2019

Counterfeit Campaign Speech

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We are entering an era in which computers can manufacture highly-sophisticated images, audio, and video of people doing and saying things they have, in fact, not done or said. In the context of political campaigns, the danger of "counterfeit campaign speech" is existential. Do current laws adequately regulate faked candidate speech? Can counter speech effectively neutralize it? Because it takes place in the vaulted realm of core political speech, would the First Amendment stymie any attempt to outlaw it? Many smart people who have looked at the general problem of deceit in campaigns have concluded that the state has no business policing it. But most examinations of lies in campaigns involve "real" mistruths told by or about a candidate or issue. As identified here, counterfeit campaign speech is different than a lie; the perpetrator has put false words in candidates' mouths or made candidates appear to take physical actions they have not. It is a form of fraud. Scholars and courts that have examined campaign deceit acknowledge that a narrow prohibition could survive constitutional scrutiny. A ban on counterfeit campaign speech fits that bill. This Article explains how it is possible and why it is necessary.

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INTRODUCTION

Long-held assumptions about First Amendment values in political campaigns are being rattled by technology that fuels not just the mass circulation of lies, but also the ability to manufacture hyper-realistic candidate *source material* that is indistinguishable from reality.[1] More than "fake news" and "alternative facts," this new speech is counterfeit—a faked version of the real thing fabricated with the intent to deceive.[2] The most vivid example of counterfeit campaign speech is the increasingly-discussed problem of "deep fakes," in which cheap and accessible software allows users to manipulate video of candidates to make it appear that they are saying or doing something they have not in fact said or done.[3] This is not simply sophisticated "lip-synching" or crude editing.[4] Rather, this is the use of artificial intelligence and facial mapping technologies to create "digitally real" video or audio depicting the target saying or doing something they did not.[5] Counterfeit campaign speech can also be accomplished through pirated or faked Twitter or Facebook accounts or websites,[6] or as fake comment submissions in online fora in which an author poses as a candidate.[7]

We have lived with misleading and falsely-attributed candidate speech in various crude and less-crude forms since the dawn of democracy.[8] But there is

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1. "Source material," as used here, refers to material (audio, video, written etc.) that appears to emanate from the candidate him or herself (as opposed to statements or material about candidates originating elsewhere).

2. *See generally* Marc Jonathan Blitz, *Lies, Line Drawing, and (Deep) Fake News*, 71 OKLA. L. REV. 59 (2018) (making this distinction in the context of faked news generally).

3. Deb Riechmann, *I Never Said That! High-Tech Deception of "Deepfake" Videos*, ASSOCIATED PRESS (July 2, 2018), https://apnews.com/21fa207a1254401197fd1e0d7ecd14cb.

4. Deb Riechmann, *Fears Grow Over Deceptive "Deepfake" Videos Made to Sway Elections*, TALKING POINTS MEMO (July 2, 2018), https://talkingpointsmemo.com/news/deepfake-videos-adversaries-political-campaigns-national-security.

5. *See* Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. (forthcoming 2019) (providing an excellent description of how deep fake technology works); *see also* Natasha Lomas, *Lyrebird Is a Voice Mimic for the Fake News Era*, TECH CRUNCH (Apr 25, 2017), https://techcrunch.com/2017/04/25/lyrebird-is-a-voice-mimic-for-the-fake-news-era/ (describing technology that enables realistic faked audio speech using algorithms derived from samples from recordings of speakers).

6. *E.g.*, Nancy Scola, *Twitter to Verify Election Candidates in the Midterms*, POLITICO (May 23, 2018), https://www.politico.com/story/2018/05/23/twitter-verify-candidates-midterms-2018-1282802 (describing Twitter's new efforts to verify candidate accounts during 2018 midterms). *But see* Nitasha Tiku, *Twitter's Authentication Policy Is a Verified Mess*, WIRED (Nov. 10, 2017), https://www.wired.com/story/twitters-authentication-policy-is-a-verified-mess/ (explaining that Twitter's efforts to authenticate accounts on its site resulted in a verification system that is "broken" and confusing to users).

7. *E.g.*, Hamza Shaban, *Two Senators Say Their Identities Were Stolen in Fake Net Neutrality Comments to the FCC*, WASH. POST (May 23, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/05/23/two-senators-say-their-identities-were-stolen-in-fake-net-neutrality-comments-to-the-fcc/?utm_term=.aa6c82c05d14.

8. While not candidate speech *per se*, there is ample evidence that the Founders engaged in forgeries. *See, e.g.*, MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 404, 409 (2016) ("Both sides [in the debate over the Constitution's ratification] also published fake letters and essays in the newspapers. . . . Madison, referring to 'an arrant forgery' in the newspapers reporting that John Jay had become an opponent of ratification, complained to Washington that '[t]ricks of this sort are not uncommon with

something new afoot, both because of advances in technology and profound shifts in our information architecture. As described here, counterfeit campaign speech is a form of candidate identity theft.[9] It is not mere impersonation where one acts falsely as another, but instances in which perpetrators, with the intent to destabilize an election, make it realistically appear—often through digital fabrication—that the campaign material emanates from the candidate when in fact it does not.[10] It is not spreading false facts *about* a candidate or her views; it is the intentional hijacking of a candidate's persona with the intention to distort democracy.[11] It is fraud.

How best to grapple with the problem of counterfeit campaign speech? This Article explores why current laws fall short and why the go-to remedy of counter speech is not up to the task. It examines whether a statutory prohibition against counterfeit campaign speech is constitutionally possible. Seeking to prevent counterfeit campaign speech through legal prohibition seems like a radical undertaking.[12] First Amendment protections are, after all, at their height when it comes to political speech.[13] Those who have looked at the general problem of deceit in campaigns have concluded that the state cannot

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the enemies of the new Constitution.' . . . In Pennsylvania, Federalist publishers went so far as to deliberately distort the published account of the state ratifying convention's debates to make it appear as if the Constitution had been unopposed there.").

9. *See, e.g.*, Jack Nicas, *Oprah, Is That You? On Social Media, the Answer is Often No*, N.Y. TIMES (July 7, 2018), https://www.nytimes.com/2018/07/07/technology/facebook-instagram-twitter-celebrity-impostors.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news (noting that a Facebook earnings document revealed that the site contains 80 million fake accounts).

10. Digital and audio counterfeit technology is still relatively crude. In the case of audio counterfeiting, recent studies have suggested that computer-created fake versions of audio clips seem realistic to only about half of listeners. *See, e.g.*, Katherine Shonesy, *UAB Research Finds Automated Voice Imitation Can Fool Humans and Machines*, UAB NEWS (Sept. 25, 2015), http://www.uab.edu/news/research/item/6532-uab-research-finds-automated-voice-imitation-can-fool-humans-and-machines. Deep fake video technology also has yet to be perfected. Looking closely, examples are not yet fully convincing. *See* Supasorn Suwajanakorn, Steven M. Seitz & Ira Kemelmacher-Shlizerman, *Synthesizing Obama: Learning Lip Sync from Audio*, 36 ACM TRANSACTIONS ON GRAPHICS 95, July 2017, http://grail.cs.washington.edu/projects/AudioToObama/siggraph17_obama.pdf (demonstrating and describing one version of deep fake technology counterfeiting Barack Obama speaking). Yet technologists posit that hyper-realistic counterfeiting technology is coming and that when it does, we will lack the means to identify the counterfeits it produces as fake. *See, e.g.*, Charlie Warzel, *He Predicted the 2016 Fake News Crisis. Now He's Worried About an Information Apocalypse*, BUZZFEED NEWS (Feb. 11, 2018) https://www.buzzfeednews.com/article/charliewarzel/the-terrifying-future-of-fake-news.

11. *See, e.g.*, Symposium, *Falsehoods, Fake News, and the First Amendment*, 71 OKLA. L. REV. 1 (2018); particularly Blitz, *supra* note 2; Helen Norton, *(At Least) Thirteen Ways of Looking at Election Lies*, 71 OKLA. L. REV. 117 (2018); James Weinstein, *Free Speech and Domain Allocation: A Suggested Framework for Analyzing the Constitutionality of Prohibition of Lies*, 71 OKLA. L. REV. 167 (2018).

12. The Supreme Court routinely shuts down attempts at adding new categories of constitutional speech restrictions. *See, e.g.*, U.S. v. Stevens, 559 U.S. 460 (2015) (declaring unconstitutional a statute attempting to criminalize depictions of animal cruelty); Brown v. Entm't Merchants Ass'n, 564 U.S. 786 (2011) (invalidating a statute restricting violent video games).

13. Meyer v. Grant, 486 U.S. 414, 425 (1988) (noting that, in the political sphere, First Amendment protection is "at its zenith," and that the burden the state must overcome to justify constraints on political speech is "well-nigh insurmountable.").

constitutionally police it.[14] But, scholars and courts acknowledge that a narrow prohibition could survive constitutional scrutiny.[15] As argued here, a ban on counterfeit campaign speech fits that bill.

This Article makes three contributions to the growing body of analysis of legal boundaries in our post-truth political environment. First, it identifies counterfeit campaign speech as a category of deceptive speech that has yet to be exclusively examined. Second, it details the harms that counterfeit campaign speech inflicts, suggesting that the state has a compelling interest in protecting voters, elections, and candidates from faked candidate speech. And finally, it takes scholars and courts up on their invitation to craft a narrowly-tailored prohibition of campaign deception by focusing on this narrow category. [16]

The discussion proceeds in five parts. Part I identifies what is and what is not counterfeit campaign speech, carving out the contours of its boundaries. Part II describes the harms counterfeit campaign speech imposes on voters, the election system, and candidates. Part III reviews current laws that might address harms emanating from counterfeit campaign speech and concludes they fall short. Part IV examines the extent to which the First Amendment protects counterfeit campaign speech, suggesting that a ban on counterfeit campaign speech could satisfy constitutional scrutiny. Part V then surveys the practical hurdles a ban on counterfeit campaign speech faces, even supposing a prohibition passes constitutional muster. In the end, this Article suggests that a ban on counterfeit campaign speech is both constitutional and needed despite the practical challenges, which are most certainly present.

I. WHAT IS AND WHAT IS NOT COUNTERFEIT CAMPAIGN SPEECH?

A threshold problem in prohibiting counterfeit campaign speech is a definitional one.[17] It is well established that a broad rule prohibiting false

14. *See, e.g.*, Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONTANA L. REV. 53, 77 (2013) ("[T]he state may no longer have the power to ban or punish malicious false campaign speech, whether made by candidates or others.").

15. *See id.* ("[T]o survive constitutional review, any false campaign speech law would have to be narrow, targeted only at false speech made with actual malice."); *see also* United States v. Alvarez, 567 U.S. 709, 734–35 (2012) (Breyer, J., concurring) (stating that a prohibition of deception must be narrowly tailored and must require proof of specific harm to identifiable victims); Chesney & Citron, *supra* note 5 ("[First Amendment doctrine] would seem to preclude a sweeping ban on deep fakes, yet it leaves considerable room for carefully tailored prohibitions of certain intentionally harmful deep fakes.").

16. *See Alvarez*, 567 U.S. at 734–35 (noting that statutes can be narrowly tailored to prevent false statements).

17. Helen Norton offers a helpful taxonomy of lies in elections. *See* Norton, *supra* note 11. Using Norton's taxonomy, the closest fit for counterfeit campaign speech in her taxonomy are "lies about the source of speech." *Id.* at 131-34 ("[M]any election lies involve deceptive aliases and sometimes even outright forgeries to confuse or deceive voters about a communication's actual origins."). Most forgeries in campaigning in the past have involved sending campaign material that appears to come from the campaign itself but is instead manufactured by an opponent. *See infra* Part III.A. Counterfeit campaign speech picks up on this forgery concept, but encompasses not just forged campaign materials like leaflets or letters, but also "forgeries" of or related to candidates themselves.

political speech cannot survive constitutional scrutiny.[18] The concept of counterfeit campaign speech targets a much narrower field of activity. It does not address the problem of faked news generally.[19] Instead, it focuses on instances in which political candidates' identities, actions, words, and images are intentionally faked with the intent to confuse voters and distort democracy.

As an initial matter, why worry just about candidates? Why not also prohibit faked speech of ordinary citizens or other public figures, like celebrities who increasingly face a barrage of injury from faked speech?[20] The present effort leaves those battles for another day. Counterfeited candidate speech is singled out here to address a threat to a process that is a predicate to securing all other rights and privileges guaranteed in a democratic system of government. There are many instances in which otherwise-constitutionally-protected speech is constrained to protect elections.[21] The present effort suggests an addition to that list.

A further line drawing problem exists. In *Minnesota Voters Alliance v. Mansky*,[22] the Court grappled with the question of whether it was possible to bar political speech at polling places. A central question was whether it is possible to segregate out "political speech" for purposes of defining what speech the statute applied to and did not apply to. As a definitional matter, the statute advised that a "political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day."[23] But this did not answer the question, according to the Court, of what was and was not "political." The state tried to narrow the definition to "any subject on which a political candidate or party has taken a stance."[24] Justice Roberts writing for the majority asked, "[w]ould a 'Support Our Troops' shirt be banned, if one of the candidates or parties had expressed a view on military funding or aid for

18. Hasen, *supra* note 14, at 69 ("[B]road laws targeting false speech stand little chance of being upheld regardless of the topic. A court undoubtedly would strike down a broad statute prohibiting false campaign statements made in any place and at any time.").

19. For an artful argument aimed at achieving this broader goal, *see* Blitz, *supra* note 2. The U.S. Senate is currently deliberating a bill that would achieve this broader result. *See* Malicious Deep Fake Prohibition Act of 2018, S. 3805, 115th Cong. (2018).

20. Celebrities are increasingly subject to celebrity identity theft that has real and frightening consequences. *See* Nicas, *supra* note 9 (describing the problem of celebrity ID theft).

21. *See* Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1816 (1999) (noting "limits on what voters are permitted to express at the ballot box; mandatory disclosure obligations on the identity of political speakers; content-based regulations of electoral speech . . . like electioneering near polling places . . . [and] selective bans on contributions from some speakers" [such as foreigners] (footnotes omitted)); *see also* Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281, 285 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012); C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. Rev. 1, 24-33 (1998); Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751, 1753-55 (1999).

22. 138 S. Ct. 1876 (2018) (holding that Minnesota's ban of political apparel in polling places unconstitutionally restricts a form of expression protected by First Amendment).

23. MINN. STAT. § 211B.11(1) (2018).

24. Minn. Voters Alliance, 138 S. Ct. at 1881.

veterans? What about a '#MeToo' shirt, referencing the movement to increase awareness of sexual harassment and assault?"[25]

The prohibition of counterfeit campaign speech considered here escapes this definitional quagmire. A court need not dither with the question of whether the speech is political or not; if a person has intentionally tried to pass off speech as emanating from a candidate running for public office, regardless of its content, the prohibition kicks in.[26] In the world of campaign finance, speech may be regulated if it refers to a clearly identified candidate or the image or likeness of a clearly identified candidate.[27] Likewise, in the case of counterfeit campaign speech, speech would only fall within a prohibition's ambit if it were falsified source material supposedly emanating from a specific, clearly identifiable candidate running for office.[28] Other counterfeits—like a fabricated video of a riot, faked evidence of a "crisis actor" in a school shooting, or a doctored image of an immigrant toddler—even if attempting to distort an electoral result, would not be implicated.[29] Counterfeit speech relating to policy issues would also be excluded from the proposed prohibition.[30]

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25. *Id*. at 1890. Scholars have questioned whether this line-drawing problem is, in fact, a problem at all. *See, e.g.*, Schauer & Pildes, *supra* note 21, at 1827 ("It is of course true that the line separating electoral speech from non-electoral speech would necessarily be both fuzzy and porous, and it is equally true that this would limit the effectiveness of any election-specific principles. But it is important to note that there is no reason to suppose that this line would be either more fuzzy or more porous than, say, the line between commercial speech and other forms of speech protected by the First Amendment.").

26. Marc Blitz discusses this distinction, arguing that the First Amendment might accommodate the "restriction of one method of making the case for a belief (through altered video) but not another (by a verbal performance intended to give the false impression that certain memories and experiences actually occurred.)" *See* Blitz, *supra* note 2, at 112.

27. Buckley v. Valeo, 424 U.S. 1, 44 (1976) ("[I]n order to preserve the provision against invalidation on vagueness grounds, [the campaign finance regulation at issue] must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate"). Because a prohibition of counterfeit campaign speech focuses on the speech of candidates themselves, it avoids the same vagueness problem Buckley confronted with speech *about* candidates; *see also*, Schauer & Pildes, *supra* note 21, at 1828 (noting that regulation of campaign finance survives First Amendment scrutiny if it regulates "communication that occurs within a specified time period of a particular election [or] that refers to a clearly identified candidate or features the image or likeness of a clearly identified candidate.").

28. The prohibition could be further narrowed to mimic campaign finance regulations that govern speech only for a specific number of days prior to a primary or general election. Citizens United v. FEC involved a regulation that placed limits based on the timing of election speech. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 321 (2010) (discussing federal statute defining an "electioneering communication . . . as 'any broadcast, cable, or satellite communication' that 'refers to a clearly identified candidate for Federal office' and is made within 30 days of a primary or 60 days of a general election [citing 2 U.S.C. § 434(f)(3)(A) (2012)].").

29. Kevin Roose, *Debunking 5 Viral Images of the Migrant Caravan*, N.Y. TIMES (Oct. 24, 2018), https://www.nytimes.com/2018/10/24/world/americas/migrant-caravan-fake-images-news.html (writing about the photos of the caravan coming from Honduras that were "debunked" as being misrepresented and mislabeled); Kim Lacapria, *Crisis Actors Uncovered?*, SNOPES (Oct. 26, 2015), https://www.snopes.com/fact-check/same-girl-crying-now-oregon/ (debunking crisis actor claims from Sandy Hook and Parkland shootings).

30. What if a member of a candidate's family is "deep faked" specifically to harm the candidate's chances of election? What if a candidate is made to appear next to a controversial figure with the aim of doing harm to the campaign (for example, in the commercial context, the famous Benneton advertising campaign that featured

Another question revolves around what might constitute falsification or manipulation. A clear case would involve the perpetrator creating a deep fake audio or video of a candidate saying something she did not in fact say. But other kinds of manipulations might be harder to label. For example, would such a ban cover statements taken out of context? Suppose a candidate gave a public speech in which she promised, "I don't believe we should get rid of all immigrants!" What if her opponent then aired an attack ad using video of that speech edited such that the candidate utters the stand-alone statement: "We should get rid of all immigrants!" Is this counterfeit campaign speech?[31]

One argument for not including such edited-but-real candidate speech within the ambit of a counterfeit campaign speech prohibition is that its deception is more easily verifiable.[32] Participants in the political process should be encouraged to get the full story; the media and campaigns should work to expose context—here, to air the full clip of a candidate's speech. The problem discussed here arises only when there is no means, at least that we can reasonably expect voters to employ, to discern truth from falsity. In the case of counterfeit campaign speech, the counterfeiter has fabricated source material such that additional work and/or more speech cannot cure the harm.[33] Selective editing is less pernicious than counterfeiting, assuming ready means are available to the public and press to expose the context of the candidate's remarks.[34] The same

prominent figures kissing, including The Pope and a Muslim leader)? *See* Riazat Butt, *Benetton Tears Down Pope-Kissing Ads After Vatican Legal Threat*, THE GUARDIAN (Nov. 17, 2011), https://www.theguardian.com/world/2011/nov/17/benetton-pope-kissing-ads. What if the doctored image does not feature the candidate's face or voice, but shows a falsified image of his car heading into the parking lot of a motel, claiming an illicit affair? Borrowing from the campaign finance context, one approach would be to include such indirect reference through a prohibition of counterfeits that *refer* to a clearly identified candidate. For some, such a prohibition sweeps up too huge a swath of speech. For that reason, the proposed prohibition here would address only counterfeited speech of the candidate him or herself and would not include speech that could be seen to "refer" to the candidate in some way.

31. What about the video of House Speaker Nancy Pelosi doctored to make her seem inebriated? *See* Sarah Mervosh, *Distorted Videos of Nancy Pelosi circulate on Facebook and Twitter*, N.Y. TIMES (May 24, 2019) (describing how some social media platforms removed the doctored video while others, including Facebook, did not and citing other examples of manipulated video) https://www.nytimes.com/2019/05/24/us/politics/pelosi-doctored-video.html. The Pelosi video's distortion did not involve new-fangled technology. Its creators simply slowed down passages to make it appear that the Speaker was slurring her words. *Id*. Putting aside that Pelosi is a sitting official and not a candidate, would a ban on counterfeit campaign speech cover such distortion? Assuming its creators could not credibly mount a parody defense, there is a strong argument to include it within the ambit of counterfeit campaign speech. It is difficult to see how to distinguish it from a deep fake, the paradigmatic example of counterfeit campaign speech. How much damage would the Pelosi video have done circulated on the eve of an election in which she was a candidate? Should would-be creators of the distorted video be deterred from circulating it prior to an election by a criminal ban? The answer offered here is yes.

32. Even obvious deceptions, however, fall prey to the "balance trap." *See* Chris Edelson, *Lies, Damned Lies, and Journalism: Why Journalists Are Failing to Vindicate First Amendment Values and How a New Definition of "The Press" Can Help*, 91 OR. L. REV. 527, 581–83 (2012) (describing the press' failure to call out inaccuracies in campaign material in the interest of appearing "balanced" in coverage).

33. *See infra* Subpart II.A.

34. A harder question: what if the edited candidate speech cannot be verified? What if candidate speech is edited, but no original exists (or, at least, is not publicly available) that would enable the public to confirm its falsity? Perhaps in this instance the law should require the selective editor to post a publicly-available full clip

cannot be said of counterfeit campaign speech, which passes fake speech off as real.[35]

What about a distortion of candidates' *positions*? Does this fall under the proposed prohibition? Imagine a candidate gave a public speech supporting constraints on illegal immigration. Suppose further that an independent group ran a political advertisement using portions of that speech with added images that suggest she also supports separating immigrant children from their parents when, in fact, she does not.[36] Has the independent group engaged in counterfeit campaign speech? The prohibition advocated here would only prevent that independent group from materially altering a candidate's message and passing it off as authentic; it would only reach manipulation of candidate source material. Inaccurate representations of candidates' positions that do not materially alter the statements or actions of candidates would not constitute counterfeit campaign speech.[37] Why? The nub of the problem is voters' inability to discern truth from falsity of counterfeit campaign speech.[38] When a candidate's views are distorted, but not through manipulation of their voice or image, it is up to the candidate and campaign to correct the distortion. In the case

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of the unedited-version. This solution seems unworkable in the extreme, given how commonly clips of candidate speech circulate and how common the practice of selective editing is. We have seen versions of this very real problem of selective editing surface. *See, e.g.*, Dave Levitan, *Unspinning the Planned Parenthood Video*, FACTCHECK.ORG (July 21, 2015), https://www.factcheck.org/2015/07/unspinning-the-planned-parenthood-video/. There are no easy answers. One possibility is to leave it to courts to discern whether the requisite intent to mislead voters, undermine the electoral process, and harm a candidate's chance of electoral success is present.

35. *See infra* Part IV.A. An obvious retort might be that a candidate can refute the counterfeit speech by calling it out as fake. This is the option candidates are currently left with. When someone sent a counterfeited text message appearing to emanate from U.S. Senate candidate Beto O'Rourke's campaign, he issued numerous denials. And, to a degree, this was enough to cure at least some of the problem. But the "it's fake" remedy falls short for a number of reasons. First, it assumes the candidate is aware of the faked speech circulating. Second, it assumes that telling voters after the fact that the material is fake adequately cures the harm done. *See infra* Part IV. Third, in a world in which multitudes of fakes are circulating, this remedy becomes wholly ineffective. In the case of the O'Rourke text, the faked text emanated from a volunteer using a campaign platform run by a third-party provider. *See* Issy Lapowsky, *Fake Beto O'Rourke Texts Expose New Playground for Trolls*, WIRED (Sept. 7, 2018), https://www.wired.com/story/fake-beto-orourke-texts-expose-new-playground-for-trolls/. As the story points out, "[l]ucky for O'Rourke, the message the rogue texter sent was outrageous enough to be easily dismissed as a troll. But what if a slightly savvier bad actor tweaked the message in a way the average voter could believe?" *Id*.

36. Distortion-through-editing is a common phenomenon in politics. *See* Levitan *supra* note 34, discussing the Planned Parenthood example.

37. Note that, as explored below in Subpart III.B, distortions may form the basis of a successful false light claim. William Prosser, when originally defining the tort of false light, listed as an example the unauthorized use of a person's name as a candidate for office. *See* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 399 (1960). Prosser does disservice to this contention, however, by citing a case from 1893 that does not involve a candidate (plaintiff sued over use of his picture in a newspaper contest). The cited case also suggests a clear exception for candidates for office. *See* Marks v. Jaffa, 6 Misc. 290, 291 (1893) (noting that when people "transgress the law, invoke its aid, or put themselves up as candidates for public favor, they warrant criticism, and ought not to complain of it."). *But see* Battaglia v. Adams 164 So. 2d 195 (Fla. 1964) (finding that unauthorized use of an individual's name in connection with a candidacy for public office is a violation of his right of privacy).

38. *See infra* Subpart II.A.

of faked candidate speech, the public is supplied two versions of the reality, setting up an impossible fix for the campaign.

What about counterfeited campaign speech produced for non-malicious ends (i.e., designed to enhance the reputation of a candidate)? What if a candidate's supporter produced a deep fake in an attempt to make the candidate appear *more favorably*? Suppose, for example, a supporter deep faked a candidate with a history of racist remarks such that she seemed to be praising the contributions of minorities? The nature of the resultant harm parallels the harm the false light tort seeks to prevent—providing plaintiffs a remedy for being depicted *falsely*, even if the depiction is a positive one.[39] For this reason, the intent prong cannot focus solely on harm to candidates, but must target intent to confuse voters and distort the democratic process, harms discussed below.[40]

Another hard problem is one of timing.[41] In the modern campaign environment, candidates may announce they are running for election many, many months in advance. And those elected can begin reelection campaigns soon after taking office. The existence of the "perpetual campaign"[42] makes it difficult to confine the prohibition suggested here.[43] Since the real damage is done when candidates lack sufficient time to educate voters that material is counterfeited, one possibility is to limit the prohibition to counterfeits circulated for some fixed period prior to the election itself.[44] In the campaign finance

39. *See infra* note 165. Helen Norton also wrestles with regulating reputation-enhancing campaign lies. Helen Norton, *Lies to Manipulate, Misappropriate, and Acquire Government Power*, in LAW AND LIES: DECEPTION AND TRUTH-TELLING IN THE AMERICAN LEGAL SYSTEM 143, 180–90 (Austin D. Sarat ed., 2015).

40. In comments on an earlier draft of this Article, Professor Marc Blitz suggested an intriguing solution to the intent problem. One approach might be to stop short of banning counterfeit campaign speech, but instead require the circulator of counterfeited campaign speech to provide a disclaimer that the material is faked. Failure to attach such a disclaimer to knowingly counterfeited campaign speech would result in liability. E-mail from Professor Marc J. Blitz, Alan Joseph Bennett Professor of Law, Okla. City Univ. Sch. of Law, to author (Feb. 2, 2019, 8:14 PM EST) (on file with author). The proposal suggested herein retains a ban on counterfeit campaign speech but exempts circulation of counterfeit campaign speech clearly identified as fake.

41. Discussed *infra* Subpart V.B.

42. *See generally* FRANCES E. LEE, INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN (2016) (explaining the recent hostility between members of different political parties); William A. Galston, *Politics & Ideas: The 'Permanent Campaign' = Perpetual Paralysis*, WALL ST. J., Oct. 29, 2014, at A17; Molly Ball, *President Trump's Perpetual Campaign*, THE ATLANTIC (Dec. 6, 2016), https://www.theatlantic.com/politics/archive/2016/12/the-power-of-president-trump/509684/.

43. Another timing issue: what if someone created counterfeit speech using footage of a sitting official who later ran for office? Would that person's activity become a crime the moment that official declares her candidacy? California legislators seeking to address "bot" participation in political speech are encountering this same issue. *See* Jonah Engel Bromwich, *Bots of the Internet, Reveal Yourselves!*, N.Y. TIMES (July 16, 2018), https://www.nytimes.com/2018/07/16/style/how-to-regulate-bots.html. The proposed legislation would require automated social media accounts seeking to influence elections to identify themselves as bots. Ryan Calo, a co-director at the University of Washington's Tech Policy Lab, wonders how this would work, particularly when bot participation precedes a person running for office. *See id.* ("Political commentary comes in different forms . . . . Imagine a concerned citizen sets up a bot to criticize a particular official for failing to act on climate change. Now say that official runs for re-election. Is the concerned citizen now in violation of [the proposed] California law?").

44. Note that a further definitional problem is whether the prohibition should be aimed at the timing of when the counterfeited material is distributed versus when it is discovered to be fake.

context, the Supreme Court has blessed regulating "electioneering communication" that occurs within thirty days before a primary and sixty days before a general election.[45] Since counterfeits can be extremely difficult to detect, perhaps the window for the prohibition proposed here should be longer. Whatever the time period, bounding the prohibition to a specific window of time would help narrow its application.

Equally difficult is navigating exemptions for the news media and political commentary. The July 30, 2018 cover of *Time Magazine* featured a morphed image combining Donald Trump's face with Vladimir Putin's.[46] The eerie photoshopped image was meant as commentary on Trump's Russia policies and the question of collusion. Could political commentary that "distorts" candidate images for purposes of making a political point constitute banned counterfeit campaign speech? The answer has to be no, but how could a law reasonably distinguish between political commentary by members of the media (an ever-broadening category)[47] versus prohibited counterfeit campaign speech? Again, the intent prong is one source of resolution. In this example, *Time Magazine* is not attempting to trick or defraud the public by passing off the image as real with a malicious intent to confuse voters and undermine democracy. Ensuring such a ban does not inhibit robust political commentary is essential.

A final and related definitional hurdle is that any successful effort to regulate counterfeited candidate speech must carve out parody. The long history of political parody in this country requires that political parodies of candidates involving manipulated voice and images and other source material be protected speech.[48] This is no less true of the proliferation of comic memes of candidates online. Now perhaps more than ever the need for collective comic relief amidst our fraught election environment is great. But a parody carve-out creates an

45. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003) (ruling the Bipartisan Campaign Reform Act constitutional).

46. Nancy Burson, Magazine Cover Photograph of a Photoshopped Mashup of Trump and Putin's Faces, TIME MAGAZINE, (July 30, 2018).

47. *See* Erwin Chemerinsky, *Tucker Lecture, Law and Media Symposium*, 66 WASH. & LEE L. REV. 1449, 1452, 1465 (2009) ("If special protections were given to the institutional press, how would lines ever be drawn in light of the democratization of access to the media? . . . [L]aws that do provide special protections to the institutional press need to be reconsidered and be expanded . . . .").

48. Any regular viewer of web content can attest to the ever-presence of political memes. Political memes put words into candidate's mouths with regularity. Candidates targeted by memes have tried a variety of legal tools to seek redress. As an example, Debbie King, a local Republican Party vice chair in Haywood County, North Carolina, filed an invasion of privacy by appropriation and intentional infliction of emotional distress suit against an activist member of a splinter faction of the Republican Party who circulated a meme of King using doctored images to depict her in compromising circumstances. King's complaint alleges that she suffered "emotional psychological distress, embarrassment, humiliation, physical disability, loss of appetite [and] stress." Cory Vaillancourt, *Haywood GOP Officer Sues Over Mocking Memes*, SMOKY MOUNTAIN NEWS (Feb. 14, 2018), https://www.smokymountainnews.com/news/item/24219-haywood-gop-officer-sues-over-mocking-memes. Do political memes that use various effects to put words in candidates' mouths rise to the level of counterfeit campaign speech? While potentially actionable in tort, unless the meme attempts to pass off faked candidate material as real with intent to harm voters and distort the electoral process, memes fit squarely into the parody exception.

obvious line-drawing problem.[49] This can be a dangerous line to draw but should not sink the project. Courts regularly engage in analyses of intent. One has only to look at defamation, copyright, and trademark jurisprudence to see the regularity of the task.[50]

Given these many definitional hurdles, what would a prohibition of counterfeit campaign speech look like?[51] A prohibition of counterfeit campaign speech imagined here would impose criminal sanction for the knowing manufacture of fake images, audio or other material of an identifiable candidate for public office, published within [a specified number of] days prior to an election, with intent to deceive voters and distort the electoral process.[52]

49. Lili Loofbourow, *How Conservative Trolls Lost Their Mojo: It's Hard to DGAF Once You're in Power*, SLATE (July 8, 2018), https://slate.com/news-and-politics/2018/07/trolls-and-the-trump-gop-are-sounding-awfully-alike.html (describing how internet trolls commonly assert that hate speech was "a joke."). Another interesting example that arguably falls in a parody grey area is an effort by a Trump campaign consultant to create fake websites of Democratic presidential candidates. As the New York Times describes the mock Joe Biden site, JoeBiden.info, it "breezily mocks the candidate in terms that would warm the heart of any Bernie Sanders supporter: There are GIFs of Mr. Biden touching women and girls, and blurbs about his less-than-liberal policy positions, including his opposition to court-ordered busing in the 1970s and his support for the Iraq war. Pull quotes highlight some of his more famous verbal gaffes.…The introductory text declares, 'Uncle Joe is back and ready to take a hands-on approach to America's problems!'" Matthew Rosenberg, *Trump Consultant is Trolling Democrats with Biden Site that Isn't Biden's*, N.Y. TIMES (June 29, 2019), https://www.nytimes.com/2019/06/29/us/politics/fake-joe-biden-website.html. Whether or not the site intends it, many site users believe the site to emanate from the Biden campaign. Language at the foot of the webpage notes that the site "is a political parody built and paid for 'BY AN American citizen FOR American citizens,' and not the work of any campaign or political action committee." *Id.*

50. Laura A. Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B.C. L. REV. 1341, 1422-23 (2011) (noting that "parodies are generally protected speech under several doctrines, including defamation, copyright infringement, and trademark infringement, in part because the impersonation concerns are minimized—in other words, parodies will typically be understood to be the defendant's speech and not the plaintiff's." (citing People for Ethical Treatment of Animals v. Doughney, 263 F.3d 359, 366 (4th Cir. 2001) ("A parody must convey two simultaneous—and contradictory—messages: that it is the original, but also that it is *not* the original and is instead a parody. To the extent that an alleged parody conveys only the first message, it is not only a poor parody but also vulnerable under trademark law, since the customer will be confused." (internal quotation marks omitted) (citations omitted)). We may be wary of an intent standard for campaign speech. What if the intent is to make a profit? *See* Samantha Subramanian, *Inside the Macedonian Fake News Complex*, WIRED (Feb. 15, 2017), https://www.wired.com/2017/02/veles-macedonia-fake-news/. What if the speaker simply intends to provoke debate? What if the speaker's intent is to be mischievous? Do these motivations constitute requisite intent for this proposed prohibition? *See infra* Part III (describing multiple legal strategies to address fraudulent speech using an intent standard); *see also*, Golb v. Att'y Gen. of New York, 870 F.3d 89, 102 (2d Cir. 2017) ("While it is true that a parody enjoys First Amendment protection notwithstanding that not everybody will get the joke, it is also true that parody depends on *somebody* getting the joke; parody succeeds only by its recognition as parody. An author who intends to fool everyone may be pulling a prank or perpetrating a hoax, but the result is not a parody.").

51. The National Labor Relations Board uses a similar distinction after it abandoned attempts to examine the truth or falsity of campaign statements by parties to a representation election (and set aside elections based on misleading campaign statements). *See* Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127 (1982). The NLRB set aside elections on the basis of one of the parties using forged or altered documents that the voters did not recognize as propaganda. *See* NLRB v. E.A. Sween Co., 640 F.3d 781 (7th Cir. 2011).

52. This exploration purposefully dodges the question of whether the prohibition explored should emanate from state or federal law and what the penalty for a criminal prohibition should be. For present purposes, this discussion examines whether such a law—in whatever form—would be constitutional and/or advisable.

Importantly, the prohibition contemplated here would exempt counterfeit campaign speech that is clearly identified as fake.[53]

Having developed this standard to cabin a counterfeit campaign speech prohibition, the next part identifies the harms counterfeit campaign speech inflicts, and asks whether counterfeit campaign speech offers any benefits?

II. COUNTERFEIT CAMPAIGN SPEECH: WHAT'S THE HARM?

The harm that counterfeited candidate speech imposes cuts to the core of democratic discourse. It is not the vague problem of "fake news" (though it is certainly a constituent form). It does not come down to simple "misleading" or "distorted" speech that falls on the edge of a blurry line of truth versus falsity. It is not a lie only in the eye of the beholder.[54] Rather, counterfeit campaign speech inflicts three distinct and overlapping harms: it purposely thwarts the voting public's means of determining the truth about candidates seeking office; it threatens to undermine elections; and it prevents candidates from controlling their core identity.[55]

A. HARM TO VOTERS

Counterfeit campaign speech threatens a right that is preservative of all other rights: the right to vote.[56] Imagine a voter who views multiple counterfeited speeches of a candidate and decides to vote for that candidate

53. Proposed legislation in California takes this approach, exempting any material that includes this disclaimer: "this (video/audio) has been manipulated." *See* Andrew Sheeler, *California Is Moving to Ban Deep Fakes. What Are They, Anyway*? THE SACRAMENTO BEE (July 1, 2019), https://www.sacbee.com/news/politics-government/capitol-alert/article232162032.html (describing proposed bill AB 730). Likewise, California legislators used this approach to address the problem of fake "bots." Bromwich, *supra* note 43 (describing legislation that "would compel automated social media accounts to identify themselves as bots—in other words, to disclose their non-personhood."). Richard Hasen advocates a disclaimer-only rule. *See* Richard L. Hasen, *Deep Fakes, Bots, and Siloed Justices: American Election Law in a Post-Truth World*, ST. LOUIS U. L.J. (forthcoming 2020) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3418427).

54. *See* Eugene Volokh, *Freedom of Speech and Knowing Falsehoods*, THE VOLOKH CONSPIRACY (June 28, 2012), http://www.volokh.com/2012/06/28/freedom-of-speech-and-knowing-falsehoods/ (noting that general bans on campaign lies are problematic "because they cover a wide range of territory in which the truth may be hard to uncover, and in some measure in the eyes of the beholder.").

55. These concerns animate Nate Persily and Jack Goldsmith's dire warnings that Democracy could meet its doom at the hands of the Internet. *See* Nathaniel Persily, *Can Democracy Survive the Internet*, 28 J. DEMOCRACY 63, 64 (2017) (arguing that the "2016 election represents the latest chapter in the disintegration of the legacy institutions that had set bounds for U.S. politics in the post-war era."); Jack Goldsmith, The Failure of Internet Freedom, *in* EMERGING THREATS, KNIGHT FIRST AMENDMENT INSTITUTE 15 (David Pozen ed., 2018), https://knightcolumbia.org/sites/default/files/content/Emerging_Threats_Goldsmith.pdf ("The internet has made speech cheap to produce and to aggregate. This has allowed private actors to engage in vicious group attacks by 'troll armies' that aim to discredit or to destroy the reputation of disfavored speakers and to discourage them from speaking again. A related practice is to distort or overcome disfavored speech by using fake news, fake commentators, and other forms of misinformation or propaganda to muffle the disfavored speech or confuse the audience.").

56. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("Though [voting is] not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will under certain conditions, nevertheless it is regarded as a fundamental political right, because [it is] preservative of all rights.").

based on the falsified positions she believes that candidate to hold. Imagine further that the candidate she has voted for in fact holds views diametrically opposed to her own. Her right to vote has been nullified; worse, it has been turned against her.

Counterfeit campaign speech deprives voters of agency, the ability to absorb "real" information from candidates to make informed decisions about who should represent them in government. This deprivation can also be described as a loss of voters' personal autonomy. Seana Valentine Shiffrin argues that protecting listener agency is an important interest behind government prohibitions of lying and a critical component of what the First Amendment protects.[57] Counterfeit campaign speech inflicts a loss of personal autonomy upon the listener; deception robs them of personal will at the ballot box.[58]

One might argue that voters have the duty to diligently investigate the candidates up for election. This sentiment underpins the Supreme Court's unwillingness to accept "preventing voter confusion" as an asserted interest supporting laws that would curtail false political speech generally.[59] If a voter reads a sloppy news article and concludes wrongly that a candidate is pro-immigration, that voter must work to confirm that stance prior to casting her vote. But counterfeited candidate speech makes the voter's job next to impossible; how can the voter discern which primary source to believe? The voter is not only tasked with determining the authenticity of the counterfeited candidate speech (difficult even for forensic computer scientists);[60] the voter must put all speech from all candidates to an authenticity test if counterfeit campaign speech is allowed to run rampant. Voters may then question the true origin of every real word candidates utter, leaving them unable to determine who to believe or where to start in figuring out what is real and what is fake. This is far too much to ask of voters. At least for now, people are programmed to believe

57. SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW 79 (2014).

58. *Id*. ("Both the prohibition on lying and the prohibition of wrongful deception work, in different ways, to protect the ability of listeners to rely on speech to develop understandings of one another and of the world. These understandings are essential . . . to enable us to act well, in concert, and pursue our collective moral ends."). *See* SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE (1978); Alan K. Chen, *Free Speech, Rational Deliberation, and Some Truth About Lies*, at 18 (unpublished manuscript) (on file with author) (describing the political harm in the face of campaign lies when a "listener casts a vote in a different way than she otherwise would have, or campaigns for or protests against a particular candidate or cause based on a false understanding of the relevant background facts."). *See, e.g.*, Heymann, *supra* note 50 (arguing that the public has an interest in the soundness of the foundation of an individual's reputation).

59. *See, e.g.*, Timmons v. Twin Cities Area New Party, 520 U.S. 351, 375–76 (1997) ("[T]he argument that the burden on First Amendment interests is justified by [the State's interest in preventing voter confusion] is meritless and severely underestimates the intelligence of the typical voter. We have noted more than once that '[a] State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism.'" (citing Eu v. S.F. Democratic Cty. Cent. Comm., 489 U.S. 214, 228 (1989))).

60. *See infra* Subpart V.A.

speech heard from the proverbial horse's mouth, so much so that courts have blessed this assumption.[61]

Some argue it is not the role of government to make voters' lives easier.[62] According to this view, the "government has no paternalistic role over matters of the intellect, just as it has no paternalistic role over matters of the soul. It is up to individual citizens alone to sort out truth from falsehood."[63] It does seem fair to require voters to parse statements taken out of context and even ferret out overt lies told about and by candidates. And they have help: political opponents, the press, friends, and family members will all engage a citizen's quest to distinguish truth from falsehood. But there is something fundamentally different about foisting on voters the burden of flushing out counterfeited candidate speech. At least at present, we are trained to believe what we see and hear with our own eyes and ears.[64]

In an article describing what she calls "Empirical Liberty," Professor Jane Bambauer suggests that,

> [T]he performance of the "marketplace of ideas" depends on our ability to validate and invalidate competing claims. Most claims, whether trivial (statements about a consumer good) or profound (statements about health, politics, or economic theory) are empirical claims that should be accepted or rejected by their audience on evidentiary grounds that the listeners can experience for themselves.[65]

If voters are confronted with rampant counterfeit campaign speech which cannot readily be verified as real or fake, the marketplace shuts down. As Professor Bambauer describes, "[t]he proverbial marketplace cannot function if listeners are unable to access information or run the experiments they need to assess the validity of the claims that are offered to them."[66] The lack of "Empirical Liberty" is precisely the harm counterfeit campaign speech inflicts on voters. It denies listeners the ability to discern authenticity in the political

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61. *See* ACLU of Ill. v. Alvarez, 679 F.3d 583, 607 (7th Cir. 2012) ("[A]udio and audiovisual recording are uniquely reliable and powerful methods of preserving and disseminating news and information about events that occur in public. Their self-authenticating character makes it highly unlikely that other methods could be considered reasonably adequate substitutes."); *see also* Scott v. Harris, 550 U.S. 372 (2007); Howard Wasserman, *Video Evidence and Summary Judgment: The Procedure of* Scott v. Harris, 91 JUDICATURE 180, 181 (2008) (describing how the Court reached its "decision on summary judgment, on its determination that a video of the chase, taken from the pursuing officer's dash-mounted camera, presented the single 'true' version of events and permitted the Court to ignore contradictory testimony from the plaintiff.").

62. *See, e.g.*, Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 21 (2008) (describing the perspective that speech restrictions that prevent voters from being led astray are wrong-headed because "those who hear the statements . . . are too lazy or dim-witted to sort out truth from falsehood.").

63. *Id*.

64. *See Alvarez*, 679 F.3d 583 at 607; *see also Scott*, 550 U.S. 372; Wasserman, *supra* note 61.

65. Jane R. Bambauer, *The Empirical First Amendment*, 78 OHIO ST. L.J. 947, 947 (2017). This idea is hinted at in *Alvarez*, 567 U.S. at 718 ("'[f]alse statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas" (citing Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988))).

66. Bambauer, *supra* note 65, at 947.

sphere.[67] Voters have the right to receive information about candidates that is verifiable. When candidate source material is counterfeited, that ability is grievously foiled.

A final and related harm is voter disillusionment. Scholars have already expressed concern that the scourge of fake news may cause voters to disengage.[68] Voters confronted with rampant and unchecked counterfeit campaign speech might reasonably conclude that the effort required to determine what a candidate truly believes and what a candidate has done or not done is too great. The specter of large-scale voter disengagement leads to the second category of harm that counterfeit campaign speech inflicts: harm to the electoral process itself.

B. HARM TO THE ELECTORAL PROCESS

The Supreme Court has recognized the government's compelling interest in upholding the integrity of elections in numerous cases,[69] noting that "[o]ther rights, even the most basic, are illusory if the right to vote is undermined."[70] Quoting this phrase, Justice Scalia wrote (in a dissenting opinion) that, "no justification for regulation is more compelling than protection of the electoral process."[71] A proliferation of counterfeit campaign speech threatens to undermine public faith in the electoral system and the political process. To uphold the integrity of elections, ensuring that voters have access to accurate source material about candidates is a necessary precursor to an informed citizenry. The "consent theory of democracy," enshrined in the U.S.

67. *Id*. at 951 ("[W]ithout Empirical Liberty, people do not have the means to gather data and test competing propositions for themselves. A First Amendment that [does not enable] Empirical Liberty may not actually be very scientific at all if the laws leave few opportunities for testing. Instead, it trades one monolithic, governmental, or religious authority for millions of individual king-popes who must resort to unscientific hunches or senseless beliefs since they cannot empirically test any of the competing claims.").

68. Toni M. Massaro & Robin Stryker, *Freedom of Speech, Liberal Democracy, and Emerging Evidence on Civility and Effective Democratic Engagement*, 54 ARIZ. L. REV. 375, 434 (2012) ("[E]xtreme incivility, including . . . 'deceptive messages' . . . may well cause voters to disengage, thereby diminishing political participation."); *see also* Warzel, *supra* note 10 (describing what one technologist calls "'reality apathy': Beset by a torrent of constant misinformation, people simply start to give up . . . . 'People stop paying attention to news and that fundamental level of informedness required for functional democracy becomes unstable.'" (citation omitted)).

69. Courts routinely cite preserving the integrity of elections as such. *See* Susan B. Anthony List v. Driehaus, 814 F.3d 466, 473 (6th Cir. 2016) ("Ohio's interests in preserving the integrity of its elections, protecting 'voters from confusion and undue influence,' and 'ensuring that an individual's right to vote is not undermined by fraud in the election process' are compelling." (citing Burson v. Freeman, 504 U.S. 191, 199 (1992) (plurality opinion))). The majority also noted that "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." *Id*. at 474 (internal quotation marks omitted) (citation omitted); *see also* Eu, 489 U.S. at 231 ("A State indisputably has a compelling interest in preserving the integrity of its election process.").

70. Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

71. McIntyre v. Ohio Elections Commission, 514 U.S. 334, 379 (1995) (Scalia, J., dissenting). Scalia noted further that Ohio's interest in preventing fraud and libel "carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large." *Id.* at 349.

Constitution,[72] is based on the idea that "the citizen's ability to make informed political choices is a necessary predicate to a truly representative democracy."[73] The state therefore has a compelling interest in ensuring elections are not distorted by faked candidate speech. If the voting public is defrauded by morphed campaign speech, our system of elections is effectively destroyed. Rampant and unchecked counterfeit campaign speech undermines faith in candidates and political campaigns, causing voters to distrust anything any candidate says or does that they do not witness in person.[74] The damage to the democratic electoral process is existential.

The Supreme Court has approved of the government's compelling interest in providing accurate information to voters to inform their decisions at the ballot box. Perhaps nowhere is this more apparent than in the area of campaign finance disclosure.[75] Both campaign finance disclosure rules and a prohibition of counterfeit campaign speech are, at their core, about protecting the right of the public to accurate information about candidates.[76] Campaign finance law sets limits on campaign contributions,[77] and important for these purposes, sets out disclosure rules to inform voters about political contributions.[78] Time and again the Court has since found various spending limitations unconstitutional.[79] But the Court, in near-unanimous rulings, has thus far resolutely upheld disclosure rules.[80] The Court has acknowledged that a primary government interest in requiring disclosure is to "insure that the voters are fully informed."[81]

In *Citizens United v. Federal Election Commission,* for example, the Court issued a sharply divided 5-4 decision holding that Congress could not

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72. *See* THE DECLARATION OF INDEPENDENCE para 2 (U.S. 1776) ("That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . .").

73. Raleigh Hannah Levine, *The (Un)Informed Electorate: Insights into the Supreme Court's Electoral Speech Cases*, 54 CASE W. RES. L. REV. 225, 229; *see also* James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL OF RTS. J. 443, 456-59 (describing the consent theory as the basis of the right to vote).

74. And maybe even then, in the case of realistic, faked holograms. *See, e.g.*, Colin Lecher, *French Presidential Candidate Mélenchon Uses "Hologram" Optical Illusion to Appear in Seven Places,* THE VERGE (Apr. 19, 2017), https://www.theverge.com/2017/4/19/15357360/melenchon-france-election-hologram.

75. Buckley v. Valeo, 424 U.S. 1, 14–15 (1974) ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential . . . .").

76. Schauer & Pildes, *supra* note 21, at 1825 (1999) ("[T]he question is whether regulation should be permissible to remedy various perceived pathologies of current electoral discourse, *even if* that same degree of government intervention would be impermissible to remedy the parallel pathologies of non-electoral discourse in roughly comparable situations.").

77. *See* 52 U.S.C.A. § 30116 (West 2014) (setting a limit on campaign contributions to federal candidates).

78. *See* 52 U.S.C.A. § 30104 (West 2015) (setting out reporting requirements).

79. *See, e.g.*, *Buckley*, 424 U.S at 143 (holding that caps on campaign expenditures are unconstitutional).

80. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 366–72 (2010) (upholding federal campaign finance disclosure requirements by an 8-1 vote).

81. *Buckley*, 424 U.S at 14–15, 76. ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential."). Likewise, the Court in *McConnell v. Federal Election Commission* upheld disclosure provisions in the Bipartisan Campaign Reform Act of 2002, holding that such disclosure would help citizens "make informed choices in the political marketplace." 540 U.S. 93, 197 (2003) (quoting McConnell v. Fed. Election Comm'n, 251 F. Supp. 2d 176, 237 (D.D.C. 2003)).

constitutionally ban independent corporate campaign speech.[82] But on the question of whether the state could require corporations to *disclose* campaign spending, the Court ruled 8-1 that it could. Justice Kennedy, quoting an earlier campaign finance case, wrote:

> "Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." At the very least, the disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party.[83]

In its campaign finance decisions, the Court struck a bargain: individuals and corporations should be able to spend freely to forward their political messages, but the public must have information about where funding comes from.[84] These same principles animate the state's interest in banning counterfeit campaign speech. State law prohibits individuals or groups from submitting falsified records about the source of funds.[85] Ensuring faked political speech is not circulated without disclaimers clearly identifying it as such, like requiring campaign finance disclosure, fulfills an important government interest of providing accurate information to voters.[86]

The Court's blessing of the information interest should not be overstated. The Court has upheld the right to withhold information from voters.[87] In each case in which the Court has done so—for example, to distribute anonymous pamphlets or circulate petitions without disclosing one's identity—the Court carefully struck a balance between general provisions prohibiting all anonymous activity versus those prohibiting fraudulent activity, which the Court acknowledged a state may (and even should) constitutionally do.[88] And, courts

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82. 558 U.S. at 371.

83. *Id*. at 368.

84. Of course, the perpetual scourge of so-called dark money often thwarts the goal of informing the public about political spending, but the proposition that the state can require disclosure has remained firm. *See, e.g*., Crossroads Grassroots Policy Strategies v. Citizens for Responsible Ethics, 135 S. Ct. 5 (2018) (denying stay requested to keep identities of donors secret).

85. *See, e.g*., KAN. STAT. ANN. § 25-4168 (1981); N.Y. ELEC. LAW § 14-104 (McKinney 2017); S.D. CODIFIED LAWS § 12-27-34 (2007).

86. As noted above, a disclosure rule (requiring those who circulate counterfeited candidate speech to disclose it as such or face penalty) is an alternative to the prohibition/exemption model proposed here. *See* E-mail from Professor Marc J. Blitz, *supra* note 40.

87. McIntyre v. Ohio Elections Commission, 514 U.S. 334, 348 (1995) ("The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit.").

88. For example, in *McIntyre*, the Court distinguished the fraud motive: "The state interest in preventing fraud and libel stands on a different footing. We agree with Ohio's submission that this interest carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large." *Id*. at 349. But the Court found that Ohio fraud statutes accomplished this goal sufficiently, writing that:

> "Ohio's prohibition of anonymous leaflets plainly is not its principal weapon against fraud. . . . Although these ancillary benefits [of preventing fraud] are assuredly legitimate, we are not persuaded that they justify [the statute]'s extremely broad prohibition. As this case demonstrates, the prohibition encompasses documents that are not even arguably false or misleading."

struck these laws because either the informational interest was not sufficiently strong or the law itself was not sufficiently narrowly tailored to secure that interest.[89]

C. HARM TO CANDIDATES

Finally, candidates targeted with counterfeit campaign speech suffer two forms of immediate and irremediable harm: diminution of electoral chances and reputational harm.

Victims of counterfeit campaign speech face the possibility of irreparable harm to their chances of electoral success.[90] Behavioral science teaches that a great deal of damage is accomplished through deception; once a person is deceived, that damage can be irreversible.[91] Commonly referred to as "belief perseverance," it is widely accepted among social scientists that the impact of false beliefs, even upon the discovery that the facts upon which those beliefs are set are false, is enduring.[92] Studies examining the impact of this phenomenon on public perceptions of candidates for office holds particularly true.[93] Stanford political scientist John Bullock's 2006 study looked at candidate evaluation in a U.S. Senate race.[94] Subjects were asked to review information about a Republican candidate for office and to evaluate that candidate. Then, some subjects were told that they were misinformed about that candidate's positions; subjects were told that information about the candidate's positions had been purposely fabricated. Bullock's study found that subjects, even after being told

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Id. at 350–51.

89. *See, e.g*., Buckley v. Am. Constitutional Law Found., 525 U.S. 182 (1999) (striking a Colorado requirement that petition circulators wear badges identifying themselves); *McIntyre*, 514 U.S. at 334 (striking an Ohio law prohibiting anonymous pamphleteering).

90. *See infra* Subpart V.B (discussing election disruption and legal remedy).

91. *See, e.g*., Craig A. Anderson et al., *Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information*, 39 J. OF PERSONALITY AND SOC. PSYCHOL., 1037 (1980) (confirming, through a study, that social theories can survive the total discrediting of initial evidential base); Tobias Greitemeyer, *Article Retracted, but the Message Lives on*, 21 PSYCHONOMIC BULL. REV. 557, 557 (2014) (confirming, through a study, that "individuals still believe in the findings of an article even though they were later told that the data were fabricated and that the article was retracted."); Charles G. Lord, Lee Ross, & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. OF PERSONALITY AND SOC. PSYCHOL. 2098 (1979) (same).

92. *See generally* Anderson et al., *supra* note 91. Some studies conclude that belief perseverance in the political realm is more durable when political preferences are reinforced as opposed to contradicted. *See, e.g.*, John G. Bullock, *The Enduring Importance of False Political Beliefs* (2006) at 3 (noting interesting differences between belief perseverance among Democrats versus Republicans).

93. *See, e.g*., Bullock, *supra* note 92 (noting that most studies of belief perseverance have been resolutely apolitical, but here using "real-world cases of political deception and a trio of experiments to demonstrate that false beliefs affect people's political views even after they are understood to be false"); Michael Cobb et al., *Beliefs Don't Always Persevere: How Political Figures Are Punished When Positive Information About Them Is Discredited*, 34 POL. PSYCHOL. 307, 307 (2013) (suggesting that "bogus credit claiming or other positive misinformation can have severe repercussions for politicians."); *see also* Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 898 (2010) (describing the common phenomenon of people believing facts even after they are disproved).

94. Bullock, *supra* note 92.

that the candidate's view on education and the environment were fabricated by the researchers, continued to think less of the candidate because of those stances.[95]

These findings underscore that damage to a candidate's electoral chances from counterfeited candidate speech will be real, immediate, and lasting—and far more damaging than run-of-the-mill lies and misinformation candidates face every day. Candidates (and voters) have come to expect unsavory tactics in political campaigning, particularly of late.[96] Voters understand they must be skeptical and vigilant about being lied to. For candidates (and the news media), countering lies in campaigns is standard practice. The harm that counterfeit campaign speech imposes is, however, far greater; it is more than false insinuation or misrepresentation of a candidate's views. It is much harder, if not impossible, for candidates to overcome these harms through counter speech because the voter ingests what appears to be incontrovertible, primary source material.[97]

A second harm to candidates of counterfeit campaign speech is its attack on their basic dignity.[98] We have come to accept that running for office in the United States results in a loss of personal privacy.[99] Candidates recognize that they must submit their lives to scrutiny in ways that private citizens do not.[100] Indeed, courts commonly cite this rationale when refusing to protect candidate privacy interests.[101] Candidates also accept that as a consequence of running, lies about them will routinely circulate; campaign resources must be dedicated to dispelling them. But by stepping into the lime light, must candidates resign

95. *Id.* at 22.

96. Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election* (Nat'l Bureau of Econ. Research, Working Paper No. 23089, 2017) (describing the rise of "fake news" relating to candidates in the 2016 election); *see* Anthony J. Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration*, 12 DUKE J. OF CONST. L. & PUB. POL'Y 57, 64–74 (2017); *see also* Richard L. Hasen, *The 2016 U.S. Voting Wars: From Bad to Worse*, 26 WM. & MARY BILL OF RTS. J. 629, 629 (2018).

97. *See infra* Subpart IV.B.

98. The Supreme Court has been clear that protecting public figures' dignity cannot alone trump constitutional protections. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 272–73 (1963) ("Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision." (citing Bridges v. California, 314 U.S. 252 (1940))).

99. Michelle Obama, BECOMING 252 (2018) ("[The presidential campaign] was like having your soul X-rayed every day . . . ."); *see* Frederick Schauer, *Can Public Figures Have Private Lives?*, 17 SOC. PHIL. & POL'Y 293, 300–01 (arguing that the public deserves access to information about candidates for office anyone may find relevant—which translates to the public's right to know everything about candidates).

100. Carl M. Cannon, *Here We Go Again*, 39 NAT'L J. 20, 22 (2007); *see also* Stanley A. Renshon, THE PSYCHOLOGICAL ASSESSMENT OF PRESIDENTIAL CANDIDATES 320 (1996) (describing general distrust of leadership after Watergate era leading to the desire to learn about the private behavior of political leaders).

101. Kapellas v. Kofman, 459 P.2d 912, 922–23 (Cal. 1969) ("Because of their public responsibilities . . . candidates for . . . office have almost always been considered the paradigm case of 'public figures' who should be subjected to the most thorough scrutiny. In choosing those who are to govern them, the public must . . . be afforded the opportunity of learning about any facet of a candidate's life that may relate to his fitness for office.").

themselves to others faking their identities to make authentic-seeming political statements in their name without recourse? Should the law rise to protect candidates' rights against counterfeiting of their public identity?

The impulse to protect candidates' dignity interest in the face of changing technology is nothing new. In the late 1800s, when yellow journalism blossomed and instantaneous photography enabled the penny press to widely circulate unflattering images and cartoons of politicians, legislators in several states passed laws banning the practice, citing just such a dignity interest.[102] Indeed, when the law of privacy first took root in this country, it arose as a dignity-based right.[103] In her book on the right of publicity, Jennifer Rothman explains that "[f]rom the beginning, courts and commentators referred to a right to control 'publicity' about oneself as central to the right of privacy."[104] As the Georgia Supreme Court put it in 1905, "[t]he right of one to exhibit himself to the public at all proper times, in all proper places, and in a proper manner is embraced within the right of personal liberty."[105]

Writing in the late 1800s, the grandfathers of American privacy law, Samuel Warren and Louis Brandeis, explicitly exempted candidates for office from the privacy protections for which they advocated. They reasoned:

> Peculiarities of manner and person, which in the ordinary individual should be free from comment, may acquire a public importance, if found in a candidate for public office . . . . To publish of a modest and retiring individual that he suffers from an impediment in his speech or that he cannot spell correctly, is an unwarranted, if not an unexampled, infringement of his rights, while to state and comment on the same characteristics found in a would-be congressman could not be regarded as beyond the pale of propriety.[106]

It seemed logical to Warren and Brandeis that when individuals put themselves before the court of public opinion for purposes of gaining public office, the public interest in learning private matters about them overtakes privacy interests of candidates.

But should a dignity-based protection against counterfeited speech be entirely unavailable to candidates for public office? The answer has to be no. At issue is not whether information *about* candidates' speech impediments or spelling prowess should be released. In the case of counterfeit campaign speech,

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102. JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY 18–19 (2018) (describing one California "anti-cartoon" statute, passed into law in 1899, which prohibited caricatures of public officials that "reflect[ed] upon the honor, integrity, manhood, virtue, reputation, or business or political motives of the person so caricatured, or which tend[ed] to expose the individual so caricatured to public hatred, ridicule, or contempt." (internal quotation marks omitted)). Rothman found "no evidence that the law was ever enforced, and it was quietly repealed in 1915." *Id.* at 19.

103. It is an interest courts still recognize today, particularly in the face of changing technology. Bartnicki v. Vopper, 532 U.S. 514, 541 (2001) (Rehnquist, C.J., dissenting) ("[T]he Constitution permits legislatures to respond flexibly to the challenges future technology may pose to the individual's interest in basic personal privacy. . . . [W]e should avoid adopting overly broad or rigid constitutional rules, which would unnecessarily restrict legislative flexibility.").

104. *See* ROTHMAN, *supra* note 102, at 27.

105. Pavesich v. New England Life Ins. Co., 50 S.E. 68, 70 (Ga. 1905).

106. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 215 (1890).

the question is whether a candidate's identity can be manipulated to manufacture a speech impediment or spelling ineptness where none exists to inflict political harm.[107] Warren and Brandeis would surely support law rising to protect candidates' dignity interest against falsifications of their identities.[108]

An additional harm is to those who opt not to run in an environment in which counterfeit campaign speech is permitted to run rampant. Political philosophers and legal scholars have debated whether some measure of candidate privacy might be maintained, often citing concerns that total sacrifice of privacy will prevent good people from entering the political fray.[109] The specter of widespread and un-checked counterfeit campaign speech would fuel an exodus of well-qualified candidates to the detriment of us all.

Technology-enabled exposure of our personal identities has prompted many scholars to call for legal protections aimed at preserving individual dignity. Danielle Keats Citron and Mary Ann Frank, for example, have argued that nonconsensual pornography—publishing nude photos of former lovers—is an egregious privacy violation.[110] Many states since have passed laws banning it.[111] Candidates for political office will almost inevitably become victims in pornographic deep fakes designed to discredit and humiliate.[112] Even in non-pornographic contexts, counterfeit campaign speech involves a form of unwelcome exposure that cuts to the core of identity, dignity, and liberty and represents a real and recognized harm.

The Supreme Court has had occasion to examine the nature of harm when faked material involves real people. In 2002, the Court took up the issue of

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107. Although, of course, spelling inadequacies are no longer necessarily disqualifying.

108. Jennifer Rothman, in her study of the right of publicity, dispels the common misperception that public figures cannot recover in right to publicity claims because of a lack of economic harm. Carefully reviewing right to publicity cases since they arose in the early 1900s, she concludes that public figures have routinely brought successful right to publicity claims based on protecting dignitary interests in their identities. *See* ROTHMAN, *supra* note 102, at 110 ("Often it is claimed that the right of publicity addresses economic injuries while the right of privacy addresses dignitary and emotional distress injuries. As I have revealed, such a division did not exist historically, is not enforced today, and makes little sense since injuries from the same harm of misappropriation can be economic, dignitary, and emotional.").

109. Scholars like Frederick Schauer argue that, because voters base electoral decisions on different factors, the only way to secure an informed citizenry is to set the bar for candidate privacy high. Some voters may care if a candidate has been unfaithful to her husband. Some voters may care if a candidate has a history of drug use. Some may not. As a result, Schauer argues that all information about candidates is fair game. *See* Schauer, *supra* note 99, at 908. Some political theorists have resisted this thesis, arguing that candidates should be afforded some zone of privacy and forwarding ideas about where the line might be drawn to do so. *See generally* Dorota Mokrosinska, *How Much Privacy for Public Officials?*, *in* SOCIAL DIMENSIONS OF PRIVACY: INTERDISCIPLINARY PERSPECTIVES 181 (Beate Roessler & Dorota Mokrosinka eds., 2015).

110. *See* Danielle Keats Citron & Mary Ann Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014).

111. *See* Mary Ann Franks, *"Revenge Porn" Reform: A View from the Front Lines*, 69 FLA. L. REV. 1251, 1256 (2017) ("As of July 2017, thirty-eight states and Washington, D.C. have passed laws criminalizing the nonconsensual distribution of private, sexually explicit images.").

112. *See* Warzel, *supra* note 10 ("In the murky corners of the internet, people have begun using machine learning algorithms and open-source software to easily create pornographic videos that realistically superimpose the faces of celebrities—or anyone for that matter—on the adult actors' bodies.").

virtual child pornography—images manipulated to appear as if they depict minors. In *Ashcroft v. Free Speech Coalition*,[113] the Court struck down a federal law banning virtual child pornography. In that instance, the Court held that the First Amendment protects that form of faked speech.[114] A big part of the Court's reasoning in striking down the prohibition of virtual child pornography is that no child is harmed in its production—the images are fabricated without harming real children.[115]

The Court did not strike the part of the law that prohibited "computer morphing" of innocent pictures of real children into pornographic images. As Justice Kennedy described it, "[r]ather than creating original images, pornographers can alter innocent pictures of real children so that the children appear to be engaged in sexual activity."[116] Plaintiffs in *Ashcroft* did not challenge the prohibition of "morphed" virtual child pornography; the Court did not therefore have a reason to rule whether "morphed" images could be constitutionally prohibited.[117] Justice Kennedy's mention of the harms associated with "morphed images," however, underscores that there is something very different when the underlying image is of real children who experience real harm as a result. Counterfeit campaign speech morphs real candidate source material; the harm to living, identifiable humans—to candidates—is real.

D. IS COUNTERFEIT CAMPAIGN SPEECH A SOCIAL GOOD?

Any discussion of harms should balance against possible benefits of counterfeited campaign speech. After all, the U.S. Supreme Court has cautioned that, "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'"[118] Justice Breyer in his *Alvarez* concurrence noted the many positives of lies.[119] Any fan of Art

113. Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

114. The Court found the statute was not sufficiently narrowly tailored in that it captured too much protected speech in its ambit. "The First Amendment requires a more precise restriction. For this reason, [the statute at issue] is substantially overbroad and in violation of the First Amendment." *Id.* at 258.

115. *Id*. at 242 ("Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children.").

116. *Id.*

117. *Id.*

118. New York Times Co. v Sullivan, 376 U.S. 254, 279, n. 19 (1963) (quoting John Stuart Mill, ON LIBERTY 15 (Alburey Castell ed., 1947)). Although Frederick Schauer points out that "Mill was not to any appreciable extent addressing issues of demonstrable and verifiable fact. Instead he was concentrating overwhelmingly on what to him were debatable matters of religious, moral, and political truth." Schauer, *supra* note 93, at 905; *see also* Jonathan Rauch, KINDLY INQUISITORS: THE NEW ATTACKS ON FREE THOUGHT 49 (1993) (arguing that no claim, no matter how absurd, should be removed from consideration).

119. U.S. v. Alvarez, 567 U.S. 709, 733 (2012) (noting that "[f]alse factual statements can serve useful human objectives, for example: in social contexts, where they may prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child's innocence; in public contexts, where they may stop a panic or otherwise preserve calm in the face of danger; and even in technical, philosophical, and scientific contexts, where (as Socrates' methods suggest) examination of a false statement

Vandalay can relate.[120] Could it be that even faked campaign speech has value in American political discourse? To this end, when discussing the potential value of fake news, Alan Chen posits several intriguing questions:

> What if fake news, like art, music, and other forms of non-propositional expression, promote valuable internal, non-cognitive experiences? Not all important brain functioning or processing of communication is cognitive, and such communication can promote senses of happiness, sadness, anger, wonder, and a range of other emotions. In this sense, fake news and political lies might have value to their listeners in some of the same ways that music does.[121]

What if some listeners, for whatever cognitive reasons, prefer to hear digitally doctored candidate speech? Chen suggests some interesting examples. When someone buys a National Enquirer, they are looking to be lied to as entertainment. When someone pays a fortune teller to tell them what lies ahead, they expect the thrill of suggestion, not honesty.[122] In both cases, the person has reached out to be lied to for entertainment or because the deceptions are in some way comforting or fill an emotional need.

Could the benefits to some voters of filling such a need with counterfeited campaign speech outweigh the harms? It is hard to see how. It is not clear, even if some voters derive some form of gratification from being exposed to a convincing fake, why that preference should be the default.[123] In addition, in the case of someone who buys a tabloid magazine or hires a fortune teller, that person has willingly asked to be duped; at some level they understand that the tabloid and psychic are unreliable,[124] but nevertheless chose to place some measure of blind faith in their prognostications. In the case of counterfeit campaign speech, its danger (and power) lies in the fact that the vast majority of voters will *unknowingly* absorb it. By definition, the counterfeiter has created it with intent to deceive voters and/or disrupt an election. The same cannot generally be said of the staff of the tabloids or a psychic.[125]

(even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth."); *see also* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 591, 593 (1982) (arguing that "the constitutional guarantee of free speech ultimately serves only one true value . . . 'individual self-realization'" which should not be constrained by utilitarian ends like "provid[ing] for participation in decisionmaking by all members of society" (internal quotation marks omitted)).

120. *See* Artemis Vandelay, *Art Vandelay*, URBAN DICTIONARY (May 18, 2011) https://www.urbandictionary.com/define.php?term=Art%20Vandelay.

121. Chen, *supra* note 58 at 21 (citations omitted). Chen continues, "the regulation of fake news could be conceptualized in a manner not that different from censoring of art, or a video game, or virtual reality experiences, that might create or inspire a different or alternative world view." *Id.* For earlier takes, *see* Helen Norton, *Lies and the Constitution*, SUP. CT. REV. 161, 165 (2012) (noting that lies can "trigger confrontation and rebuttal" and "lead to increased public awareness and understanding of the truth . . . .").

122. Chen, *supra* note 58 at 22–23.

123. Unless, perhaps voters are comforted by lies presented as simple solutions to complex problems. Still, rhetorical shortcuts and lies-as-grandstanding are qualitatively different from counterfeit campaign speech.

124. *But see* Peter Glick et al., *The Fault Is Not in the Stars: Susceptibility of Skeptics and Believers in Astrology to the Barnum Effect*, 15 PERSONALITY & SOC. PSYCHOL. BULL. 572, 572 (1989).

125. *But see* Jim Rutenberg et al., *Investigators Focus on Another Trump Ally: The National Enquirer*, N.Y. TIMES (Apr. 11, 2018), https://www.nytimes.com/2018/04/11/us/politics/trump-national-enquirer-american-media.html.

In the end, while there may be arguments for positive contributions of faked candidate speech, its harms far outweigh them. As with fraud, impersonation, defamation, and other constitutionally-sanctioned restrictions on speech, courts must necessarily weigh the potential value of counterfeit campaign speech. The balance could well hinge on the facts of specific cases. That there exists a tenuous possibility that counterfeit campaign speech has negligible value does not negate the very real harms a state may legitimately seek to prevent.

Having surveyed the harms counterfeit campaign speech inflicts, Part III addresses whether current law may adequately protect against these harms, concluding that it does not.

III. DO EXISTING LAWS ADDRESS COUNTERFEIT CAMPAIGN SPEECH?

Federal and state election laws seek to police our system of elections to ensure fairness and public confidence in election outcomes.[126] Outside the election context, state and federal law seeks to prevent fraud and manipulation in contexts that could serve to limit or prevent counterfeit campaign speech.[127] This Part reviews both categories of existing law with an eye towards whether it can be leveraged to adequately police counterfeit campaign speech.

A. FEDERAL AND STATE ELECTION LAWS ADDRESSING MISREPRESENTATION

Among the many shady efforts of Don Segretti to reelect President Nixon in 1972,[128] he mass-mailed a letter printed on "Citizens for Muskie" stationary making it appear as if presidential candidate Edmund Sixtus Muskie was falsely accusing Senators Humphrey and Jackson of sexual improprieties.[129] The effort aimed to purposefully undermine Muskie's campaign.[130] Prosecutors convicted Segretti under 18 U.S.C. § 612, which prohibited causing "to be published or distributed . . . any . . . statement relating to . . . any person who has publicly declared his intention to seek the office of President . . . which does not contain the names of the persons, associations, committees, or corporations responsible."[131] This federal prohibition on the distribution of anonymous campaign literature was an awkward fit. Segretti's crime was not distributing material anonymously—it was distributing forged campaign material.

Other courts of that era grappled with this mismatch. In *People v. Duryea*, a New York court wrestled with the constitutionality of a state law that required

126. *See, e.g.*, DEL. CODE ANN. tit. 15, § 101A (West 1978) (stating that the state's election laws are designed to provide a free and equal election process, while preserving its integrity).

127. *See infra* Subpart III.B.

128. Carl Bernstein and Bob Woodward, *FBI Finds Nixon Aides Sabotaged Democrats*, WASH. POST (Oct. 10, 1972).

129. Segretti v. State Bar of Cal., 544 P.2d 929, 931 (Cal. 1976). Senators Humphrey, Jackson, and Muskie were all candidates for the Democratic nomination for president.

130. "Segretti testified that, when he wrote the letter, it was not his desire to have anyone believe the contents thereof and that instead he wanted to create confusion among the candidates." *Id.*

131. 18 U.S.C. § 612 (1970) (repealed 1976).

those circulating political material to include the name and address of the person responsible.[132] As in the Segretti situation, the offending literature was not anonymous, but counterfeit.[133] The *Duryea* court rejected the defendant's argument that they could not be found "factually guilty of non-identification by virtue of false identification"[134] and found the defendant guilty under New York's anonymity statute.

After Watergate, Congress passed the Federal Election Campaign Act (FECA) to address the political shenanigans of that period.[135] While most of the focus on FECA (then and today) relates to its campaign finance provisions, part of the new law more directly prohibited forgeries of the sort Segretti undertook:

> No person who is a candidate for Federal office or an employee or agent of such a candidate shall . . . fraudulently misrepresent himself or any committee or organization under his control as speaking or writing or otherwise acting for or on behalf of any other candidate or political party or employee or agent thereof on a matter which is damaging to such other candidate or political party or employee or agent thereof.[136]

This post-Watergate reform addresses distribution of forged campaign material. Yet it is not clear that it would cover technology-assisted counterfeits such as deep fakes. The offense prohibits misrepresentation of *oneself* (or a candidate's agents), but does not anticipate deep fake counterfeited candidate speech.[137] In addition, the law does not cover actions of third parties, leaving a wide opening for would-be purveyors of counterfeited candidate speech to evade prosecution.

Most state election codes lack explicit prohibitions of deceptive activity that would cover counterfeit campaign speech directly.[138] Commonly, state election codes feature highly-specific bans such as prohibitions on stating

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132. 76 Misc. 2d 948, 951 (1974).

133. In this instance, the ruse aimed at getting voters to vote for a third party as a spoiler.

134. Duryea, 76 Misc. 2d at 956. The court also rejected the defendant's follow up argument, that the statute violated the First Amendment, noting that "[c]alculated falsehood is never protected by the First Amendment." *Id.* at 957. The Court later found laws prohibiting anonymous campaign literature unconstitutional in McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995). Until *McIntyre*, most state codes included requirements that political communications include the name of a responsible party.

135. S. REP. NO. 93-981, at 564 (1973) (describing the history and purpose of the Federal Election Campaign Act).

136. 52 U.S.C. § 30124 (2018). Paragraph 2 of this provision provides that "willfully and knowingly participat[ing] in or conspir[ing] to participate in any plan, scheme, or design" violates paragraph 1.

137. Prosecutions under this law have largely focused on a portion of the law—not excerpted here—relating to fraudulent solicitation of funds. *See, e.g.*, Fed. Election Comm'n v. Novacek, 739 F. Supp. 2d 957 (N.D. Tex. 2010) (involving defendant making fraudulent misrepresentations to the general public implying that she was raising money for the Republican Party, when in fact she was not).

138. California's election code provides, "[a]ny person who commits fraud or attempts to commit fraud, and any person who aids or abets fraud or attempts to aid or abet fraud, in connection with any vote cast, to be cast, or attempted to be cast, is guilty of a felony, punishable by imprisonment . . . ." CAL. ELEC. CODE § 18500 (West 2019). If this prohibition is read broadly, it could capture circulation of counterfeit campaign speech, though case law suggests that the statute is primarily intended to punish voter fraud. *See* Albert-Sheridan v. Spitzer, No. G056715, 2018 WL 5023792, at *4 (Cal. Ct. App. Oct. 17, 2018) ("The language of this statute is geared toward voter fraud in the casting of a ballot, rather than false statements about an electoral opponent at a public forum.").

endorsements falsely,[139] misrepresenting the origin of a telephone call,[140] or misrepresenting a candidate's voting record,[141] none of which would cover counterfeited campaign speech unless it related to a prohibited category.

Section 255.004 of Texas' election code provides an example of a state statute that generally targets misrepresentation of campaign materials' source. It reads:

> (a) A person commits an offense if, with intent to injure a candidate or influence the result of an election, the person enters into a contract or other agreement to print, publish, or broadcast political advertising that purports to emanate from a source other than its true source.
>
> (b) A person commits an offense if, with intent to injure a candidate or influence the result of an election, the person knowingly represents in a campaign communication that the communication emanates from a source other than its true source.[142]

Would this statute apply to circulating a deep-faked video of a candidate saying something she did not? If the intent of the video was to make it seem as if the candidate is the "true source" of the video, perhaps the Texas statute would apply. Codified in 1987, the statute most likely targeted labels affixed to campaign materials that misrepresented the materials' source (for example, forged letterhead). But the Texas statute is one of the few that would appear to have modern application to the problem of counterfeit campaign speech.

As examined in Part IV below, a common state approach to policing falsity in campaigning was to either prohibit anonymity in campaign communications (which the Court declared unconstitutional in 1995)[143] or to attempt a general prohibition of lies in campaigns (a tactic courts have similarly rejected).[144] Most state election codes, however, do not feature applicable affirmative prohibitions.

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139. *See, e.g.*, CAL. ELEC. CODE § 20007 (West 2019).

140. *See, e.g.*, N.H. REV. STAT. ANN. § 664:14-b. (2010).

141. *See, e.g.*, MONT. CODE ANN. § 13-37-131 (2017).

142. TEX. ELEC. CODE ANN. § 255.004 (West 2019). Alabama's election code also has a provision that could address deep fakery in campaigning:

> It shall be unlawful for any person fraudulently to misrepresent himself or herself, or any other person or organization with which he or she is affiliated, as speaking or writing or otherwise acting for or on behalf of any candidate, principal campaign committee, political action committee, or political party, or agent or employee thereof, in a manner which is damaging or is intended to be damaging to such other candidate, principal campaign committee, political action committee, or political party.

ALA. CODE § 17-5-16(a) (2013). Unlike the federal statute which this law mirrors, it applies to "any person." But it suffers from the same potential shortfall as 52 U.S.C. § 30124 (2018) in that it is rooted in a person "misrepresenting himself or herself," which presumably would not reach attempts to misrepresent the candidate through technological means.

143. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).

144. *See infra* Subpart IV.B.

B. STATE AND FEDERAL LAWS NOT SPECIFIC TO THE ELECTION CONTEXT THAT MIGHT ADDRESS COUNTERFEIT CAMPAIGN SPEECH

If a perpetrator hacked a candidate's Twitter account and posted faked Tweets, the candidate may have recourse under state and federal anti-hacking statutes (depending on the facts).[145] Corporate policy might also prevent fakes. For example, Twitter's terms of service ("TOS") prohibit impersonation.[146] Yet anti-hacking laws and corporate TOS agreements do not go far enough to address the problem of counterfeit campaign speech.[147] First, the jury is still out on whether private companies are up to the task of self-policing.[148] Second, perpetrators do not necessarily need to hack or employ private networks to obtain what they need to create and distribute faked candidate speech; they may obtain publicly-available source material and alter and disseminate it through perfectly legal means.

Do state and federal laws prohibiting identity theft address counterfeit campaign speech? Identity theft involves a defendant who wrongfully obtains and uses another person's personal data to perpetrate a fraud or deception. Statutes targeting the use of personal data generally target misuse of credit card data or personal identifiers like Social Security Numbers, birth dates, or drivers' license numbers.[149] Using digital material from, for example, a series of videos of a candidate, would likely fall outside most statutory language, at least as currently formulated. In addition, laws protecting against identity theft typically

145. Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(2) (2012), and its state equivalents criminalize gaining unauthorized access (or access that exceeds authorization) to computers. Some state computer fraud statutes appear to come close. For example, Kansas's computer crime statute makes it unlawful to "use a computer, computer system, computer network or any other property for the purpose of devising or executing a scheme or artifice with the intent to defraud or to obtain money, property, services or any other thing of value by means of false or fraudulent pretense or representation." KAN. STAT. ANN. § 21-5839(a)(2) (2012). It is unclear whether this statute would reach counterfeit campaign speech, particularly because of its focus on the purpose of the fraud as obtaining a thing of value, i.e., financial gain, which does not map easily onto the campaign context.

146. *See* Chesney & Citron, *supra* note 5, at 56 ("TOS agreements . . . will be primary battlegrounds in the fight to minimize the harms that deep fakes may cause."); *see also Impersonation Policy*, TWITTER, https://help.twitter.com/en/rules-and-policies/twitter-impersonation-policy (last visited July 27, 2019). Before the 2018 midterms, Facebook's policy seemed unprepared for the task of ferreting out impersonators. *See* William Turton, *We Posed as 100 Senators to Run Ads on Facebook. Facebook approved All of Them*, VICE NEWS (Oct. 30, 2018), https://news.vice.com/en_ca/article/xw9n3q/we-posed-as-100-senators-to-run-ads-on-facebook-facebook-approved-all-of-them.

147. *See* Chesney & Citron, *supra* note 5, at 57 (noting that Twitter has long banned impersonation on its platform and that Google's corporate policy has taken steps to prevent faked speech).

148. *See, e.g.*, Nicholas Confessore & Gabriel J.X. Dance, *On Social Media, Lax Enforcement Lets Impostor Accounts Thrive*, N.Y. TIMES (Feb. 20, 2018), https://www.nytimes.com/2018/02/20/technology/social-media-impostor-accounts.html (describing shortcomings of private sector efforts to combat imposters on social networking sites).

149. The Identity Theft Assumption and Deterrence Act of 1998 ("ITADA") was the first federal statute to define identity theft as a stand-alone crime. The ITADA defines identity theft as "knowingly transfer[ring], possess[ing], or us[ing], without lawful authority, a *means of identification of another person* with the intent to commit, or to aid or abet . . . any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law." 18 U.S.C. § 1028(a)(7) (2012) (emphasis added).

require plaintiffs to demonstrate financial harm.[150] They are not intended, at least in their current iterations, to address the stealing of one's political identity.[151]

Could anti-cyberstalking statutes provide a means of redress? A federal anti-cyberstalking statute makes it a crime to use an "interactive computer service or electronic communication service" to intimidate a person in ways "reasonably expected to cause substantial emotional distress."[152] In their analysis of whether such laws might address the problem of deep fakes, Danielle Citron and Bobby Chesney suggest that, in certain circumstances, such provisions could provide redress.[153] But cyberstalking statutes are an awkward fit as applied to counterfeited candidate speech. Most counterfeit campaign

150. *See, e.g.*, W. VA. CODE § 61-3-54 (2018) ("Any person who knowingly takes the name, birth date, social security number, or other identifying information of another person . . . for the purpose of making financial or credit transactions in the other person's name, or for the purpose of gaining employment, is guilty of a felony."); CONN. GEN. STAT. § 53a-129a(a) (2018) ("[a] person commits identity theft when such person knowingly uses personal identifying information of another person to obtain or attempt to obtain money, credit, goods, services, property or medical information without the consent of such other person."); CAL. PENAL CODE § 530.5-530.55(a) (West 2019) ("Every person who willfully obtains personal identifying information . . . of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person."). Some states have "imposter" statutes that could be leveraged to address counterfeit campaign speech. *See, e.g.*, N.M. STAT. ANN. § 30-16-24.1(A) (West 2009) (prohibiting theft of identity which "consists of willfully obtaining, recording or transferring personal identifying information of another person without the authorization or consent of that person and with the intent to defraud that person or another or with the intent to sell or distribute the information to another for an illegal purpose."). This language could be leveraged against perpetrators of counterfeit campaign speech. For a full listing of state identity fraud and impersonation statutes, see *Identity Theft*, NCSL: NAT'L CONF. OF STATE LEGISLATURES, http://www.ncsl.org/research/financial-services-and-commerce/identity-theft-state-statutes.aspx (last visited July 27, 2019).

151. Part of the reason is that U.S. imposter and identity theft laws evolved to address questions of liability and fraud against the government, not to address fraud perpetrated in the political sphere. *See* Jennifer Trost, *The Impostor Rule and Identity Theft in America*, 35 LAW & HIST. REV. 433, 435 (2017) ("Impersonation and then identity theft emerged in the space between a civil system preoccupied with moving money and determining allocation for losses incurred by impostors, and a later-developing criminal system preoccupied with fraud or forgery against the government."). Some related statutes may address some parts of the problem. For example, a federal regulation prohibits transmitting inaccurate or misleading caller identification information. 47 C.F.R. § 64.1604 (2011). If a scheme to digitally impersonate a candidate included use of a misleading caller ID, this law would presumably apply (though there is some question because the law prohibits scams that seek to obtain "anything of value"). In any case, the prohibition does not reach the digital impersonation itself, nor does it touch schemes that do not involve caller identification. For more, see Maureen Groppe, *How Unsolicited Text Messages Were Sent to Hoosiers to Put Pressure on Sen. Joe Donnelly*, INDIANAPOLIS STAR (July 13, 2018), https://www.indystar.com/story/news/politics/2018/07/13/do-texts-pressuring-joe-donnelly-support-brett-kavanaugh-comply-federal-rules/782090002/; *see also* Kevin Roose & Mitchell Ferman, *'Impostor' Sent Texts to Beto O'Rourke Supporters, Campaign Says*, N.Y. TIMES (Sept. 5, 2018), https://www.nytimes.com/2018/09/05/us/politics/beto-orourke-texts-voting-texas.html (describing faked tweets from a U.S. Senate candidate in Texas).

152. 18 U.S.C. § 2261A (2018).

153. Chesney & Citron, *supra* note 5, at 43 (describing penalties defendants face under federal anti-cyberstalking law and suggesting that "[s]ome deep fakes will fit [the] bill.").

speech will not resemble "stalking" in the conventional sense, to the extent the motive is to destabilize elections.[154]

What about state rules prohibiting impersonation? Many states have laws, for example, prohibiting impersonation of public servants and police officers.[155] In *United States v. Chappell*,[156] a former Fairfax County Sherriff's Office employee falsely claimed he was still a police officer in order to avoid a speeding ticket. Prosecuted under Virginia's statute prohibiting impersonation of a police officer, the defendant raised the argument that the First Amendment protected his lie.[157] The Fourth Circuit was unimpressed: "[T]he Virginia impersonation statute has a plainly legitimate sweep. By protecting unsuspecting citizens from those who falsely pretend to be law enforcement officers, the statute serves the Commonwealth's critical interest in public safety."[158]

Some states criminalize online impersonation. In Texas for example, it is a felony to create a website on a social networking site using the name or persona of another with the intent to harm, defraud, intimidate or threaten.[159] Texas also prohibits sending an email, instant message, or text claiming to be another person, without his or her permission, if the intent is to harm or defraud.[160] Currently only a few states have such laws,[161] but they could provide a hook for addressing some forms of counterfeit campaign speech—that is, if such laws are not found to violate perpetrators' First Amendment rights.

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154. *See* Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 374–75 (2009) (describing the more typical, often gendered forms of cyberstalking and cyberharassment that such laws aim to prevent).

155. *See, e.g.*, New York statute criminally prohibits impersonation of a public servant. *See* N.Y. PENAL LAW § 190.25(4) (McKinney 2018) (stating that criminal liability for impersonating "another by communication by internet website or electronic means with intent to obtain a benefit or injure or defraud another, or by such communication [pretend] to be a public servant in order to induce another to submit to such authority or act in reliance on such pretense."). Federal law also prohibits impersonating a public servant. *See* 25 C.F.R. § 11.432 (2017) ("A person commits a misdemeanor if he or she falsely pretends to hold a position in the public service with purpose to induce another to submit to such pretended official authority or otherwise to act in reliance upon that pretense to his or her prejudice.").

156. United States v. Chappell, 691 F.3d 388, 391 (4th Cir. 2012), *cert. denied*, 568 U.S. 1136 (2013).

157. The defendant argued the statute facially violated the First Amendment because it "criminalizes the behavior of adults who attend costume parties dressed as a police officer, children playing cops and robbers, and actors portraying law enforcement officials." *Id.* at 393.

158. *Id.* at 392. Notably, the Fourth Circuit reached its decision post-*Alvarez*, noting that all nine justices in *Alvarez* "affirmed that the federal officer impersonation statute, 18 U.S.C. § 912, is constitutional." *Id.* at 394.

159. TEX. PENAL CODE ANN. § 33.07(a)(1) (West 2011).

160. *Id.* at § 33.07(a)(2).

161. *See, e.g.*, HAW. REV. STAT. § 711-1106.6(1) (2008) ("A person commits the offense of harassment by impersonation if that person poses as another person, without the express authorization of that person, and makes or causes to be made, either directly or indirectly, a transmission of any personal information of the person to another by any oral statement, any written statement, or any statement conveyed by any electronic means, with the intent to harass, annoy, or alarm any person."); N.Y. PENAL LAW § 190.25 (McKinney 2018) (stating that criminal impersonation in the second degree, occurs if a person "[i]mpersonates another and does an act in such assumed character with intent to obtain a benefit or to injure or defraud another . . . ."). Section 190.25 of the New York Penal Code was challenged and upheld in Golb v. Att'y Gen. of New York. 870 F.3d 89, 102 (2d Cir. 2017).

In 2014, prosecutors indicted Billy Mack Maddison under Texas' criminal impersonation statute for using nude photographs of his ex-wife to create Facebook profiles in her name and sending friend requests to her friends and family. Maddison challenged the statute as a facial First Amendment violation. The trial court agreed it was.[162] But in *Ex parte Maddison*, the appellate court reversed, finding that the defendant's actions fell "within the categories of criminal, fraudulent, and tortious activity that are unprotected by the First Amendment."[163]

Which brings us to tort. Do tort claims, like defamation,[164] false light,[165] or the right of publicity,[166] offer candidates adequate means of addressing counterfeit campaign speech? The short answer is that they might.[167] But there are real barriers to expecting individual plaintiffs to police counterfeited candidate speech effectively through civil tort suits, particularly in the election context.[168] For one, candidates may not have the resources or ability to identify

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162. *See* Tommy Witherspoon, *Waco Judge Rules Texas Online Impersonation Law Unconstitutional, Violates First Amendment*, WACO TRIBUNE-HERALD (Feb. 26, 2016), https://www.wacotrib.com/news/courts_and_trials/waco-judge-rules-texas-online-impersonation-law-unconstitutional-violates-first/article_d633811c-86d0-5dce-a3f5-924ff6591ba0.html (describing the ruling that the law used to prosecute defendant for using "the name of his ex-wife to create a Facebook profile 'with the intent to harm or defraud or intimidate or threaten' her" violated the First Amendment).

163. *Ex parte* Maddison, 518 S.W.3d 630, 638 (Tex. App. 2017).

164. Generally, to prove a defamation claims, a plaintiff must show a false or defamatory statement concerning another published to a third party and damage caused to the person who is the subject of the statement. *See* RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977). In the case of a non-public figure, the plaintiff must prove negligence, whereas public officials (like candidates for office) must prove the defendant acted with actual malice. New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (establishing the actual malice standard for public officials in defamation claims).

165. To bring a false light claim, a plaintiff must show that the defendant published information about the plaintiff portraying the plaintiff in a false or misleading light with reckless disregard for its falsity. That information must be highly offensive or embarrassing to a reasonable person of ordinary sensibilities. RESTATEMENT (SECOND) OF TORTS § 652E (AM. LAW INST. 1977).

166. When William Prosser categorized the right of publicity as one of four privacy torts, he described the right of publicity as appropriation, for the defendant's advantage, of plaintiff's name or likeness. Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887, 1888–90 (2010); *see* ROTHMAN, *supra* note 102 (describing the historical and current contours of the tort). Since its inception, the publicity tort seeks to address attacks on dignity, which counterfeit campaign speech undoubtedly is. Jennifer Rothman addresses the misperception that the harm must be pecuniary for right of publicity plaintiffs to recover in right of publicity claims. *See infra* Subpart IV.A. That said, some state right of publicity laws, like California's misappropriation of likeness statute, require a commercial element, which would not be present in cases of counterfeited candidate speech. *See, e.g.*, CAL. CIV. CODE § 3344(a) (West 1984) (providing that defendant must knowingly use the plaintiff's photograph or likeness, without consent, "for purposes of advertising or selling . . . goods or services.").

167. For a thoughtful discussion of the viability of tort remedies for deep fakes generally, see Chesney & Citron, *supra* note 5, at 34–41. The authors review liability of individuals as well as platforms hosting deep fakes. On individual liability, the authors suggest that right of publicity, defamation, and intentional infliction of emotional distress are all possible tort claims to address deep fakes. They review the many hurdles to such civil claims (finding the perpetrator, time and expense, etc.). On platform liability, the authors discuss the problem of immunity under the Communications Decency Act § 230 (47 U.S.C. § 230(e)(2) (2012)), and suggest such immunity should be curtailed to constrain malicious deep fakes.

168. Defamation may also be an uncomfortable fit. In the case of a deep fake, the false statement at issue is not uttered by a defendant—it is digitally-uttered by the plaintiff herself. In addition, the counterfeited candidate

perpetrators. Technology enables anonymous actions by domestic and international actors that frustrate would-be plaintiffs from securing remedies.[169] For another, tort claims are expensive to bring and can take months, if not years, to resolve, rendering them an ineffective means of addressing election disruption.[170] And finally, First Amendment protections, as discussed in the next Part, could bar recovery in tort given the high bar for restraints on political discourse.[171]

IV. DOES THE FIRST AMENDMENT SHIELD COUNTERFEIT CAMPAIGN SPEECH AGAINST LAWS THAT WOULD RESTRICT IT?

Before 2012, courts issued highly splintered opinions on whether or not lying in campaigns can constitutionally be prohibited.[172] In 2012, the U.S. Supreme Court signaled a death knell for curbing lying in campaigns in *United States v. Alvarez*.[173] In *Alvarez*, the Court found unconstitutional a law prohibiting lying about receiving military honors.[174] In ruling against the law, a majority of justices worried that the statute had the potential to criminalize too much speech—that it was not sufficiently tailored to address the problem it targeted. Writing for the plurality, Justice Kennedy suggested that a better solution to policing lies about military honors would be for the state to publish a database of who has received them.[175] So long as the public has access to the truth, Kennedy reasoned, lies can easily be disproven (and would-be liars deterred by the ease with which we can expose their lying ways).[176]

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speech may raise the candidate's reputation in the eyes of some. In a highly-polarized political context, half of voters might like the counterfeit speech better than the candidate's real views, making damage to reputation harder to prove. *See* RESTATEMENT (SECOND) OF TORTS § 559 cmt. e (AM. LAW INST. 1977) ("A communication to be defamatory need not tend to prejudice the other in the eyes of everyone in the community or of all of his associates, nor even in the eyes of a majority of them. It is enough that the communication would tend to prejudice him in the eyes of a substantial and respectable minority of them, and that it is made to one or more of them or in a manner that makes it proper to assume that it will reach them. On the other hand, it is not enough that the communication would be derogatory in the view of a single individual or a very small group of persons."). First Amendment sanctity of political speech protects most defamers in this realm. Defamation may deter certain forms of counterfeit campaign speech (assuming it applies), but in the case of those running for office, most courts have concluded that the best cure for defamed political candidates is counter speech.

169. Chesney & Citron provide an in-depth analysis of problems plaintiffs face in pursuing tort claims. *See* Chesney & Citron, *supra* note 5, at 34.

170. For discussion of election disruption and timing of legal remedies, see *infra* Subpart V.B.

171. *See generally* Time, Inc. v. Hill, 385 U.S. 374 (1967) (protecting false statements made by the press on First Amendment grounds).

172. Hasen, *supra* note 14, at 56 ("For many years, courts have divided on the constitutionality of laws regulating false campaign speech, with some courts upholding some false campaign speech laws and other courts striking them down.").

173. States v. Alvarez, 567 U.S. 709, 715 (2012).

174. *Id*.

175. *Id*. at 729 ("There is, however, at least one less speech-restrictive means by which the Government could likely protect the integrity of the military awards system. A Government-created database could list Congressional Medal of Honor recipients. Were a database accessible through the Internet, it would be easy to verify and expose false claims.").

176. *Id.*

Counterfeit campaign speech is distinct from the problem in *Alvarez*. It involves attempts to manipulate or otherwise falsify source material emanating from political candidates. It would be as if, instead of merely bragging about accolades he did not receive, Mr. Alvarez were able to add his name to the official database of military honorees. Laws prohibiting Mr. Alvarez from doing so must be constitutional, as Mr. Alvarez does not have a First Amendment right to falsify the record.

Counterfeit campaign speech is different than a lie: it threatens to wreak havoc on political discourse and denies the public the ability to ascertain the truth about political candidates by manipulating the source material used to judge them. Counterfeit campaign speech doesn't just distort democratic political discourse about candidates for public office, it pulls the rug out from underneath it. The question remains, however, whether this distinction would exempt a ban on counterfeit campaign speech from First Amendment protection.

A. LIES AND POLITICAL SPEECH PRE-*ALVAREZ*

American law exempts certain kinds of speech from First Amendment coverage, permitting laws that curb speech in defined circumstances. Trademark law provides a good example. If an infringer produces an advertisement using a trademark holder's slogan, trademark law enables the holder to pursue damages against the infringing use.[177] The First Amendment does not protect the trademark abuser's use of the slogan. Defamation, fraud, and perjury are additional examples of First Amendment-sanctioned speech prohibitions.[178]

The Court (rightly) sets a high bar for core political speech.[179] Assessing fraud in the context of political discourse—as opposed to speech squarely in the commercial realm like trademark—is, therefore, a delicate task. To understand how the Court might approach the constitutionality of a ban on counterfeit campaign speech, this Subpart turns first to the history of courts' policing of prohibitions on deception in campaigning.

The idea that prohibiting false campaign speech is constitutional seemed plausible when the Supreme Court first examined the issue, though indirectly, in a case called *Brown v. Hartlage* in 1982.[180] That case involved a Kentucky candidate who exclaimed during a candidate speech that he would lower his official salary if elected to save taxpayer money.[181] This declaration allegedly ran afoul of the state's Corrupt Practices Act, which prohibited candidates from "making [an] expenditure, loan, promise, agreement, or contract as to action

177. *But see* Lisa P. Ramsey, *Increasing First Amendment Scrutiny of Trademark Law*, 61 SMU L. REV. 381 (2008) (arguing that more courts should subject trademarks to First Amendment scrutiny).

178. *See supra* Part II.

179. Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) ("[T]he constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."); Roth v. United States, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.").

180. Brown v. Hartlage, 456 U.S. 45 (1982).

181. *Id.* at 47–48.

when elected, in consideration for vote."[182] While the law did not prohibit lying in campaigns, it sought to limit candidate speech, prompting the Court to consider whether campaign speech could be constitutionally constrained.[183]

The Court acknowledged that the state has a "legitimate interest in upholding the integrity of the electoral process itself," but noted that First Amendment protections are at their pinnacle when it comes to protecting speech at the "heart of American constitutional democracy—the political campaign."[184] The Court required that the state proffer a compelling interest in restricting campaign speech.[185] In the course of concluding that the state's asserted interest in this instance did not make the cut, the *Hartlage* Court warned against attempts to regulate campaign speech:

> In barring certain public statements . . . the State ban runs directly contrary to the fundamental premises underlying the First Amendment as the guardian of our democracy. That Amendment embodies our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad, and between candidates for political office. The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech.[186]

Hartlage did not address whether a state could bar *false* campaign speech. Indeed, the Court seemed to take that assumption as given. Citing defamation principles, the Court acknowledged that "demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements."[187] Using the defamation frame, the Court found dispositive that there had been no showing that the candidate made the disputed statement in bad faith or that he made the statement with reckless disregard as to its falsity.[188]

This opening in *Hartlage* suggested that laws barring lying in campaigns were constitutional. States have attempted various prohibitions of lying in political campaigns, many of which have been subject to constitutional challenges.[189] A Washington state statute, for example, prohibited the sponsorship with actual malice of political advertising that contained a false statement of material fact.[190] The Washington Supreme Court struck down the

182. *Id.* at 49.

183. *Id.*

184. *Id.* at 52–53.

185. *Id.* at 53–54 ("[W]hen a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression.").

186. *Id*. at 60.

187. *Id*.

188. *Id*. at 61.

189. *See infra* note 221.

190. The law also prohibited political advertising that falsely represented that a candidate is an incumbent for the office sought, or directly or indirectly, falsely claimed the support or endorsement of any person or organization when in fact the candidate does not have such support or endorsement. WASH. REV. CODE § 42.17.530(1)(a) (2012).

law in *State ex rel. Public Disclosure Commission v. 119 Vote No! Committee*.[191] Wrestling with whether false political speech could be constitutionally prohibited, *119 Vote No!* involved a political advertisement opposing a ballot initiative.[192] The ad at issue suggested that, if it passed, the law would invite assisted suicide without adequate safeguards.[193] The state filed a complaint alleging that the advertisement violated the Washington statute.[194]

A sharply divided court issued four separate opinions. A majority of justices found that the Washington statute prohibiting lies in campaigns violated the First Amendment on its face.[195] The majority found the state lacked a compelling interest in preventing lies in the course of an initiative or referendum campaign.[196] The majority made a distinction between speech about ballot measures versus candidates, suggesting (with a nod to defamation law) that a narrower law banning malicious lies about political *candidates* could survive constitutional scrutiny.[197]

The majority's decision was animated by age-old American distrust of the state's ability to determine "truth,"[198] here with respect to the advertisement in question.[199] Whether or not the proposed legislation contained adequate safeguards for assisted suicide was up for debate; government-decreed truth or falsity felt "patronizing and paternalistic."[200] The majority believed the solution to be more speech to help the public weigh the issue.[201]

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191. State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm., 957 P.2d 691, 695–99 (Wash. 1998).

192. *Id*. at 693–94.

193. *Id*.

194. *Id*.

195. *Id*. at 699 ("We therefore conclude [the statute] chills political speech, usurps the rights of the electorate to determine the merits of political initiatives without fear of government sanction, and lacks a compelling state interest in justification.").

196. *Id*.

197. Citing defamation law in her concurring opinion, Justice Madsen explained that "[a] state . . . may allow recovery of damages for defamation to . . . candidates for public office, provided that the *New York Times* [*v. Sullivan*] actual malice standard is satisfied." *Id*. at 700. Professor Charles Fried takes a similar, if not more restrictive, view. He has suggested confining allowable prohibitions to a narrow class of defamatory speech when it comes to political speech. According to Fried, "the First Amendment precludes punishment for generalized 'public' frauds, deceptions and defamation. In political campaigns the grossest misstatements, deceptions, and defamations are immune from legal sanction unless they violate private rights—that is, unless individuals are defamed." Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 238 (1992).

198. *119 Vote No! Comm.*, 957 P.2d at 695.

199. *Id*. ("The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind . . . . In this field *every person* must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." (quoting Grant v. Meyer, 828 F.2d 1446, 1455 (10th Cir. 1987) (internal quotation marks omitted)). The 8th Circuit adopted this view in 281 Care Comm. v. Arneson, 638 F.3d 621, 635 n.3 (8th Cir. 2011).

200. *119 Vote No! Comm.*, 957 P.2d at 698.

201. The fallback position that "the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). More recently, scholars have begun to question whether the concept of more speech curing harm works in the Internet Age. *See* Nabiha Syed, *Real Talk About Fake News: Towards a Better Theory for Platform Governance*, 127 YALE L.J. FORUM, 337, 342 (2017) ("The internet—

Justice Talmadge, joined by one other Justice, wrote a fiery concurring opinion, agreeing only that the group did not violate the law, but not agreeing that the law was unconstitutional.[202] Justice Talmadge lambasted the majority for being the "first court in the history of the Republic to declare First Amendment protection for *calculated* lies."[203] Justice Talmadge wrote:

> The majority . . . presumes the people of Washington have no authority to require persons to tell the truth. This presumption is, of course, wrong. Perjury has been a part of Washington's criminal code since territorial days. Prohibitions against lying and bearing false witness may be found in cultures worldwide from time immemorial.[204]

Justice Talmadge took issue with the notion that lies could not be prohibited in the political sphere. Instead, he argued that the state had an important interest in affirmatively prohibiting deception in this realm:

> 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.[205]

After this set of conflicted opinions about whether political lies can be constitutionally prohibited, the question came to head (though again not in the campaign speech context) in *United States v. Alvarez*, decided in 2012.[206]

B. *ALVAREZ* AND ITS AFTERMATH

Like the Washington state case, the U.S. Supreme Court issued splintered opinions, voting 6-3 that the Stolen Valor Act was not sufficiently narrowly tailored.[207] In *Alvarez*, the Justices discussed the problem of lying in campaigns. Thus, it is instructive for discerning how the court would rule on a prohibition of counterfeit campaign speech.

Four Justices—Kennedy, Roberts, Sotomayor and Ginsburg—held that lies are constitutionally protected under a strict scrutiny standard requiring any

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replete with scatological jokes and Prince cover songs—involves much more than political deliberation. And so any theory of speech that focuses only on political outcomes [for example., that the marketplace of ideas cures false speech] will fail because it cannot fully capture *what actually happens* on the internet.").

202. *119 Vote No! Comm.*, 957 P.2d at 701.

203. *Id*. (emphasis added). Talmadge quoted Justice Brennan, who wrote, "the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." *Id.* at 703 (quoting Garrison v. Louisiana, 379 U.S. 64, 75 (1964)). Justice Talmadge went on to reference Supreme Court opinions with language supportive of this idea: "Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Id.* at 697 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)). The court continued: "Of course, demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements." *Id.* at 703 (citing Brown v. Hartlage, 456 U.S. 45, 59 (1982)).

204. *Id.* at 702.

205. *Id*. at 703 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

206. United States v. Alvarez, 567 U.S. 709 (2012).

207. *Id*. at 738 ("And so it is likely that a more narrowly tailored statute combined with such information-disseminating devices will effectively serve Congress' end.").

prohibition to be narrowly tailored to serve a compelling government interest.[208] All four Justices acknowledged that such First Amendment protections would not apply to categories of punishable lies like defamation, perjury, or fraud.[209] Two Justices, Kagan and Breyer, would apply "intermediate scrutiny" in which the government would have a lighter burden of proving its prohibition served an important government interest.[210]

Though these six Justices disagreed as to the level of scrutiny to apply, all six supported the contention that "falsity alone may not suffice to bring the speech outside the First Amendment."[211] It must be accompanied by an identified harm.[212] As Justice Breyer framed it, only narrow prohibitions on false speech could survive constitutional scrutiny upon "proof of specific harm to identifiable victims" or instances in which a "particular and specific harm by interfering with the functioning of a government department" could be shown.[213] Justice Breyer settled on statutes that prohibit trademark infringement as what he called "the closest analogy" to lying about receiving a military honor:

> Trademarks identify the source of a good; and infringement causes harm by causing confusion among potential customers (about the source) and thereby diluting the value of the mark to its owner, to consumers, and to the economy. Similarly, a false claim of possession of a medal or other honor creates confusion about who is entitled to wear it, thus diluting its value to those who have earned it, to their families, and to their country.[214]

But Breyer distinguished trademark law from the Stolen Valor prohibition by noting that trademark law is narrower: it requires a showing of commercial harm.[215]

Justice Alito, joined by Scalia and Thomas, dissented, siding with Justice Talmadge in denying that false statements have "intrinsic First Amendment value."[216] Justice Alito noted that the sale and manufacture of counterfeit military decorations is constitutionally prohibited,[217] and also took up the

208. *Id.* at 710.

209. *Id.* at 736 ("[I]n virtually all these instances . . . requirements of proof of injury . . . narrow the statute to a subset of lies where specific harm is more likely to occur. The limitations help to make certain that the statute does not allow its threat of liability or criminal punishment to roam at large, discouraging or forbidding the telling of the lie in contexts where harm is unlikely or the need for the prohibition is small.") (Breyer, J., concurring).

210. *Id.* at 732 (Breyer, J., concurring). Even under this lower standard, Kagan and Breyer found the government's justification for banning lies about military awards lacking. *Id*. at 739. ("The Government has provided no convincing explanation as to why a more finely tailored statute would not work. In my own view, such a statute could significantly reduce the threat of First Amendment harm while permitting the statute to achieve its important protective objective.").

211. *Id*. at 719.

212. *Id*. at 720 ("Perjured testimony 'is at war with justice' because it can cause a court to render a 'judgment not resting on truth.'" (quoting In re Michael, 326 U.S. 224, 227 (1945)).

213. *Id*. at 734–35 (Breyer, J., concurring).

214. *Id*. at 735 (Breyer, J., concurring).

215. *Id*.

216. *Id.* at 746 (Alito, J., dissenting).

217. *Id*. at 741 (Alito, J., dissenting) (citing Schacht v. United States, 398 U.S. 58, 61 (1970) (upholding on its face, a federal statute that makes it a crime to wear a United States military uniform without authorization)).

trademark analogy. He pointed out that trademark law rests on the principle that trademark owners have the right to exclusive profit of their mark and the public has the right to rely on the mark as a signal of the genuineness of the product.[218] Justices Alito and Breyer recognized the importance of protecting the public from fakes.

Justice Alito focused on harm caused when individuals forward false claims about military honors by, for example, defrauding the government out of veterans' benefits or securing government contracts through fraud.[219] Justice Alito pointed to a litany of federal laws that make it a crime to present false information to government agencies to prevent specific harms.[220]

Since *Alvarez*, courts have applied its reasoning to state statutes prohibiting lying in campaigns.[221] For example, in *Susan B. Anthony List v. Driehaus*,[222] the Sixth Circuit struck an Ohio law prohibiting false statements "during the course of any campaign for nomination or election to public office or office of a political party."[223] In *SBA List*, an anti-choice organization wanted to post language on a billboard suggesting that a candidate who voted for the Affordable Care Act had in fact "vot[ed] *for* 'taxpayer-funded abortion.'"[224] When the candidate's attorneys threatened legal action citing the Ohio statute, the billboard company refused to post the group's advertisement.[225] SBA List sued, arguing that Ohio's statute violated its First Amendment rights.[226] SBA List faced difficult Sixth Circuit precedent in *Pestrak v. Ohio Elections Commission*, which had upheld Ohio's political false statements laws as constitutional.[227]

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218. *Id*. at 743 (Alito, J., dissenting) (citing Landes & Posner, *Trademark Law: An Economic Perspective*, 30 J. LAW & ECON. 265, 308 (1987)). The Court does not always dismiss First Amendment implications of trademark law. *See* Matal v. Tam, 137 S. Ct. 1744 (2017) (holding that the disparagement clause of Lanham Act, prohibiting federal trademark registration for marks that might disparage any persons, living or dead, was facially invalid under First Amendment protection of speech).

219. *Alvarez*, 567 U.S. at 742–43.

220. *Id*. at 747–48 ("[I]t has long been assumed that the First Amendment is not offended by prominent criminal statutes with no close common-law analog. The most well known of these is probably 18 U.S.C. § 1001, which makes it a crime to 'knowingly and willfully' make any 'materially false, fictitious, or fraudulent statement or representation' in 'any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States.' Unlike perjury, § 1001 is not limited to statements made under oath or before an official government tribunal. Nor does it require any showing of 'pecuniary or property loss to the government.' Instead, the statute is based on the need to protect 'agencies from the perversion which *might* result from the deceptive practices described.'" (citations omitted)).

221. *See, e.g.*, 281 Care Comm. v. Arneson, 766 F.3d 774, 785 (8th Cir. 2014), *cert. denied*, 135 S. Ct. 1550 (2015) ("[N]o amount of narrow tailoring succeeds because [Minnesota's political false-statements law] is not necessary, is simultaneously overbroad and underinclusive, and is not the least restrictive means of achieving any stated goal."); Commonwealth v. Lucas, 34 N.E.3d 1242, 1257 (Mass. 2015) (striking down a similar Massachusetts law); *see also* Rickert v. State Pub. Disclosure Comm'n, 168 P.3d 826, 829–31 (Wash. 2007) (striking down Washington's political false-statements law, which required proof of actual malice, but not defamatory nature).

222. 814 F.3d 466 (6th Cir. 2016).

223. OHIO REV. CODE ANN. § 3517.21(B) (West 1995).

224. *Susan B. Anthony List*, 814 F.3d at 470 (emphasis added).

225. *Id*.

226. *Id*.

227. Pestrak v. Ohio Elections Comm'n, 926 F.2d 573 (6th Cir. 1991).

Pestrak held that "false speech, even political speech, does not merit constitutional protection if the speaker knows of the falsehood or recklessly disregards the truth."[228]

But citing *Alvarez*, a unanimous Sixth Circuit held that the law was not sufficiently narrowly tailored.[229] The court found that *Alvarez* distinguished cases upon which the *Pestrak* lower court had relied.[230] Namely, those cases had not depended solely on the falsity of the statements made.[231] Instead, the Sixth Circuit also focused on harm, reasoning that those cases relied on prohibitions of false speech that was also defamatory, fraudulent, or caused some other "legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation."[232] The ad at issue in *SBA List* was not fraudulent; it was attacked only for its alleged falsity. *SBA List* drove home the central lesson in *Alvarez*: falsity cannot be the sole driver of a law prohibiting lies in campaigns. Thus, to survive constitutional scrutiny, a prohibition of deceptions in campaigns must target (1) a narrow subset of speech that (2) causes specific and identifiable harm.[233]

C. A NARROW COUNTERFEIT CAMPAIGN SPEECH PROHIBITION

Turning to the question of First Amendment protections for counterfeit campaign speech post-*Alvarez*, a threshold question is whether the First Amendment protects it at all. [234] Unlike garden-variety political lies—lies about political opponents' positions or love lives—the truth of which may be subject to honest discourse or debate—counterfeit campaign speech is, by definition, a knowing fraud. To prosecute, an official or court need not figure out whether the *content* is true or false (a task that begs selective prosecution and manipulation for partisan ends).[235] Rather, the question is whether the material is *faked* with intent to confuse voters and distort democracy.[236] Just like Justice Alito's

228. *Id.* at 577.

229. *Susan B. Anthony List*, 814 F.3d at 476.

230. *Id*. at 471 (stating that "the Supreme Court's decision in *United States v. Alvarez* most clearly abrogates *Pestrak* 's reasoning." (citations omitted)).

231. *Id*.

232. *Id*. at 472 (citing *Alvarez*, 567 U.S. at 719).

233. *Alvarez*, 567 U.S. at 734 (Breyer, J., concurring).

234. Frederick Schauer takes issue with whether demonstrably false speech is even relevant to First Amendment questions. *See* Schauer, *supra* note 93, at 908 ("[D]emonstrable factual falsity, whether public or private, is simply not the same subject as that of free speech and the First Amendment.") Chen and Marceaux suggest that lies can be placed according to a spectrum of harm: "On one end of the spectrum are lies such as perjury and fraud, which fall beyond the First Amendment's reach because they are widely and historically understood to cause tangible harm, material gain, or both." Alan K. Chen & Justice Marceau, *Developing a Taxonomy of Lies under the First Amendment*, 89 U. COLO. L. REV. 655, 658 (2018). At the other end of the spectrum are what Chen and Marceaux refer to as "high value" lies, which they describe as lies told to uncover truth, for example by investigative journalists who disguise their identity in order to ferret out a story. *Id.*

235. William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 299 (2004).

236. In Illinois *ex rel*. Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 620 (2003), the U.S. Supreme Court upheld the state's power to police fraudulent claims. In that case, telemarketers made fundraising calls

example of the perfectly-constitutional prohibition of the production and sale of counterfeit Purple Hearts in *Alvarez*, counterfeit campaign speech is, at base, a fraud pursued for an ignoble goal of the sort the state regularly bans. Counterfeited campaign speech thwarts members of the public from discerning who to believe: the counterfeiter or the real candidate. As discussed in Part II, more speech cannot adequately cure the damage done.[237] For these reasons, there is a strong argument that First Amendment protections do not reach counterfeit campaign speech.

In the case of defamatory speech, the Court has blessed liability for malicious lies told about public figures. In *New York Times v. Sullivan*, the Supreme Court established that false speech about public figures, so long as actual malice and knowledge of falsity is proved, is not protected by the First Amendment.[238] The Court weighed the right of the public to criticize public officials, including candidates for office, and found that the importance of uninhibited discourse about public events (including inadvertent mistruths) precluded public officials from pursuing libel judgments unless knowledge of falsity or reckless disregard of the truth could be shown.[239] *Sullivan* thereby recognized that just because defamatory false speech is uttered in the political realm does not mean the First Amendment indelibly protects it. Defamatory false speech uttered with knowledge of falsity is not protected.[240] Neither, in that same light, should the First Amendment protect counterfeit campaign speech.[241]

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claiming that a significant amount of each dollar donated would be used for charitable purposes. These claims were knowingly false. The lower court found that the First Amendment protected the speech at issue. The U.S. Supreme Court, however, focused on the fraudulent nature of the speech and held that the First Amendment did not bar prosecution. *Id*. at 624 ("Consistent with our precedent and the First Amendment, states may maintain fraud actions when fundraisers make false or misleading representations designed to deceive donors about how their donations will be used."). *See* Jason Zenor, *A Reckless Disregard for the Truth? The Constitutional Right to Lie in Politics*, 38 CAMPBELL L. REV. 41, 63 (2016) (comparing false campaign speech to false advertising in the commercial realm).

237. Richard Hasen suggests that a law prohibiting lies by candidates that are easily verifiable might be constitutional. As soon as the question becomes murkier—for example, whether the candidate supports tax increases—the risk of prosecutorial discretion rises, a concern commonly raised by courts examining the question. But Hasen points to a problem in this logic: if false speech is easily verifiable as such, the counter-speech cure is arguably the best means of addressing it. Hasen, *supra* note 14 at 75. In the case of counterfeit campaign speech, if the counterfeit is easily verified as false (ineptly done or obviously fake) the need for protection against it diminishes. If verification of authenticity is nearly if not entirely impossible, then counter speech is ineffective.

238. New York Times v. Sullivan, 376 U.S. 254, 279–80 (announcing "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.").

239. *Id*.

240. *Id*. at 281–82 ("[A]ny [public official] claiming to be defamed by the communication must show actual malice, or go remediless. This privilege extends to a great variety of subjects, and includes matters of public concern, public men, and candidates for office." (citation omitted)).

241. *Id*. at 279–80 ("The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.").

Principal among the *Sullivan* Court's concern was protecting robust and unfettered discourse and exchange of opinion about public figures—something it felt compelled to secure even when untruths inadvertently enter political discourse. *Sullivan's* goal of protecting the marketplace—even that sullied by unknowing factual error and mistruths—is furthered by a ban of counterfeit campaign speech; it seeks to ensure that only "real" speech enters the marketplace.

If *Sullivan* provides strong support for the assertion that a prohibition on counterfeit campaign speech could survive constitutional scrutiny, the conduct-versus-speech dichotomy provides additional support. Laws that prohibit computer tampering,[242] identity theft,[243] and unauthorized impersonation,[244] target specific conduct can be constitutionally prohibited.[245] It is illegal to hack into someone's computer account. It is illegal to steal someone's identity and take out a loan in her name. It is illegal to impersonate a police officer. The First Amendment does not stop prohibition of these forms of conduct.[246] Doctoring a candidate's speech bears a strong relation to constitutionally-punishable conduct.[247]

One might counter that because counterfeit campaign speech occurs in the First Amendment sanctum of political discourse, it cannot so easily escape constitutional scrutiny. In the draft card case *United States v. O'Brien,* the Court advised that when core "'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[248] Thus, even if counterfeit campaign speech is seen as a form of conduct, the analysis would come down to the strength of the government interest in preventing it. In *Chappell*, the government's interest was protecting public safety;[249] in *O'Brien* it was protecting the administrative functions of the draft system in wartime America.[250] Is protecting voters, our system of elections, and candidates similarly vital?

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242. *See, e.g.*, 18 U.S.C. § 1030 (2012) (Computer Fraud and Abuse Act).

243. *See, e.g.*, 18 U.S.C. § 1028(a)(7) (2000) (The Identity Theft Assumption and Deterrence Act).

244. *See, e.g.*, VA CODE ANN. § 18.2-174 (West 2018) ("Any person who falsely assumes or exercises the functions, powers, duties, and privileges incident to the office of sheriff, police officer, marshal, or other peace officer, or any local, city, county, state, or federal law-enforcement officer, or who falsely assumes or pretends to be any such officer, is guilty of a Class 1 misdemeanor.").

245. Justice Kennedy ceded in *Alvarez* that laws may "prohibit impersonating a Government officer" and punish impersonators even without a showing of "'actual financial or property loss' resulting from the deception." United States v. Alvarez, 567 U.S. 709, 721 (2012).

246. *Id.* at 720 (plurality opinion); *id.* at 734 (Breyer, J., concurring); *id.* at 746 (Alito, J., dissenting).

247. This is the conclusion the Texas appeals court reached in *Ex parte Maddison*. In that case, the court found that "[i]mpersonation is a nature-of-conduct offense." *See* Ex parte Maddison, 518 S.W.3d 630, 637 (Tex. App. 2017).

248. United States v. O'Brien, 391 U.S. 367, 376 (1968).

249. United States v. Chappell, 691 F.3d 388, 402 (4th Cir. 2012).

250. 391 U.S. at 381 ("We think it apparent that the continuing availability to each registrant of his Selective Service certificates substantially furthers the smooth and proper functioning of the system that Congress has established to raise armies. We think it also apparent that the Nation has a vital interest in having a system for

Even if a court were unwilling to exempt counterfeit campaign speech as a category unprotected under the First Amendment or as a constitutional conduct prohibition, a narrow law targeting counterfeited candidate speech produced and distributed with knowing intent to confuse voters and disrupt elections should survive First Amendment scrutiny because the harm it seeks to prevent is democratically existential. It provides the narrow exception the *Alvarez* court required: proof of specific harm to identifiable victims or specific harm by interference with the functioning of a government department.[251] Here, harms to voters, our system of elections, and to candidates themselves satisfy the test.

In sum, the First Amendment barrier to a ban is significant but surmountable. Part V next explores practical challenges to curbing counterfeit campaign speech.

V. PRACTICAL HURDLES TO PROHIBITING COUNTERFEIT CAMPAIGN SPEECH

Whether or not a restriction of counterfeit campaign speech survives constitutional scrutiny, practical challenges remain: counterfeit campaign speech is hard to detect and even when detected may not be prosecuted in time to prevent the identified harms.

A. A PROBLEM OF DETECTION

Given the current state of technology, counterfeit campaign speech can be very difficult to identify in three respects. First, on its face, a video, image, audio, or written form of counterfeit campaign speech appears real; that is the point. It may well take a long time (if ever) for a counterfeit to be exposed. Technology that readily detects fakes through digital forensics is not yet available.[252] Forensic computer scientist Hany Farid has devoted his career to authenticating digital material. Professor Farid warns that new and sophisticated technology thwarts digital forensic techniques through,

> [R]apid advances in machine learning that have made it easier than ever to create sophisticated and compelling fakes. These technologies have removed many of the time and skill barriers previously required to create high-quality fakes. Not only can these automatic tools be used to create compelling fakes, they can be turned against our forensic techniques . . . [to] modify fake content to bypass forensic detection.[253]

raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances.").

251. United States v. Alvarez, 567 U.S. 709, 734 (2012) (Breyer, J., concurring).

252. Hany Farid, *Digital Forensics in a Post-Truth Age*, 289 FORENSIC SCI. INT'L 268, 268 (2018) (describing the process of authentication photographic material).

253. *Id*.

What Farid describes is a counterfeit-authentication arms race—and one in which counterfeiters are outrunning digital forensics experts' ability to expose fakes.[254]

Second, even if material can be reliably identified as fake, a legal prohibition might be difficult to enforce. Locating the person or entity that created and distributed the counterfeit is very often an impossible task.[255] The nature of the modern information environment poses real risks in that perpetrators of crime online can easily hide.[256] Not all purveyors of counterfeited candidate speech will be sophisticated actors capable of leveraging impenetrable online anonymity tools. But, particularly if such conduct is outlawed, those who engage in this form of fraud are likely to mask their identities with increasing sophistication.

Third, a very real hurdle to any ban on counterfeited candidate speech is that even when identified, counterfeiters may not physically reside within U.S. jurisdiction. Prosecutions of foreign individuals for a growing list of crimes face similar challenges. And given the difficulties associated with prosecuting foreign nationals, a ban on counterfeit campaign speech's value of deterrence diminishes. As Chesney and Citron describe:

> The prospect of a criminal prosecution in the United States will mean little to foreign government agents involved in [producing fakes] so long as they are not likely to end up in U.S. custody (thought it might mean something more to private actors through whom those agencies sometimes choose to act, at least if they intend to travel abroad).[257]

Still, Robert Mueller's indictment of Russian Nationals for, *inter alia*, assuming fake identities to create social media accounts suggests that international criminal prosecution to protect the sanctity of U.S. elections is not an entirely lost cause.[258]

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254. *See* Warzel, *supra* note 10 (describing the phenomenon of "laser phishing" (i.e., faked phishing communications appearing to be from one's close friends or family rather than a man from Nigeria) becoming a widespread inevitability. As one expert describes, "It's a threat for sure, but even worse—I don't think there's a solution right now"). Facebook is attempting to use artificial intelligence to help detect deep fake videos. *See* Liam Tung, *Facebook's Fact-Checkers Train AI to Detect 'Deep Fake' Videos,* ZDNET (Sept. 14, 2018), https://www.zdnet.com/article/facebooks-fact-checkers-train-ai-to-detect-deep-fake-videos/.

255. As Chesney and Citron describe in addressing the challenges of deep fakes generally, "ascertaining provenance in connection with a deep fake might be insufficient to identify its creator." Chesney and Citron, *supra* note 5 at 34. They note that this problem is exacerbated when "the creator or someone else posts the deep fake on social media or otherwise injects it into the marketplace of information." *Id.*

256. *See* Ahmed Ghappour, *Searching Places Unknown: Law Enforcement Jurisdiction on the Dark Web*, 69 STAN. L. REV. 1075, 1090 (2017) (describing the related problem of the increasing difficulty of pursuing criminal suspects who have anonymized their identity on the dark web).

257. Chesney and Citron, *supra* note 5, at 44–45.

258. Indictment, United States v. Internet Research Agency, No. 1:18-cr-00032-DLF (D.D.C. Feb. 16, 2018).

B. THE ELECTION-EVE PROBLEM

In the realm of protecting elections, timing is often everything. If the goal is to protect the electoral process from faked candidate speech, could a ban provide an adequate remedy before the damage is done? Particularly with respect to counterfeit campaign speech unleashed on the eve of an election, a remedy may fail to protect the vote. Sophisticated actors will surely time the release of counterfeit campaign speech to maximize its damage to the candidate, to voters, and to the electoral process.[259]

One way to address the unique timing problem counterfeit campaign speech presents is to implement a notice and take-down regime similar to the system used in copyright law but confined to a short period before an election.[260] This could provide candidates who become aware of counterfeited campaign speech a means to require the platform hosting it to remove it immediately from circulation followed by a process for determining liability that would unfold after its power to distort an electoral outcome is extinguished. The obvious retort is that any requirement to immediately remove political speech from circulation could be misused by political adversaries, resulting in a diminished marketplace of ideas.[261] Those considering this type of tool to address counterfeit campaign speech must carefully balance these interests.

Importantly, assuming digital forensics continue to improve, it may well be that, in the future, detecting faked speech quickly and effectively will be possible. One fascinating breakthrough came when media forensics experts realized that people portrayed in deep fake videos rarely blink, suggesting a surprising avenue of detection.[262] For the most part, however, media forensic scientists are keeping possible detection methods under wraps for fear of tipping off deep fakers on ways to elude detection.[263] Despite Hany Farid's gloomy predictions, he and many others are on the job.[264] One can imagine that a

259. This problem arises often in courts' appraisals of the problem of deception in campaigns generally. *See, e.g.*, Commonwealth v. Lucas, 34 N.E.3d 1242, 1254 (Mass. 2015) (noting difficulty in discrediting a lie on eve of election); s*ee also* Chesney and Citron, *supra* note 5 at 20 (listing as a harm to society "fake audio clip that [sic] 'reveal[s]' criminal behavior by a candidate on the eve of an election.").

260. *See* Digital Millennium Copyright Act (DCMA) notice and take-down provisions codified at 17 U.S.C. § 512(c)(3), (g)(2) (2012). Scholars have proposed modified notice-and-takedown regimes to address harms such as revenge porn. *See, e.g.*, Ariel Ronneburger, *Sex, Privacy, and Webpages: Creating a Legal Remedy for Victims of Porn 2.0*, 2009 SYRACUSE SCI. & TECH. L. REP. 1, 28–30; *see also* Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. 2025, 2055 (2014) ("Internet intermediaries are familiar with analogous provisions of [the DCMA], which condition immunity on compliance with a notice-and-takedown system for material allegedly infringing copyright. It should be straightforward for Internet firms to implement the proposed notice-and-takedown system for non-consensual distribution of intimate media as well.").

261. *See, e.g.*, Hasen, *supra* note 14 at 75 (noting the Court's concern with "partisan manipulation" of processes to police lies in campaigns).

262. Will Knight, *The Defense Department Has Produced the First Tools for Catching Deepfakes*, MIT TECH. REV. (Aug. 7, 2018), https://www.technologyreview.com/s/611726/the-defense-department-has-produced-the-first-tools-for-catching-deepfakes/.

263. *Id*. (explaining that scientists would "rather hold off at least for a little bit . . . . We have a little advantage over the forgers right now, and we want to keep that advantage." (internal quotation marks omitted)).

264. Farid, *supra* note 252.

technological fix may one day eclipse legal prohibition, allowing voters and/or trusted platforms to filter content to ensure that faked candidate speech does not reach voters' eyes and ears—or that, if it does, it is clearly identified as such.[265] Some might object to detection filters of any kind. Surely a filter would be imperfect, acting as a technological censor of speech that could be authentic and important. Yet, it is a good placeholder; workable technological solutions to the problem of counterfeit campaign speech may lie somewhere on the horizon. In the meantime, a clear law imposing stiff penalties would serve as a deterrent, as would well-publicized prosecutions even after elections have concluded.

CONCLUSION

A ban on counterfeit campaign speech is a natural extension of age-old bans on counterfeit activity that seeks to defraud. Seen in this light, counterfeit campaign speech could serve as the unicorn courts and scholars have suggested exists to reign in at least one form of false election speech. Stemming the tide of counterfeited candidate speech—or perhaps more achievably ensuring that it is labeled as such—is no easy task. But some of the hardest problems of regulating false campaign speech fall away when the targeted behavior is counterfeited candidate speech. This narrow focus does not eliminate line-drawing problems, nor ought it remove all First Amendment scrutiny given the core nature of political speech involved. Still, to safeguard the faith of the voting public, to preserve the essence of our democratic project, and to protect the ever-dwindling dignity of candidates for office, attention to what can be done deserves every effort. As argued here, recognizing that a ban on counterfeit campaign speech is constitutionally permissible—and advisable—is a step in that direction.

265. *See, e.g.*, Hany Farid, *Reining in Online Abuses*, 19 TECH. AND INNOVATION 593, 594 (2018) (describing efforts to develop technologies to detect child pornography images).