Towards a Criminal Offence for Politicians Making Deceptive Representations to the Public

Abstract

In recent years politicians have been increasingly accused of making deceptive representations to the public. The false or misleading information imparted in these representations has the potential to influence how the public forms political preferences, leading to broader democratic implications when the public then engages in democratic procedures. These developments have exposed the need to reflect on what is and should be being done to deter politicians from these representations. My purpose in this paper is two-fold. I explore why these representations are problematic and set out a case for why legal reform is necessary. In doing so I make the case for a new legal solution. Specifically, I advocate for a new criminal offence to address the most egregious deceptive political representations which are made to the public.

Introduction

Deceptive representations (material statements of fact which are knowingly or recklessly false or misleading) have always been pervasive in the political domain.[1] Unlike other types of deceptive statements (like opinions or vague comments), deceptive representations carry greater credibility and influence. They are made with a sincerity and certainty which offer the public something to rely on and induce them to have false beliefs.

As a public we are used to our politicians making these representations. In the 1990's John Major lied to the public about engaging in peace talks with the IRA,[2] and just over a decade later Tony Blair claimed that there was intelligence which showed[3] that Iraq had weapons of mass destruction when this was not the case.[4] Yet recent shifts have meant the situation is now more poignant than ever

[1] P. Bernal, *The Internet, Warts and All* (Cambridge University Press, 2018) pp.229, 234-239, 241.
[2] A. Bevins, E. Mallie and M. Holland, "Major's secret links with IRA leadership revealed" (28 November 1993) *The Guardian, https://www.theguardian.com/uk/1993/nov/28/northernireland*
[3] BBC, "Breakfast with Frost" (26 January 2003) *BBC, https://www.bbc.co.uk/programmes/p00pnb0d* at 5:42-6:10.
[4] Committee of Privy Counsellors, *The Report of the Iraq Inquiry: Executive Summary* (HC 2016, 264) paras 540, 796. See also Gordon Corera, "How the search for Iraq's secret weapons fell apart" (13 March 2023) *BBC, https://www.bbc.co.uk/news/world-64914542*

before. Greater scrutinisation from democratic watchdogs has uncovered more examples of deception, thereby exposing the extent to which politicians are trying to deceive the public. Just a few years ago, Boris Johnson's claim that the UK will make a gain of £350 million a week if it leaves the EU became a notorious example of deception in politics.[5] The implication from the claim was that this was a net gain, when in fact it "did not take into account the rebate or other flows from the EU to the UK public sector […]".[6] Another prolific instance was Boris Johnson's claim that he did not participate in Covid-19 breaches, saying "anybody who thinks I was knowingly going to parties that were breaking lockdown rules […] [are] out of their mind". This is despite having been previously reported as saying "this is the most un-socially distanced party in the UK right now […]".[7] The point is that greater scrutiny has brought to light the regularity with which these representations are made and the extent to which our politicians are trying to deceive us. All this creates an opportunity for reflection. In particular, it invites questions about what the UK's approach to addressing deceptive representations is, and whether it is up to par.

Now, the UK has a multitude of mechanisms at its disposal to recognise and sanction deceptive representations. The problem is that these mechanisms are deficient in various ways, either in terms of not being utilised, having a lack of applicability or being otherwise fundamentally flawed. The result is that politicians are not discouraged from making these representations. In the meantime, the false or misleading information being imparted has the potential to influence how the public forms political preferences. This can have broader democratic implications when the public engages in democratic procedures.

What I argue for is a new criminal offence to complement the existing framework. The criminalisation route has been attempted before, as with the Elected Representative (Prohibition of

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[5] A. Asthana, "Boris Johnson: we will still claw back £350m a week after Brexit" (16 September 2017) *The Guardian, https://www.theguardian.com/politics/2017/sep/15/boris-johnson-we-will-claw-back-350m-a-week-post-brexit-after-all*

[6] Office for National Statistics, "Leave campaign claims during Brexit Debate" (7 February 2017) *ONS, https://www.ons.gov.uk/aboutus/transparencyandgovernance/freedomofinformationfoi/leavecampaignclaimsduringbrexitdebate*

[7] S. Ravikumar, K. MacLellan and W. James, "UK's Boris Johnson and the 'partygate' scandal" (15 June 2023) *Reuters, https://www.reuters.com/world/uk/uks-boris-johnson-partygate-scandal-2023-06-15/*

Deception) Bills of 2006 and 2023. However, these attempts have been unsuccessful and never come close to being enacted into law. My suggestion is that we should still use the criminal law but take a different tact and try to make it more appealing. I advocate for a new and more narrowly drafted criminal offence (compared to what has previously been suggested). Specifically, one which is geared towards the most egregious deceptive representations which are made to the public. Importantly, I argue that this strikes the balance between intervening to provide some protection from democratic harms whilst not overextending the criminal law or giving substance to frequently cited objections.

To substantiate this argument, I adopt a tripartite structure. I begin by using political theory to explain why making deceptive representations to the public is problematic. I then critically assess the efficacy of the mechanisms in the UK's current approach, finding it to be deficient. In the final part of the paper, I propose a way that this deficiency can be addressed and advocate for a new offence. It is beyond what can be achieved in this paper to outline a complete draft offence, but I do put forward a provisional idea of what it could involve. In particular, I highlight certain elements which should form the foundation of the offence, with the aim of capturing the most egregious deceptive representations.

The Problem of Deceptive Political Representations

Why are deceptive representations to the public problematic?

Understanding why deceptive representations are a problem returns to the broader question of how the public forms political preferences. Elite influence as a whole is widely appreciated as being a significant factor in shaping political opinions. "Citizens have clear incentives to take political cues from those more knowledgeable, typically experts or elites whose views are conveyed by the media".[8] The elites which carry this influence are a "wide range of individuals and organizations, including politicians, political officials, policy experts, interest groups, religious leaders, and journalists".[9] Politicians in particular (by this I mean those who are in Parliament or Government) are fundamental

[8] M. Gilena and N. Murakawa, "Elite Cues and Political Decision Making" (2002) 6 Political Decision Making, Deliberation and Participation 15, 15.
[9] Gilena and Murakawa, "Elite Cues and Political Decision Making" (2002) 6 Political Decision Making, Deliberation and Participation 15, 16.

to forming and shaping public opinion. They have the unique position of not only being professionals in the political field but also being informed of and party to the inner workings of policy. As put by Christiano, "the evaluation of policy includes many different elements and areas of expertise" e.g., knowledge of: the sciences, law and policy, how to compromise in the political environment, and local knowledge.[10] This is something which the majority of the public is not well-versed in. The ideal is that the public draws on the expertise of those who are: politicians.

Deference to politicians is similar to how you treat any area outside of your expertise. When you are not an expert in the field you defer to someone who is- this is a logical form of specialist labour-division. In the context of politics, the public subcontracts expertise in policy to politicians with the expectation that relevant and truthful information is relayed back. The public then draws on and evaluates this information, using the evidence and the soundness of an argument's logic to form their own opinions.[11] The issue is that when politicians deceive this arrangement is threatened because the information being imparted is corrupted. The public then potentially forms political opinions from a knowledge base which is comprised of false or misleading information.[12]

With that being said how the public forms political opinions is a multi-faceted issue. In particular, heuristic factors (cognitive short-cuts which enable the public to "be knowledgeable in their reasoning about political choices without necessarily possessing a large body of knowledge about politics")[13] are increasingly recognised as important. This school of thought evolved from the Downsian economic view of public reasoning. In Downs's view, acquiring and evaluating information is a costly activity[14] - requiring a considerable amount of time and effort which most rational people are not willing to expend. [15] The idea is that instead they turn to other more efficient resource-saving devices.[16]

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[10] T. Christiano, 'Rational deliberation among experts and citizens' in J. Parkinson and J. Mansbridge (eds) *Deliberative Systems* (Cambridge University Press 2012) p.28.
[11] Gilena and Murakawa, "Elite Cues and Political Decision Making" (2002) 6 Political Decision Making, Deliberation and Participation 15, 17.
[12] J. Oppenheimer, *Principles of Politics* (Cambridge University Press 2012) p.15.
[13] P.M. Sniderman, R. A. Brody, and P.E. Tetlock, *Reasoning and Choice: Explorations in Political Psychology* (Cambridge University Press 1991) p.19.
[14] A. Downs, *An Economic Theory of Democracy* (Harper & Row 1967) p.207.
[15] Downs, *An Economic Theory of Democracy* p.42.
[16] J. Mondak, "PUBLIC OPINION AND HEURISTIC PROCESSING OF SOURCE CUES" (1993) 15(2) Political Behaviour 167, 168.

Since Downs, a number of scholars have analysed how the public actually forms political preferences, and what has ensued is a growing recognition of heuristic influences.[17] LePoutre for instance, puts great emphasis on the influence of social group membership. He argues that there is an "assum[ption in democratic theory] that […] [the public is] trying to form accurate or reliable political judgments. But there is ample evidence suggesting that, when it comes to politics, people simply accept whatever their social group tells them to believe",[18] through intuitive[19] (social or emotional) reasoning.[20] The core idea is a social group is partly defined through exposure to a "distinctive set of shared social constraints and enablement's by the laws, norms, and physical infrastructure that constitute the social context".[21] The by-product is a shared social perspective with shared constraints and experiences at the forefront. LePoutre argues that this perspective can be influential when group members look to form political preferences. Members take a cognitive shortcut, trusting and using the opinion of other more informed members as a cue for their own political preferences. This is on the assumption that most members will share certain priorities.[22]

The public also draws upon political partisanship to guide the publics preferences. Say, for instance, that you are affiliated with a particular political party and the party approves of a particular immigration policy. You (as a member of the public) are uninformed about the policy and have not yet formed an opinion. To shape your opinion, you refer to the stance your party takes, placing trust in it because you assume that it will have a similar outlook and values to your own.[23]As Kuklinski and Quirk note, "[b]y merely attending to party labels, voters can compensate for a lack of reliable information […]".[24] The classic example of using party affiliation to act as an opinion cue is when

[17] E.g. Achen and Bartels, *Democracy for Realists: Why Elections Do Not Produce Responsive Government* p.272 and I. Somin, *Democracy and Political Ignorance: Why Smaller Government is Smarter* (2nd edn, Stanford University Press, 2016) pp.62-79
[18] M. LEPOUTRE, "Democratic Group Cognition" (2020) 48(1) Philos. Public. Aff. 40, 41
[19] M. LEPOUTRE, "Democratic Group Cognition" (2020) 48(1) Philos. Public. Aff. 40, 41, 43, 51.
[20] Achen and Bartels, *Democracy for Realists: Why Elections Do Not Produce Responsive Government* p.232.
[21] LEPOUTRE, "Democratic Group Cognition" (2020) 48(1) Philos. Public. Aff. 40, 48.
[22] LEPOUTRE, "Democratic Group Cognition" (2020) 48(1) Philos. Public. Aff. 40, 50-51.
[23] J. Mondak, "PUBLIC OPINION AND HEURISTIC PROCESSING OF SOURCE CUES" (1993) 15(2) Political Behaviour 167, 182-184.
[24] J. H. Kuklinski and P. J. Quirk, "Reconsidering the Rational Public: Cognition, Heuristics, and Mass Opinion" in *Elements of Reason Cognition, Choice, and the Bounds of Rationality* (Cambridge University Press 2012) p.155.

people are called to vote on political candidates. Often the public tends not to explore the policies of a particular candidate. Instead, they will often look to the party the candidate is affiliated with to decide how to vote, assuming that the candidate will have a particular outlook because they have a certain party-membership.

Aside from social or political cues, scholars are increasingly noting the use of gut instinct or emotive influence as another heuristic method. Popkin in his pioneering work on voting preferences in the US, places emphasis on the likeability of a party or candidate, as well as the inferences which can be made about their character e.g., their sincerity.[25] These inferences can then be used by the public to influence how they form a political opinion e.g., whether a policy is viewed favourably. Seen in this light, political opinion formation needs to be recognised as a complex and multi-faceted theory.

Whilst it is important to stress that this is not a straightforward issue and that a politician's influence may not be determinative in how opinions are formed, it still has a role.[26] Even new empirically-based studies note its significance. Take, for instance, Clarke et al's mass observation project into voting in the Brexit referendum.[27] The results indicated that when developing opinions, panellists often fell back on feelings.[28] The findings showed that '[m]any panellists looked to the campaign for help, at least initially. They read leaflets and newspapers, watched television and listened to the radio'.[29] The problem was that the misleading, unverified and contradicting claims left them feeling uninformed, and the public was forced to use their instinct to fill that deficit.[30] Another illustrative example is Arceneaux's cross-national analysis of the impact of election campaigns as informational tools and

[25] S.L. Popkin, *The Reasoning Voter: Communication and Persuasion in Presidential Campaigns* (University of Chicago Press 2020) pp.7, 44, 65. See also, J. H. Kuklinski P. J. Quirk, "Reconsidering the Rational Public: Cognition, Heuristics, and Mass Opinion" in *Elements of Reason Cognition, Choice, and the Bounds of Rationality* (Cambridge University Press 2012) pp.153-159.
[26] G. Markus, "The Impact of Personal and National Economic Conditions on the Presidential Vote: A Pooled Cross-Sectional Analysis" (1988) 32 American Journal of Political Science 137, 137–154.
[27] N. Clarke, W. Jennings, J. Moss and G. Stoker, "Voter Decision-Making in a Context of Low Political Trust: The 2016 UK EU Membership Referendum" (2023) 71(1) Political Studies 106, 110 -118.
[28] Clarke, Jennings, Moss and Stoker., "Voter Decision-Making in a Context of Low Political Trust: The 2016 UK EU Membership Referendum" (2023) 71(1) Political Studies 106, 107.
[29] Clarke, Jennings, Moss and Stoker, "Voter Decision-Making in a Context of Low Political Trust: The 2016 UK EU Membership Referendum" (2023) 71(1) Political Studies 106, 113.
[30] Clarke, Jennings, Moss and Stoker, "Voter Decision-Making in a Context of Low Political Trust: The 2016 UK EU Membership Referendum" (2023) 71(1) Political Studies 106, 115-116.

their use by voters.[31] Survey data from 9 European countries across 12 years, indicated that voter learning actually improved when party's campaigned. Although Arceneaux did observe that "voters' pre-existing attitudes and assessment of things beyond the control of political campaigns, like the economy, have the strongest impact on voting decisions, [he also noted that] campaigns play a major role in producing these effects".[32] In other words, whilst heuristic factors were present, their existence did not invalidate the fact that information being imparted by politicians also had influence.

If we follow this reasoning, then we can also hold that the deceptive representations being made by politicians is problematic. It is giving the public a flawed knowledge base on which to make decisions. This is something which has broader democratic implications when the public then engages in democratic procedures whether it be institutional e.g., voting in referendums or elections, or alternative and ongoing signalling procedures e.g., protesting, petitioning or the critiquing of policy decisions.[33] It is on the basis that deceptive political representations play a part in political opinion formation and potentially give rise to democratic implications, that I suggest that this issue is problematic. Having explored why this is a problem, I will now move onto the next part of this paper in which I critically assess the UK's current approach.

The Failure of the Current Approach

The current approach to tackling these representations can be broadly distinguished into two themes: an approach based on a lack of intervention (i.e. the self-correcting public debate) and formal regulation.

Self-correcting public debate

[31] K. Arceneaux, "Do Campaigns Help Voters Learn? A Cross-National Analysis" (2005) 36 British Journal of Political Studies 159, 160, 164-169.

[32] Arceneaux, "Do Campaigns Help Voters Learn? A Cross-National Analysis" (2005) 36 British Journal of Political Studies 159, 160.

[33] See S. Marien and H. Serup Christensen, "Trust and Openness: Prerequisites for Democratic Engagement?" in K. N Demetriou (ed) *Democracy in Transition Political Participation in the European Union* (Springer 2013) 109, for discussion on alternative forms of activism. See more generally, R. Inglehart, *Modernization and postmodernization: Cultural, economic, and political change in 43 Societies* (Princeton University Press 1997) p.307.

The first part of the approach is based on non-intervention, essentially, relying on the idea that public discussion has the ability to self-correct. Such a theory is advocated by a number of free speech scholars including Mill,[34] Brandeis and Holmes,[35] and Mieklejohn,[36] who have all suggested that the public debate has the capacity to identify problematic speech (e.g., false or dangerous rhetoric) and remove it from circulation. The theory is that unconstrained public discussion provides an open platform for ideas, so initially all ideas have equal status. However, as time and the discussion develop, the public is able to scrutinise and challenge different ideas.[37] As ideas are tested and pressure is exerted, some are able to withstand the scrutiny whilst others have their weaknesses and flaws exposed and are subsequently defeated. The argument is that the best and most rational idea emerges victorious.

Under this interpretation a deceptive representation can be introduced into public discussion but it will eventually be exposed.[38] The public discussion acts as a "search engine for truth […]",[39] meaning more formalised regulatory mechanisms may be unnecessary.[40] The logic is that if there is sufficient exposure and scrutinisation, "the good will over time drive out the bad and the true prevail over the false".[41] Free speech will provide its own remedy[42] to deceptive speech. Accordingly, restraining or deterring a type of speech is not the solution. Instead, the public debate should be enriched to help identify it. For instance, more speech and counter speech ("communication that seeks to counteract potential harm that is brought about by other speech")[43] should be added to aid public discussion. As put by Justice Brandeis, "[i]f there be time to expose through discussion the falsehood and fallacies, to

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[34] J. S. Mill, *On Liberty* (4th edn, Longmans, Green, Reader and Dyer 1869) pp.94-95.
[35] *Abrams et al v United States* (1919) 250 US 616 Supreme Court no 316, at 630-631 per Justices Holmes and Brandeis.
[36] A. Meiklejohn, *Free Speech and its Relation to Self-Government* (HarperCollins Publishing 2001) pp.26-27. See also A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Harper 1960) p.27.
[37] *Regina (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15**,** (2008) 1 AC 1312 [28] per Lord Bingham.
[38] *Abrams* at 630-631.
[39] A. Lewis, *Freedom for the Thought That We Hate: A Biography of the First Amendment* (Basic Books 2010) p.185.
[40] A. Meiklejohn, *Free Speech and its Relation to Self-Government* (HarperCollins Publishing 2001) pp.26-27.
[41] *Regina (Animal Defenders International) v Secretary of State for Culture, Media and Sport* n 98 above, [28] per Lord Bingham.
[42] J. Rowbottom, "Lies, Manipulation and Elections— Controlling False Campaign Statements" (2012) 32(3) O.J.L.S. 507, 522.
[43] B. Cepollaro, M. Lepoutre, R. M. Simpson 'Counterspeech' [2023] Philos. Compass. 1, 2.

avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence".[44]

Whilst the self-correcting speech model has appeal, I am not convinced that it is the answer for the same reason other media law scholars have noted e.g., Coe,[45] and Rowbottom.[46] This model is fraught with difficulties and is an idealistic representation of how public debate works. The core issue is that our cognitive processes are not framed in a way which makes us easily-susceptible to changing our beliefs. Individuals are not only biased towards evidence which is familiar[47] but that which fosters confirmation of their previous beliefs.[48] For the most part, even when confronted with evidence to the contrary, the original deceit exerts a "lingering influence on people's reasoning after it has been corrected […]".[49] At times, it can even go further and reinforce the false belief.[50] Afterall, we are particularly predisposed to protect beliefs which form part of our identify (such as political and cultural beliefs). When faced with contradicting evidence[51] we persist in defending our beliefs[52] and will spread the belief further to our "network of like-minded people who have the same propensity to believe […]"[53] to gain affirmation.

[44] *WHITNEY v. CALIFORNIA. No. 3*. 274 US 357(1927), 377 per Justices Brandeis and Holmes.
[45] P. Coe, "Tackling online false information in the United Kingdom: The Online Safety Act 2023 and its disconnection from free speech law and theory" (2023) 15(2) J.M.L. 213, 223-227.
[46] Rowbottom, "Lies, Manipulation and Elections— Controlling False Campaign Statements" (2012) 32(3) O.J.L.S. 507, 522-524. See also, I. Katsirea, "Fake news": reconsidering the value of untruthful expression in the face of regulatory uncertainty' (2018) 10(2) J.M.L. 159, 184-185.
[47] U K. H. Ecker, S. Lewandowsky, J. Cook, P. Schmid, L. K. Fazio, N. Brashier, P. Kendeou, E. K. Vraga and M. A. Amazeen, "The psychological drivers of misinformation belief and its resistance to correction" (2022) Nat. Rev. 13, 15-16.
[48] Ecker, Lewandowsky, Cook, Schmid, Fazio, Brashier, Kendeou, Vraga and Amazeen, "The psychological drivers of misinformation belief and its resistance to correction" 13. See Rowbottom, "Lies, Manipulation and Elections— Controlling False Campaign Statements" (2012) 32(3) O.J.L.S. 507, 522-523.
[49] Ecker, Lewandowsky, Cook, Schmid, Fazio, Brashier, Kendeou, Vraga and Amazeen, The psychological drivers of misinformation belief and its resistance to correction" (2022) Nature Reviews Psychology 13, 13.
[50] E. Thorson, "Belief echoes: The persistent effects of corrected misinformation" (2016) 33(3) Political. Commun. 460, 461.
[51] D. M. Kahan, 'Misinformation and Identity-Protective Cognition', (Yale Law & Economics Research Paper No. 587, 2017), 5-6 *https://ssrn.com/abstract=3046603*.
[52] Thorson, "Belief echoes: The persistent effects of corrected misinformation" (2016) 33(3) Political. Commun. 460, 461.
[53] Bernal, *The Internet, Warts and All* p.240.

Indeed, the evidence does not support the idea that we have the cognitive processing required for the self-correcting model to work. Numerous political studies, such as those conducted by Nhyan et al,[54] Tabler et al,[55] and Lord et al[56] share the finding that the public is resistant to information which contradicts their beliefs. In these studies, individuals were presented with information which challenged their initial assumptions on controversial issues e.g., capital punishment,[57] weapons of mass destruction, or tax cuts.[58] Regardless of the topic in question, individuals were not convinced by the contradicting evidence. They were resistant to it or worse the contradicting evidence actually reaffirmed their commitment to the belief.[59] In the words of Mackenzie and Bhatt, people are drawn to polarising and false speech like conspiracy theories and generalisations: they are "allured by patently false [information] […] dogmatically persist[ing] with [the] belief […]" in the face of evidence exposing it as false.[60] This, I suggest, demonstrates the general issue with the non-interventionist, self-correcting model. If the public is not able to be open to identifying and correcting their misperception, then the deceit will not be defeated and removed from discussion.

Of course, one may counter this assessment of the public discussion with the admission that yes, the theory in its original form is flawed, but a modified version could be effective. To a degree I can accept this. Studies by those such as Kuklinski et al have demonstrated that the public can be induced to correct their belief.[61] However, the counter speech needs to be more sophisticated than the mere

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[54] B. Nyhan, and J. Reifler, "When corrections fail: The persistence of political misperceptions" (2010) 32(3) Polit. Behav. 303.
[55] C. Taber and M. Lody, "Motivated Skepticism in the Evaluation of Political Beliefs" (2006) 50(3) A.J.P.S 755.
[56] C. Lord, L. Ross, and M. Lepper, "Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence" (1979) 37(11) J. Pers. Soc. Psychol. 2098.
[57] Lord, Ross, and Lepper, "Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence" (1979) 37(11) J. Pers. Soc. Psychol. 2098, 2105-2107.
[58] Nyhan and Reifler, "When corrections fail: The persistence of political misperceptions" 32(3) Polit. Behav. 303, 314-320.
[59] Nyhan and Reifler "When corrections fail: The persistence of political misperceptions" 32(3) Polit. Behav. 303, 324-320. See also Lord, Ross and Lepper, "Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence" (1979) 37(11) J. Pers. Soc. Psychol. 2098, 2099-2100.
[60] MacKenzie and Bhatt "Bad Faith, Bad Politics, Bad Consequences: The Epistemic Harms of Online Deceit" p.11.
[61] J. Kuklinski, P. Quirk, J. Jerit, D. Schwieder and R. Rich, "Misinformation and the Currency of Democratic Citizenship" (2000) 62(3) J.Politics 790, 792. See also M. Gilens, 'Political Ignorance and Collaborative Policy Preferences' (2001) 95(2) A.P.S.R. 379, 392.

counteraction of a particular view by ordinary citizens.[62] Instead, there needs to be some sort of authoritative statement, provided by an omniscient source, such as state actors acting on society's behalf.[63]

Such an idea, does have a degree of merit. We already have certain organisations in place such as Radio 4's More or Less podcast,[64] and FullFact,[65] which check claims and the use of figures. We even have the Advertising Standards Authority,[66] which has been posed as being appropriate for checking and regulating political advertising.[67] Despite these, we do not have a single authoritative, unbiased and independent body to check political statements. On the odd occasion, we have tried to do so by using the UK Statistics Authority to correct misperceptions. In the midst of the Brexit campaigning, for example, the UK Statistics Authority (an impartial body) intervened and highlighted the limitations of the claim that £350 million will be invested in the NHS if we leave the EU.[68]

However, this example is a good illustration of how even with this limited intervention the narrative can remain uncorrected. In Clarke et al's study, for instance, panellists found that it was "increasingly hard to decipher and believe" the different claims put forward.[69] Part of the issue was that there was no distinguished authority because public figures were throwing their weight behind a wide range of claims. Thus, the clarity which the UK Statistics Authority sought to provide was lost in the midst of discussion. Nevertheless, even if such a body was able to distinguish itself as being *the* leading authority on exposing deceitful representations, it would likely encounter a number of logistical issues if it was used with greater frequency and on a wider scale. Effective countering would require a

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[62] Rowbottom, "Lies, Manipulation and Elections— Controlling False Campaign Statements" (2012) 32(3) O.J.L.S. 507, 523.
[63] Cepollaro, Lepoutre, Simpson, "Counterspeech" [2023] Philos. Compass. 1, 3.
[64] *https://www.bbc.co.uk/programmes/b006qshd*
[65]*https://fullfact.org/?gad_source=1&gclid=EAIaIQobChMIouPn4Yq6hAMVkphQBh3HnwBDEAAYASAAEgKmGPD_BwE*
[66] Whilst there is a code of best practice, the ASA does not regulate this material, see, ASA Rules 7.1-7.2 at *https://www.asa.org.uk/codes-and-rulings/advertising-codes/non-broadcast-code.html*
[67] This idea was eventually dropped: partly because the ASA primarily deals with commercial advertising (and was ill-suited to regulate non-commercial advertising) and partly because it is financed by advertisers, meaning its independence is more disputable, compared with a statutory body. See, ASA *https://www.asa.org.uk/news/why-we-don-t-regulate-political-ads.html*
[68] UK Statistics Authority, "UK Statistics Authority statement on the use of official statistics on contributions to the European Union"
[69] Clarke, Jennings, Moss and Stoker, "Voter Decision-Making in a Context of Low Political Trust: The 2016 UK EU Membership Referendum" (2023) 71(1) Political Studies 106, 114.

burdensome amount of time and resources. This would be both in terms of interrogating the claims made, and then spreading the exposure of the deceit to the public with sufficient accessibility,[70] "reach[,] and frequency".[71] This would take a significant amount of money, time and effort, and even then, some members of the public may not be convinced. Additionally, there may be particular difficulty in correcting the discussion when the deceit is circulated right before a fixed democratic procedure (e.g., days before a referendum or election). In such circumstances, there simply would not be time to investigate and then correct the narrative: the damage would already be done.[72] All this considered, whilst a modified theory of self-correction has appeal, it is not the answer to addressing deceitful political representations. With this analysis undertaken, this brings me to the next section: examining the regulatory mechanisms.

The regulatory mechanisms

The starting point for an analysis of the regulatory part of the framework, are the Principles of Public Life, which unlike measures such as Ministerial Responsibility apply to all public officials. Following the recommendations of the 1995 Nolan report, seven principles were introduced (selflessness, integrity, objectivity, accountability, openness, honesty, leadership)[73] becoming the quintessential basis for what political behaviour should be. A select few have particular applicability to addressing political deceit. The most obvious one is honesty- that public office holders "should be truthful"[74] in the statements they make or promote.[75] There are also associated values of accountability and openness, which encourage transparency ("unless there are clear and lawful reasons for [not] doing so")[76] and the scrutinization of behaviour more broadly. These principles form part of many codes of

[70] Clarke, Jennings, Moss and Stoker, "Voter Decision-Making in a Context of Low Political Trust: The 2016 UK EU Membership Referendum" (2023) 71(1) Political Studies 106, 114.
[71] B. G. Southwell, E. A. Thorson and L. Sheble 'Introduction: Misinformation among Mass Audiences as a Focus for Inquiry' in *Misinformation and Mass Audiences* (University of Texas Press 2018) p.5.
[72] Renwick and Palese, "Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK be Improved?" (The Constitution Unit 2019) p.39.
[73] The Committee on Standards in Public Life, *Standards in Public Life Vol 1*, p.14 para 55.
[74] GOV.UK, "The Seven Principles of Public Life" (31 May 1995) *GOV.UK, https://www.gov.uk/government/publications/the-7-principles-of-public-life/the-7-principles-of-public-life--2*
[75] R. Thomas, 'Fake news and the Nolan Principles' *Committee on Standards in Public Life* (6 March 2017) *CSPL, https://cspl.blog.gov.uk/2017/03/06/fake-news-and-the-nolan-principles/*
[76] GOV.UK, "The Seven Principles of Public Life"

conduct, including the Ministerial Code, House of Commons and House of Lords, which all hold an overarching duty to observe them.[77]

For the most part, non-compliance with these principles does not result in punitive action. The principles tend to be used as part of an integrity-based model,[78] relying on individual consciences, rather than an overseeing body to regulate behaviour. The premise is that ethical principles are not enforced but embedded into political culture,[79] over time becoming internalised norms of what is acceptable.[80] However since their introduction they have not prompted a drastic change in behaviour,[81] mainly because they rely on individual consciences to uphold them.[82] As MP Liz Saville puts, "we are no longer in [a] […] world [where] chivalry and words as bonds […]"[83] are enough to regulate most political behaviour.

Although the Principles of Public Life mainly operate as guidance for political behaviour, they do have some capacity to trigger sanctions. Of note, is the Ministerial Code where these are enforceable as standards of behaviour. There is not only an overarching duty on Ministers "to adhere to the Seven Principles of Public Life […]",[84] but a specific stipulation that Ministers should be as open as possible with Parliament and the public. Refusal to provide information is only permissible when disclosure would not be in the public's interest.[85] Breaching these Ministerial standards can result in an

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[77] Cabinet Office, "Ministerial Code" (November 2024) para 1.4 *Cabinet Office, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1126632/Ministerial_Code.pdf.* See also House of Lords, *Code of Conduct for Members of the House of Lords, Guide to the Code of Conduct, Code of Conduct for House of Lords Members' Staff* (2022, H.L. 13) pp.2-3 paras 9-12, p.10 para 11; House of Commons, *The Code of Conduct together with The Guide to the Rules relating to the Conduct of Members* (H.C. 2023, 1083) pp.2-3.

[78] F. M. Lartey "INTEGRITY-BASED AND COMPLIANCE-BASED ETHICS PROGRAMS: A CRITICAL ANALYSIS OF KEY DIFFERENCES" (2021) 5(5) I.J.B.E.M. 43, 44

[79] The Committee on Standards in Public Life, *Standards in Public Life Vol 1,* p.3 para 6.

[80] P. Spicker, "Seven Principles of Public Life: time to rethink" (2014) 34(1) P.M.M 11, 11-12.

[81] M. Bull "Whatever happened to the Nolan principles? Sleaze in the government of Boris Johnson" (17 May 2021) *LSE, https://blogs.lse.ac.uk/politicsandpolicy/nolan-sleaze-johnson/*

[82] R. Roberts, "The rise of compliance-based ethics management" (2009) 11(3) Public Integrity 261, 261-273.

[83] Elected Representatives (Prohibition of Deception) Deb Tuesday 28 June 2022, cols 183-185 (Liz Saville).

[84] Cabinet Office, "Ministerial Code" para 1.4. See also Independent Advisor on Minister's Interests, 'Independent Adviser on Ministers' Interests Annual Report 2022-2023' (May 2023) Independent Advisor on Ministers' Interests, para 1 *https://www.gov.uk/government/publications/annual-report-of-the-independent-adviser-on-ministers-interests-may-2023/independent-adviser-on-ministers-interests-annual-report-2022-2023-html*

[85] Cabinet Office, "Ministerial Code", para 1.4(e).

investigation and sanction (e.g., a public apology, remedial action, removal of ministerial salary, or removal from office). Although the Prime Minister can ask the Independent Advisor to investigate the matter and the Independent Advisor can make recommendations, the ultimate judge of whether there has been a breach and what the consequence should be is the Prime Minister.[86] One would think that based on this, that this mechanism would be effective at addressing deceit made to the public. Afterall, if the public is deceived by a Minister, then this is a potential breach.

However, this is not how it works in practice because the Prime Minister does not enforce this standard. Under this mechanism, the Prime Minister is the judge of what is acceptable, and tends not to open investigations just because a Minister deceives the public. Even if the Prime Minister did decide to do so, they are able to opt for minimal sanctions or ignore a finding that a breach occurred.[87] Although the Prime Minister usually follows the advice of the Independent Advisor, there are instances where the findings of their investigation have not been accepted. One notorious example, is Boris Johnson who ignored his then-advisor's findings that Priti Patel was bullying members of staff, allowing her to breach the code without repercussion.[88]

Some of the problem may be ameliorated with the recently updated Ministerial Code. Now, the Independent Adviser greater autonomy and the power to launch investigations into potential breaches. This means that instances of deception which had previously not been investigated may now gain attention and be looked into. Yet, this really just bolsters the investigative side of the issue. The actual enforcement side remains deficient and still grants a great deal of power to the Prime Minister. Decisions over whether a breach has occurred, whether to impose a sanction and the form it should take all lie with the Prime Minister.[89] Regardless of the nature of the problem, the point I am making

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[86] Cabinet Office, "Ministerial Code" para 2.7.
[87] S. Blewett, D. Lynch, D. McGrath, "Rishi Sunak appoints ethics adviser but accused of preserving 'rotten regime'' (22 December 2022) *Press Association https://www.proquest.com/docview/2756691907?parentSessionId=aS1DldJyXi6ckxmlRJXui4mKevTYJidbaoEyYnh539E%3D&pq-origsite=primo&accountid=14533*
[88] S. Murphy "Alex Allan: the veteran windsurfing mandarin who quit over Patel row" (20 November 2020) *The Guardian, https://www.theguardian.com/politics/2020/nov/20/alex-allan-the-veteran-windsurfing-mandarin-who-quit-over-bullying*
[89] Cabinet Office, "Ministerial Code" paras 2.6-2.7.

is that the Ministerial Code and the Principles of Public Life are not appropriate for addressing deceitful representations made to the public. The insufficiency of the existing regulatory mechanisms is one that extends beyond the Ministerial Code and continues into the legal remedy (section 106 of the Representation of the People Act 1983).

Section 106, is integral for any analysis of regulating deceitful representations made to the public, because it is the only legal mechanism which specifically combats it (albeit only electoral defamation). To quote section 106, this provision makes it an illegal practice for a person to make or publish "any false statement of fact in relation to [a] candidate's personal character or conduct […]",[90] "before or during an election",[91] "for the purpose of affecting the return of any candidate at the election".[92] Unless, the individual can show that they "had reasonable grounds for believing, and did believe, the statement to be true".[93] It draws together criminal penalties such as prosecution for an illegal practice and on a summary conviction a fine not exceeding level 5,[94] with civil remedies like the claimant can apply for an injunction to restrain distribution of the deceit.[95] In addition, electoral sanctions can be imposed such as the election being declared void[96] and/ or the respondent being barred from standing for Parliament (or holding elective office) for three years, as well as being asked to vacate the seat.[97]

It is easy to note similar issues to those which were identified in relation to the Principles of Public Life and the Ministerial Code. For instance, it is evident that section 106 has limited applicability, and only addresses a certain variety of deceitful representation made by politicians to the public. Only targeting electoral defamation is itself enough to warrant criticism as it narrows the scope of what is being addressed substantially, but the reality is the scope is much more limited. One reason is that the

[90] Representation of the People Act 1983, s.106(1)(b).
[91] RPA 1983, s.106(1)(a).
[92] RPA 1983, s.106(1)(b).
[93] RPA 1983, s.(1)(b).
[94] RPA 1983, s.169. See also *DPP v Edwards* [2002] EWHC 636, [2002] 3 WLUK 551 at [4]-[13].
[95] RPA 1983, s.106(3).
[96] RPA 1983, s.135, s159.
[97] RPA 1983, s.106(2), s.160(4), (5)(b), s.173(1)-(3). See also Rowbottom, "Lies, Manipulation and Elections—Controlling False Campaign Statements" (2012) 32(3) O.J.L.S. 507, 508.

illegal practice only applies to the personal conduct of a fellow candidate.[98] The courts have repeatedly emphasised that there is a distinction between "whether the statement is one as to personal character or conduct[,] or a statement as to the political position or character of the candidate".[99] The former is actionable and the latter is not. The second limiting factor is that section 106 is only applicable in cases where there has been a lie. As argued by Horder, the notion of "a false statement of fact in relation to the candidate's personal character or conduct" notably excludes deception which is misleading. "[S]omeone might disseminate a perfectly correct claim that a candidate has been convicted of murder, whilst failing to mention that the conviction was later overturned and the candidate completely exonerated [...]".[100]

The narrowness of this scope has meant that section 106 has had little effect. Data from both the Electoral Commission and the law reports prove that this offence has had little use as a legal remedy. For instance, there have only been two convictions in the last thirteen years (despite over 800 allegations having been made to the police during this time).[101] Similarly, only a handful of electoral petitions have been brought.[102] Now, part of this inefficacy may be addressed if the scope of the offence was widened e.g., to accommodate political defamation and other types of representations (like misleading statements). However, even if these amendments were made what it would be addressing, is still negligible. The core issue is, that this mechanism would still only be addressing electoral defamation and not representations which are made to the public more broadly. Much like the Principles of Public Life and the Ministerial Code, even with modifications section 106 would not go far enough.

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[98] RPA 1983, s.106(1)(b). See also *Cumberland Cockermouth Division case* (1901) 5 O'M&H 155, 160.
[99] *Regina (Woolas) v Parliamentary Election Court* [2010] EWHC 3169, (2011) 2 W.L.R. 1362 at [111]. See also [107]-[111], [114].
[100] J. Horder, *Criminal Fraud and Election Disinformation: Law and Politics* (Oxford University Press 2022) p.146.
[101] Electoral Commission, "Fraud data 2010-2016" (Electoral Commission, 2023); Electoral Commission, 'Electoral Fraud Data 2017-2023' (2024) *Electoral Commission, https://www.electoralcommission.org.uk/search?search=fraud+data*
[102] Only 8 civil actions have been brought on s106 grounds in the last thirteen years (electoral petitions or applications for interim injunctions) and few have been successful. Based on a search of the Law Reports through the online databases of Westlaw last conducted in November 2024. Note, that I excluded appeals.

My overarching point in this part of the paper is that the current approach is failing: none of the mechanisms are effectively addressing deceitful representations. Whether it be a lack of comprehensiveness or a lack of use there is inadequate protection in place. Based on this analysis, I suggest that reform is needed. Specifically, I advocate for a new specific criminal offence to complement the existing framework. This would help to ensure that the public's formation of political preferences and democratic participation is based on truthful information.

Towards a Criminal Offence

Having carefully assessed the framework and identified its deficiencies, I will now turn to setting out how we should move forward, specifically suggesting a new criminal offence. I begin by setting out a rough conceptualisation of what I envision the offence to be and then move onto offering some analysis on it, setting out why it is appealing.

A new specific offence for the most egregious representations

In this paper, my argument is that we should introduce a new specific criminal offence for some of the deceptive representations which are made to the public by politicians. Whilst it is beyond what can be achieved in this paper to offer a draft offence, it is necessary to offer a rough indication of what I envision the offence to be. Although I readily admit that this is not a complete outline, I do seek to offer an indication of what the offence should be capturing and highlight certain principles which should form its foundation.

In my view the remit of the criminal offence should be limited to the most egregious representations similar to instances like Boris Johnson claiming that "we send the EU £350 million a week",[103] or Tony Blair claiming that "we have the intelligence that says that Saddam has continued to develop these weapons of mass destruction […]".[104] In my view these are the most egregious because they embody a number of principles which are indicative of greater culpability and potential for significant harm.

[103] Asthana, "Boris Johnson: we will still claw back £350m a week after Brexit".
[104] BBC, "Breakfast with Frost".

First and foremost, egregious instances are forms of true deceit- the politician is aware that what they are saying was false or misleading, or knew that there was risk of it being so. They are therefore worthy of blame because there is a duplicity between what they know to be true and what they are inducing others to believe.

Second, such representations have the potential to cause the most harm to the formation of political opinions and democratic engagement. This requires the following conditions. One, the representation needs to be made by a certain type of politician, namely they need to hold parliamentary or governmental office. Such roles tend to carry greater political influence and are consequently more likely to be given greater credibility by the public when they form their political preferences.
Two, the representation needs to have the potential for collectivised harm. Thus, it needs to be made to the public more broadly, or the politician needs to be aware that it will likely be disseminated to the public more broadly in the near-future. So, this could include conventional communicative transactions e.g., speeches, social media or press releases, but it could also involve other means e.g., radio or television interviews. The obvious exclusion to the behaviour would be speech which is covered by parliamentary privilege (on account of the need for free parliamentary debate).

Third, the representation needs to be a material matter of public interest- as in relevant to the public and with the potential to be influential on their decision-making.

Aside from basing the offence around principles which capture the greater propensity for culpability and harm, I would also include an excuse for justification for justifiable deceit to reflect some situations where the deceitful representation was required or necessitated. The classic example to this would be in instances of national security or when secret negotiations are taking place.
Ultimately, this is what I suggest makes deceptive representations so egregious that they warrant a response. It is these very principles which I suggest should form the basis of the offence.

A case for this new offence

In my view it is natural to turn towards using the criminal law to address this issue, as opposed to other regulatory mechanisms e.g., parliamentary committees or ordinary regulators. Compared to the

other options, criminal law is more expressive and symbolic- it is after all the most severe expression of societal disapproval. The criminal law achieves this through a systematic and holistic reflection on the behaviour, beginning with the stigmatisation associated with the act. The act of criminalisation is a declaration that the state sees it as wrongful and society recognises the severity of being labelled a criminal (e.g., having a criminal record). Being labelled a criminal is something which needs to be disclosed in certain formal contexts (e.g., employment and visa applications).[105] Of course, the punishment itself then also acts as a severe form of censure.[106] Whilst other political and legal mechanisms do have sanctions attached (e.g., typical political sanctions involve a formal reprimand, suspension, or loss of pay and civil remedies involve damages) they are generally not as costly as criminal sanctions. My point is that the criminal law has a social significance and resonance[107] which other regulatory mechanisms do not carry. It sends a powerful message that the conduct will not be tolerated and that if someone engages in this behaviour then they will be labelled a criminal.[108]

This expressive quality should mean that the criminal law is effective as a deterrence. What I mean by this, is that the cost of being labelled a criminal and the actual sanctions imposed should mean that it has a significant cost thereby having a great deterrence on behaviour. The deterrence model is based on rational cost-benefit analysis e.g., if you increase the cost of something, less of it will be consumed. So, if you make a behaviour more costly to engage in less of it will occur[109] because the benefit of engaging in the behaviour is outweighed by the burdens of potentially being caught and punished.[110] If we draw on this reasoning then it is natural to turn towards the more costly mechanism of a criminal offence for political deceit, compared to say regulation through a parliamentary committee or an ordinary regulator. In turn, this should reduce the amount of political deceit that occurs. The main attraction of using this model, is that it works to prevent the behaviour from

[105] A. P. Simester and A. von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart Publishing 2011) p.4.
[106] Simester and von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* p.5.
[107] Simester and von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* pp.4, 212.
[108] C. McGlynn, "Challenging anti-carceral feminism: criminalisation, justice and continuum thinking" Women's Studies International Forum (2022) 93 102614.
[109] G. Tullock, "Does Punishment Deter Crime?" (1974) 36 The Public Interest 103, 105.
[110] T. Brooks, *Punishment: A Critical Introduction* (2nd edn, Taylor & Francis Group 2019) p.45.

occurring in the first place, and as a result is forward-looking.[111] The fact that people are often unwilling to change their mind once they have formed a political opinion means that it is logical to try and pre-empt it: preventing the behaviour from happening and the harm before it occurs. Of course, we also need to impose consequences which reflect the gravity of one's political deceit[112] (retribution) but the strategy of the regulation should centre around deterrence, as opposed to gearing towards a backward-looking response, particularly in light of the idea of protecting the public's ability to form political preferences and engagement in democratic procedures.

Now one may counter this with the argument that deterrence theory is not that successful, drawing on empirical studies to do so. For example, Anderson's survey into male prisoners and the factors influencing their offending suggests that most criminals do not contemplate the potential effect of the criminal behaviour before engaging in it. He notes that "76% of active criminals and 89% of the most violent criminals either perceive no risk of apprehension or are incognizant of the likely punishments for their crimes".[113] With that being said, there is evidence to suggest that the success of deterrence theory varies by context, with a propensity for it to be more effective in cases of minor or administrative crime when individuals undertake rational choice theory before the act i.e. weighing the risks up against the benefits. Dölling et al's meta-analysis of 700 studies [114] notes the effect of the deterrence model varies by type of crime. They note that "statistically significant estimations [are] […] to be found [in minor crimes like] […] traffic offences, whereas the deterrence hypothesis is rarely confirmed in the case of more serious offences". They attribute this to the role of rational choice, which is more prevalent in minor offences, whereas major crimes are often characterised by expression e.g., emotion and spontaneity which often do not give the opportunity for rational thinking

[111] Brooks, *Punishment: A Critical Introduction* p.44.
[112] Brooks, *Punishment: A Critical Introduction* pp.48-49.
[113] D. A. Anderson, "The Deterrence Hypothesis and Picking Pockets at the Pickpocket's Hanging" (2002) 4(2) American Law and Economics Review 295, 295.
[114] D. Dölling, H. Entorf, D. Hermann and T. Rupp, "Is Deterrence Effective? Results of a Meta-Analysis of Punishment" (2009) 15 Eur J Crim Policy Res 201, 214-215.

and a risk assessment.[115] Similar findings can be seen in Abramovaite et al's[116] analysis of police forces and the reduction of theft, burglary and violence in England and Wales. Yes, increasing the certainty of punishment (measured by increased police detections) was associated with a reduction in non-expressive crimes like theft and burglary, but it did not have the same effect on violent crime.

Now, deceptive representations are not crimes characterised by emotion or spontaneity so they are an act which would naturally lend themselves towards a risk assessment. Further, once the politician engages in the risk assessment there are a number of factors that would colour their perception. First, a politician is likely aware of the risks and penalties attached to the offence e.g., likely punishment, so will be well-informed of the potential costs and fully understand the implications of getting caught.[117] Second, politicians have a high social and economic status which should mean that they have more to lose if they engage in criminal acts.[118] Those "who receive relatively few rewards from society, whether [it be] economic or social, would tend to place a greater value on the potential rewards for criminal activity". Conversely, those who receive more rewards will perceive "greater informal costs […]"[119] from engaging in the behaviour such as loss of status and prestige. The political profession aligns with the latter and will mean that they potentially have a lot to lose from engaging in criminal behaviour. In particular, the publicity that is associated with the role, and the long-term effect on their career and livelihood that being caught may have[120] are notable costs and should help to act as a significant deterrent.

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[115] D. Dölling, H. Entorf, D. Hermann and T. Rupp, "Is Deterrence Effective? Results of a Meta-Analysis of Punishment" (2009) 15 Eur J Crim Policy Res 201, 215. See also D. A. Anderson, "The Deterrence Hypothesis and Picking Pockets at the Pickpocket's Hanging" (2002) 4(2) American Law and Economics Review 295, 298, 301-304.

[116] J. Abramovaite, S. Bandyopadhyay, S. Bhattacharya, and N. Cowen, "Classical deterrence theory revisited: An empirical analysis of Police Force Areas in England and Wales" (2023) 20(5) European Journal of Criminology 1663, 1663.

[117] P. H. Robinson and J. M. Darley, "Does Criminal Law Deter? A Behavioural Science Investigation" (2004) 24(2) O.J.L.S.173, 176.

[118] M. R. Geerken and W. R. Gove, "Deterrence: Some Theoretical Considerations" (1975) 9 Law Society Review 497, 498, 507.

[119] Geerken and Gove, "Deterrence: Some Theoretical Considerations" (1975) 9 Law Society Review 497, 507-508.

[120] Geerken and Gove, "Deterrence: Some Theoretical Considerations" (1975) 9 Law Society Review 497, 503-507.

I do admit that the deterrence-effect may be reduced once a person of high socio-economic status is convicted of the offence. As is evident in Weisburd et al's 1995 study into white collar criminals, harsher sanctions like imprisonment had no major effect on reoffending[121] however, this is likely because the costs of being caught become less significant once there has been that first conviction. Their reputation or employment prospects will have already been damaged. My point is not so much that people who have already been convicted will be deterred from engaging in this type of speech, but that those who are not yet offenders will be deterred because the stakes are still high. For those who are not already offenders, the deterrence effect should work.

The overarching point here, is that I have a broad preference towards criminalisation- the criminal law should be more effective at reducing the number of politicians who make deceitful representations, particularly when compared with other regulatory mechanisms. With that being said, there are a number of objections which could be raised in response to my suggestion of using the criminal law. I will examine and address the most frequently raised objections, seeking to highlight the appeal of a new specific offence.

The first objection which could be levied at criminalisation is what I term the legislative objection. What I mean by this, is that it would require the very people who the Act would be restricting to support its passage. I can admit that typically, Parliament has been unwilling to support the passage of similar legislation. For instance, there have been attempts to pass Bills making it illegal for politicians to make deceptive statements (the Elected Representative (Prohibition of Deception) Bill was introduced in 2006 and 2022 and both times the Bills failed to get a second reading). Whilst I admit that there will be a degree of self-interest to overcome, there is reason to believe that Parliament could support a new and different offence. The offence I set out is significantly narrower compared to the one in either of the Elected Representative Bills. Even in the rough outline I provided there are extra conditions of materiality and a broader justifiability defence. As the offence will have less general applicability, it should be more appealing to those in Parliament.

[121] D. Weisburd, E. Waring and E. Chayet, "SPECIFIC DETERRENCE IN A SAMPLE OF OFFENDERS CONVICTED OF WHITE COLLAR CRIMES" (1995) 33 Criminology 587, 587, 593-597.

With that being said, there is evidence to suggest that Parliament can set aside its self-interest. What is particularly indicative is the recent move by the Welsh government committing to making lying in politics illegal.[122] Although what this will entail is unknown (the legislation has not been drafted) the fact that politicians are willing to commit to it and support its passage, suggests that Parliament introducing an Act to criminalise this behaviour is possible. Setting aside these more specific reasons, it is important to stress that most British politicians are answerable to the public. If the public feels that their current representatives are not serving their interests, then politicians can lose political power at the next election. Therefore, if enough public pressure is exerted and expressed in favour of a Bill to address this issue, then politicians would be forced to support it because a failure to do so would risk their political power.

Another possible objection is what I term the politicisation objection. As in the argument that creating a criminal offence to address political deceit would encourage the judiciary to become overly involved in political matters when these institutions should be kept separate. Whilst I can appreciate the validity of this objection, what I am advocating for is a very narrow offence. It would only involve expanding the judiciary's role in addressing political behaviour to a very small degree. Indeed, we already have a number of criminal provisions which each regulate very small amounts of behaviour from our political representatives and public figures. Again, I refer to section 106 of the Representation of the People Act 1983 as well as other offences such as bribery[123] and various provisions which relate to election expenses.[124] My point is that the law already addresses other political issues and has not been brought into disrepute. If you consider this, in light of the fact that the offence would be very narrow and not be something which the courts would encounter every day, then the judicial role would not be extended very much and would likely not influence public perception on judicial independence.

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[122] S. Morriss, "Welsh government commits to making lying in politics illegal" (2 July 2024) *The Guardian*, *https://www.theguardian.com/politics/article/2024/jul/02/welsh-government-commits-to-making-lying-in-politics*

[123] Bribery Act 2010, s.1-2, 6. See also RPA 1983, s.113 for bribery in the context of voting.

[124] RPA 1983, s.72-90D.

A further objection which could be made is what I term the logistical objection. As in the question could be posed how much would difference would such a narrowly drafted offence make? I concede that the offence is quite narrow and this would be compounded by the fact that it is a difficult process to actually enforce the offence. For instance, the Crown Prosecution Service (CPS) requires there to be a realistic possibility of conviction and it to be in the public interest before proceeding with prosecution. Further, even if they do decide to progress with prosecution, court proceedings can take a long time by which point the damage is done. I can appreciate both these objections and do acknowledge that if imposed, this offence would have limited applicability and be subject to the logistical limitations of legal proceedings. With that being said, I am not proposing something that would be used frequently, instead, I am suggesting something which deliberately has limited applicability. Its purpose is not to address deceptive representations more broadly but is more narrowly construed so as to only address the most egregious representations and the most clear-cut cases. So, in my view it is right that this offence would have limited use. In regards to the second issue of it potentially taking a long time to proceed to court, I can fully admit that this is a valid point. However, this seems to be a natural limitation of using any legal mechanism to address behaviour, it does not mean that we should not use them.

The final objection which could be levied at criminalising certain types of political deceit is the free speech critique. What I mean by this, is that you could argue that criminalising a type of political speech would be at odds with our international obligations under the European Convention of Human Rights (ECHR) and in light of the European Court of Human Rights (ECtHR) jurisprudence. To a degree, I can understand the concern, but I do not agree with the sentiment that criminalising this type of political speech would be a violation.

Under Article 10 of the ECHR[125] there is a general guarantee afforded to free expression and political expression is guarded even more fervently with less capacity for interference something which is reflected in ECtHR case law. Traditionally, the court has been very reluctant to grant interferences,

[125] European Convention on Human Rights 1950, Article 10.

offering protection to an entire spectrum of political speech from information or ideas which are favourably received to those which are indifferent and even to those which offend, shock or disturb.[126] As such, not only have relatively straightforward types of political speech been protected (such as ideas which challenge the current institutional order),[127] but also more controversial and offensive types such as where a political applicant engaged in hateful, hostile or offensive rhetoric.[128]
More importantly for the purposes of this paper, ECtHR jurisprudence seems to support the fact that Article 10 protection extends to making false political claims. The pertinence of this is clearly illustrated by *Salov v Ukraine.*[129] In this case Mr Salov (the applicant) had disseminated incorrect information about the alleged death of a presidential candidate, thereby breaching Article 127 of Ukraine's Criminal Code by interfering with "electoral rights, or […] with the activity of an electoral commission, for the purpose of influencing election results […]"[130] and as a result received criminal penalties for doing so.[131]

The Court seemed to have no issue with the fact that the state had satisfied the first two limbs of the test for legitimate interference under Article 10(2). First, the Court found that the legislation under Article 127 was sufficiently foreseeable and clear so as to allow an individual to see the consequences of their behaviour.[132] To add to this, Article 127 was a measure which imposed sanctions for speech that was already made and the ECtHR generally tends to be more tolerant of measures restraining speech.[133] Second, the Court affirmed that safeguarding against false or misleading political

[126] *Eğitim ve Bilim Emekçileri Sendikası v. Turkey* App no 20641/05 (ECtHR, 25 September 2012) para 67, citing *Handyside v United Kingdom* App no5493/72 (ECtHR, 7 December 1976) para 49, and *Jersild v Denmark,* App no 15890/89 (ECtHR, 23 September 1994), para 37.
[127] *Eğitim ve Bilim Emekçileri Sendikası v. Turkey*, paras 70-74.
[128] See, for instance, *Jersild v Denmark, GÜNDÜZ v. TURKEY* App no 35071/97 (ECtHR, 4 December 2003); *Erbakan v Turkey* App no 59405/00 (ECtHR, 6 July 2006).
[129] *Salov v Ukraine* App no 65518/01 (ECtHR, 6 December 2005).
[130] Criminal Code of Ukraine, Art 127.
[131] *Salov v Ukraine*, paras 10-32.
[132] *Salov v Ukraine*, paras 108-110.
[133] *Savva Terentyev v Russia,* App no 10692/09 (ECtHR, 28 August 2019) para 65.

information fell under the legitimate aim[134] of protecting the publics engagement with the democratic processes (such as choosing a presidential candidate).[135]

With that being said, the major issue the Court had was that the interference failed on the latter part of the test: being necessary in a democratic society and proportionate to the aim pursued.[136] In relation to necessity, the Court drew particular attention to the nature of the speech in question, noting the fact that the information was not produced or published by the defendant. Instead, it was; a personalised assessment, had limited impact, and lacked evidence of being made with deceitful intention.[137] When these characteristics were collectively considered in light of the fact that Article 10 protects the discussion or dissemination of information (even if it is strongly suspected to be untrue), there was no need for the interference.[138] Aside from the issues with necessity, the measures imposed were seen as disproportionate to the aim pursued. In particular, the nature and severity of the penalties imposed far outweighed the aim of ensuring the democratic process.[139] In this case, Mr Salov was given a sentence of five years (which was suspended for two), a fine, and annulment by the Bar Association of the applicant's licence to practise law.

Now it is important to stress that I agree with the Courts approach in *Salov*: for that particular speech the measure was unnecessary and the sanctions imposed disproportionate.[140] However, this case can be interpreted as suggesting that there may be circumstances in which political deceit *may* in fact be criminalised in a way which is compatible with Article 10(2).[141] The issue of proportionality may be fairly easily resolved by introducing an offence with less severe sanctions e.g., fines or community orders as opposed to imprisonment, but the problem of necessity may require more work.
I fully admit that not all low value speech (such as false or deceitful political rhetoric) poses such a

[134] *Salov v Ukraine*, para 110. See also *AHMED AND OTHERS v THE UNITED KINGDOM* App no 65/1997/849/1056 (ECtHR, 2 September 1998), para 52 where the Court stressed the importance of ensuring the free will of the people during elections and the need to protect democratic society from interferences.
[135] *Salov v Ukraine*, para 101.
[136] *Salov v Ukraine*, para 116.
[137] *Salov v Ukraine*, paras 113-116.
[138] *Salov v Ukraine*, para 113.
[139] *Salov v Ukraine*, para 115.
[140] *Salov v Ukraine*, paras 110-113.
[141] See Coe's different interpretation of the case in Coe, "Tackling online false information in the United Kingdom: The Online Safety Act 2023 and its disconnection from free speech law and theory" 10-11.

significant threat to the democratic process as to necessitate criminalisation. With that being said, the Court's approach may be different if there was a change in the nature of the deceit. Say, for example, the individual was more culpable, or the deception had more potential for harm by embodying certain qualities which exacerbated its threat. Whilst this is something which was not met by the facts in *Salov*, the reasoning underpinning the judgement suggests that there are other factors which may sway their assessment of whether criminalising political deceitful representations unduly interferes with Article 10.[142] The point to be taken is the offence would need to be more discerning with what it addresses compared to *Salov*, something which I suggest my proposed offence achieves. My offence is very narrowly drafted and only seeks to address the instances of deceit which are indicative of higher levels of culpability and harm (the most egregious). In turn, these are more likely to satisfy the requirement of necessity. The point I am making is that even though the ECtHR has previously viewed similar interferences as violating Article 10, there is reason to argue that the opposite can be achieved, particularly if you impose a narrower and carefully drafted offence.

Whilst I willingly accept that criminalisation is not a route to be entered into lightly (and that there are some legitimate concerns), I have argued that there is a case for criminalising the most egregious instances of deceitful representations and highlighted the appeal of such an offence.

Conclusion

Recent shifts in the political sphere have cast deceptive representations into a new light. As time has progressed, greater scrutiny has uncovered the regularity with which deceptive representations are being made. With the extent that politicians are willing to deceive us now being exposed, the democratic implications on the public's political preferences become more acute. Such developments create an opportunity to reflect on the UK's approach and ask whether it is suitable.

A careful assessment of the UK's approach to addressing deceptive representations highlights how the framework is struggling to cope. I suggest that a new response is needed to help complement what is

[142] See similar points being made about a more discerning threshold in the US context, S. Lieffring, "First Amendment and the Right to Lie: Regulating Knowingly False Campaign Speech after United States v. Alvarez Note*"* (2012-13) 97 Minnesota Law Review, 1047, 1061-1076.

already in place. My suggestion is that the most effective response would be a new criminal offence. I admit that the criminalisation route is something which has been attempted before and often encounters objections. Yet, I still argue that we should use it but take a different tact. Developments in ECtHR jurisprudence demonstrate that a new and narrower criminal offence may be more appropriate. Particularly towards the end of this paper, I put forward a rough idea of what I envision the offence to be. Here, I emphasise how the specificity of the offence seems to mollify some of the frequently cited concerns about criminalising this type of behaviour and stress how it is a feasible course of action. My hope is that following the changes in the political sphere, we reassess our view of the feasibility and capability of an offence to address deceptive representations. I suggest that it has untapped potential in stemming their use.