 11.
[124] *Watkins v Woolas* [2010] EWHC 2702 (QB), [109].
[125] *Monitor Patriot Co v Roy*, 401 US 265, 275 (1971) (Stuart J).
[126] *R (on the application of Woolas) v The Parliamentary Election Court* [2010] EWHC 3169 (Admin) [117].
[127] *Garrison v Louisiana* 379 US 64, 76–77 (1964).

This illustrates the difficulty of asking the courts to become involved in adjudicating such claims, as a matter of the application of the criminal law. As I have already indicated, an election outcome tainted by fraud can be overturned as a matter of public law.[128] Any candidate also has the right to seek a private law remedy for defamation, or to seek the removal of defamatory content from an internet platform.[129] In short, the case for the continued criminalisation of electoral viewpoint fraud is weak.

VI. Conclusion

It is worth starting a conclusion with the ringing endorsement in *Alvarez* of (republican) freedom to speak, an endorsement that echoes the 'more speech' solution to political falsehoods and half-truth advocated by Brandeis J in *Whitney v California*.[130] The *Alvarez* Court said:

> The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uniformed, the enlightened; to the straight-out lie, the simple truth. … Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person. And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.[131]

An important question these sentiments raise is whether, if a state decriminalises false political viewpoint claims made with a view to influencing voters, it is in some sense abdicating an important responsibility to discourage lying and misleading in politics. Some might argue that the state has no such responsibility, but that argument takes an unduly narrow view of the state's role in relation to the promotion of important public goods. To begin with, there may be special public contexts in which the obligation to be truthful and honest, in relation to viewpoint politics, takes precedence over freedom of speech. So, for example, someone commits a contempt of Parliament when

> deliberately attempting to mislead the House or a committee (by way of statement, evidence, or petition);
>
> – deliberately publishing a false or misleading report of the proceedings of a House or a committee.[132]

[128] See text at n 35.
[129] See generally Defamation Act 2013; Defamation (Operation of Websites) Regulations 2013.
[130] See text at n 15.
[131] *United States v Alvarez*, 132 S Ct 2537, 2550 (2012).
[132] https://publications.parliament.uk/pa/jt199899/jtselect/jtpriv/43/4310.htm.

Similarly, under the Ministerial Code:

> It is of paramount importance that Ministers give accurate and truthful information to Parliament, correcting any inadvertent error at the earliest opportunity. Ministers who knowingly mislead Parliament will be expected to offer their resignation to the Prime Minister.[133]

Continued membership of political organisations can also be made to depend on the observance of truthfulness.[134] More broadly, those who persistently lie about certain issues on social media platforms may find their access to those platforms restricted.[135] Further, beyond the use of (softly) coercive measures, agreements to voluntary codes of conduct for political campaigning, which include commitments to truthfulness and honesty, are something that the state, and social media platforms, are fully entitled to promote.[136]

No one – and certainly not any individual government – has privileged insight into political 'truths',[137] which is an important reason for state toleration of political (or religious) viewpoint untruths. However, that proposition is not inconsistent with defending the legitimacy of official campaigns to encourage people to engage critically with the evidential basis for political argument and judgement.[138] The non-coercive promotion of engagement by citizens with evidence, and with competing argument and perspectives,[139] is arguably one of the most important challenges facing liberal-democratic states in their attempts to create a flourishing and vibrant political environment.[140]

[133] Cabinet Office, *Ministerial Code* (2019) para 1.3(c); but see A Tomkins, 'A Right to Mislead Parliament?' (1996) 16 *LS* 63.

[134] For example, see Conservative Party, 'Code of Conduct for Conservative Party Representatives' (July 2021) www.conservatives.com/code-of-conduct, 6 ('Honesty: – Holders of public office should be truthful').

[135] www.facebook.com/formedia/blog/working-to-stop-misinformation-and-false-news (last accessed 17 March 2022).

[136] P Butcher and J Greubel, 'Towards a European Code of Conduct for Ethical Campaigning' (Brussels, European Policy Centre, 2021), http://aei.pitt.edu/103725/1/PRO-RES_PB.pdf.

[137] 'Any purely governmental response [along such lines] … is bound to be regarded as biased and propagandist': J-BJ Vilmer at al, *Information Manipulation: A Challenge for Our Democracies* (2018) www.diplomatie.gouv.fr/IMG/pdf/information_manipulation_rvb_cle838736.pdf.

[138] See, in the context of a discussion of the duties of internet platforms, Horder (n 4) ch 2.

[139] For example, by encouraging the practice of attaching warnings to unreliable online content, together with links to content involving alternative perspectives. See Horder, ibid.

[140] See, generally, Vilmer (n 138) 170.