Assessing the UK's Current Approach to Addressing Deceptive Representations from Westminster Politicians: An Argument in Favour of Introducing a New Criminal Offence Covering Politicians Making Deceptive Representations to the Public

CATLEY, HENRIETTA,ALICE

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Henrietta Catley

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Henrietta Catley

Abstract

Despite the plethora of regulation to sanction or discourage their use, Westminster politicians frequently make deceptive representations (false or misleading statements of fact). Such representations have existed throughout British politics, but recent scandals such as Partygate and the Brexit campaign have exposed their regular use. This shift invites questions about the suitability of the current regulatory approach, both in terms of what we should be regulating and how this should be done.

This thesis conceptualises regulation liberally. I posit, that to justify regulation, the behaviour must have certain qualities. In this sense, it must not just be a moral wrong (something which we ought not to do) but actually cause or risk causing harm. Using this conceptualisation as an apparatus, I identify the types of deceptive representations which warrant a regulatory response (these being, those which are made to Parliament and those which are made to the public).

Viewed through this lens, I ask whether the current regulatory framework is effective at addressing these representations (either by discouraging their use or by providing a formal recognition and consequence). Based on theoretical and functionalist analysis, I put forward recommendations for how to improve upon the design and use of the current mechanisms. In particular, I advocate in favour of a new criminal offence to cover the most egregious deceptive representations which are made to the public. Using Duff's model as guide, I put forward an argument for why criminalisation is the right response for this particular class of representations. I then turn to indicating how imposing criminal liability could work, paying attention to demonstrating how it could be drafted so as not to give rise to frequently cited objections, such as concerns over free speech or politicisation of the judiciary.

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List of Abbreviations

ASA	Advertising Standards Authority
CPS	Crown Prosecution Service
ECtHR	European Court of Human Rights
ECHR	European Convention on Human Rights
MP	Member of Parliament
PMQ's	Prime Minister's Questions
PPE	Personal protective equipment
UNHRC	United Nations High Commissioner for Refugees
WMD's	Weapons of Mass Destruction

Statement of Copyright

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Introduction

Deceptive statements have always been pervasive within the political sphere,[1] to the degree that the public is now accustomed to their use.[2] While some deceptive statements like opinions, or vague comments (pufferies) do not pose that much of a problem, deceptive representations do. These are false or misleading statements of fact which offer the recipient something to rely on. Their apparent sincerity and certainty induce the reasonable recipients i.e., the public or fellow politicians, to have false beliefs.[3]

These representations have a long pedigree in British politics. In the 1960's then-Secretary of State for War John Profumo admitted that he lied to Parliament about his affair with Christine Keeler.[4] Later on, in the 1990's John Major lied about not engaging in peace talks with the IRA.[5] More recently, Tony Blair claimed that there was intelligence[6] that Iraq had weapons of mass destruction. The implication from his claim was that the evidence was strong and reliable when in fact, there was reason to doubt it. In particular, there were limitations to the evidence which if he had disclosed would have offered a much more accurate depiction.[7]

Whilst deceptive representations have had a long pedigree in British politics, recent scandals such as Partygate and the Brexit campaign have exposed their regular usage. Just a few years ago Boris Johnson's claim that the UK would make a gain of £350 million a week if it left the EU was given significant exposure and became notorious as an example of deception in

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[1] Paul Bernal, *The Internet, Warts and All* (Cambridge University Press, 2018) 229, 234-239, 241.
[2] Derek Edyvane, 'The Ethics of Democratic Deceit' (2015) 32(3) Journal of Applied Philosophy 310, 310.
[3] Aubrey L Diamond, 'Puffery' (1975) 1 Poly Law Review 12, 12-13.
[4] HC Deb 22 March 1963, vol 674, cols 809-10.
[5] Anthony Bevins, Eamonn Mallie and Mary Holland, 'Major's secret links with IRA leadership revealed' (*The Guardian*, 28 November 1993) https://www.theguardian.com/uk/1993/nov/28/northernireland accessed 3 October 2024.
[6] Specifically, he said: 'What we have is the intelligence that says that Iraq has continued to develop weapons of mass destruction; that what he is doing is using a whole lot of dual-use facilities to continue to develop weapons of mass destruction; and what we know is there is an elaborate programme of concealment which is pushing this stuff into different parts of the country. […]' per BBC, 'Breakfast with Frost' (*BBC*, 26 January 2003) https://www.bbc.co.uk/programmes/p00pnb0d at 5:42-6:10 accessed 3 October 2024.
[7] Committee of Privy Counsellors, *The Report of the Iraq Inquiry: Executive Summary* (HC 2016, 264) paras 513-514, 540 and 796. In particular, para 540 held that 'The assessed intelligence had not established beyond doubt that Saddam Hussein had continued to produce chemical and biological weapons. […] [Whilst] Iraq had the means to deliver chemical and biological weapons […] [the Joint Intelligence Committee] did not say that Iraq had continued to produce weapons'.
See also, Liaison Committee, *Oral evidence: Follow up to the Chilcot Report* (HC 689, 2016) Q12 (Sir John Chilcot), 'What was not mentioned in the dossier, or in his parliamentary speeches, were the qualifications and conditions that the various JIC assessments had attached to them, which meant that statements made with certainty could not be supported by that kind of evidence'.

politics.[8] The implication was that this was a net gain when it 'did not take into account the rebate or other flows from the EU to the UK public sector […]'.[9] Another prominent instance was Boris Johnson misleading Parliament about the Partygate scandal.[10] He made a number of misleading claims to the House of Commons about Covid-19 social distancing breaches. Such as, that the lockdown rules and guidance were followed at all times, that events in Number 10 were in accordance with the rules and guidance, and that the rules and guidance had been followed at all times when he was present at gatherings.[11] Another recent example is Suella Braverman who made the claim that, '[t]here are 100 million people around the world who could qualify for protection under our current laws. Let us be clear - they are coming here'[12] in Parliament's discussion of the Illegal Migration Bill. The implication was that 100 million people are coming to the UK, when in fact the statistic just represents the number of people who are forcibly displaced around the world- not the number of people who come to the UK.[13] The exposure in frequent usage invites questions about the suitability of the current regulatory approach, both in terms of what we should be regulating and how this should be done.

Thus far, the literature has not explored these issues in-depth. Philosophical and political perspectives have tended to dominate the research, and whilst this has helped to conceptualise and identify parts of the problem, few have gone beyond this to investigate how we can actually discourage or formally sanction their use. Moreover, the few who have explored regulatory intervention tend to take a cautious approach.

[8] Anushka Asthana, 'Boris Johnson: we will still claw back £350m a week after Brexit' (*The Guardian*, 16 September 2017) https://www.theguardian.com/politics/2017/sep/15/boris-johnson-we-will-claw-back-350m-a-week-post-brexit-after-all accessed 3 October 2024.
[9] Office for National Statistics, 'Leave campaign claims during Brexit Debate' (*ONS*, 7 February 2017) https://www.ons.gov.uk/aboutus/transparencyandgovernance/freedomofinformationfoi/leavecampaignclaimsduringbrexitdebate accessed 9 October 2024.
[10] Sachin Ravikumar, Kylie MacLellan and William James, 'UK's Boris Johnson and the 'partygate' scandal' (*Reuters*, 15 June 2023) https://www.reuters.com/world/uk/uks-boris-johnson-partygate-scandal-2023-06-15/ accessed 3 October 2024.
[11] House of Commons, *Committee of Privileges Matter referred on 21 April 2022 (conduct of Rt Hon Boris Johnson): Final Report* (HC 2023, 564) 4 para 6.
[12] Illegal Migration Bill 7 March 2023, vol 729, col 152.
[13] Hannah Smith, 'Who are the 100 million displaced people Suella Braverman said could qualify for UK protection?' (*FullFact*, 8 March 2023) https://fullfact.org/immigration/suella-braverman-100-million-claim/ accessed 7 January 2024. See also Good Morning Britain, 'On what planet is that likely and how is that not inflammatory language?' (*Twitter*, 8 March 2023) https://twitter.com/GMB/status/1633387389702877185?s=20 accessed 7 January 2024.

Jacob Rowbottom's[14] and Jeremy Horder's[15] respective works are the leading pieces of literature, but both are sceptical about expanding the use of enforceable and mandatory regulation towards this type of speech. They take the stance that using these measures on such a sensitive type of speech would be a disproportionate response and face significant logistical and conceptual difficulties. I disagree with their views and take a more radical position. I argue in favour of not just strengthening the existing mechanisms, but advocate for a new enforceable and mandatory mechanism. Specifically, a new criminal offence.

My inquiry is constructed to have a strict focus in mind and I do not explore ancillary issues such as distribution channels (e.g., journalists and other media sources which facilitate access to deceptive representations).[16] I am also not concerned with other elites who either engage in deception on political issues (e.g., scientific experts or public figures). I focus on politicians alone and argue that this is justified because they have a stronger obligation not to make these representations.

I recognise that the political sphere vests the majority of its power through a chain of delegation, 'which can be understood with the help of the conceptual apparatus of agency theory'.[17] Power is delegated first from the public (i.e. voters) to parliament, then from parliament to the government, and finally from the government to bureaucrats.[18] Each of these pairings have a principal who appoints another (an agent) to act on their behalf. This is because the agent has time, expertise, information or skills) which the principal lacks.

Whilst the chain of delegation is not unique to the political sphere, it is unique in the sense that the public has an important role. The public is the one who first delegates political power by participating in elections and starts the chain reaction. The public is the first principal in the chain,[19] appointing agents such as: Members of Parliament, Police and Crime

[14] Jacob Rowbottom, 'Lies, Manipulation and Elections— Controlling False Campaign Statements' (2012) 32(3) Oxford Journal of Legal Studies 507.
[15] Jeremy Horder, *Criminal Fraud and Election Disinformation: Law and Politics* (Oxford University Press 2022). Whilst Horder does argue that false or misleading claims on the electoral process should be curtailed, in the interests of protecting freedom of speech, those which are broader (what he terms political viewpoint content) should be tolerated. See pp1-8.
[16] Bernal (n 1) 241-242.
[17] Kaare Strøm, 'Delegation and Accountability in Parliamentary Democracies' (2000) 37 European Journal of Political Research 261, 262.
[18] ibid. See also, Torbjörn Bergman, Wolfgang C Müller, and Kaare Strøm, 'Introduction: Parliamentary democracy and the chain of delegation' (2003) 37 European Journal of Political Research 255, 257-259. Note that this is just the basic chain and there are variations of it. For example, the public can appoint elected officials who are not MP's who then delegate to bureaucrats.
[19] Arthur Lupia, and Mathew D McCubbins, 'Representation or abdication? How citizens use institutions to help delegation succeed' (2000) 37 European Journal of Political Research 291, 291–307.

Commissioners, Mayors, local councillors and Members of the devolved assemblies to act on their behalf. As the chain continues those who have been agents become principals, and appoint more agents. Elected officials often designate more power, choosing people to fill certain positions like being: Prime Minister, membership of the House of Lords or Ministerial office. These agents then become principals and appoint more agents like special advisors and civil servants to act on their behalf.

Seeing the political sphere through the chain of delegation, exposes the obligation on politicians to emulate good conduct. The unique arrangement of power which has the public as first principal, places a strong moral force on politicians and obliges them to behave with integrity (this includes not making deceptive representations). It is for this reason that I look at the political sphere and not at other associated issues. Whilst it is beyond the scope of this inquiry to explore other related issues, I encourage others to use my assessment of the problem to undertake more work in the field.

I recognise that the moral force is present on all UK politicians, but I have chosen to take an asymmetric focus and look only at Westminster politicians. By this I mean: Members of the House of Commons (also known as MP's), Members of the House of Lords, and candidates standing for election as Members of the House of Commons.[20] This choice was primarily because Westminster is the apex of political power in the UK so there is an even stronger obligation force on this set of politicians to emulate good behaviour. On a secondary basis, Westminster Parliament is a useful case study for starting to explore this issue. There are more political roles present compared to other parliamentary systems in the UK and consequently, there is a more detailed regulatory system. Therefore, there are good reasons for testing Westminster Parliament's approach first.

This thesis is structured in three parts. In Part 1 of this thesis, I lay the theoretical and conceptual groundwork. I begin with Chapter 1 and create a theoretical framework for important typology, focussing on the definitional and normative differences between key terms like deception, misleading, falsity, paltering and passive deception. Due to their significance to my thesis, it is imperative that I make it clear from the start what I mean when I use a particular term and to do so I create a theoretical framework. I then proceed to Chapter 2 and ask which deceptive representations should be subject to regulation. I conceptualise

[20] Although the obligational force is not as strong for candidates who have not yet been vested with political power, I still argue that the obligation is present because they are vying to be an agent of the public and gain this power. Thus, I take a somewhat expansive view and include political candidates within my inquiry.

regulation liberally and posit that to justify regulation (some sort of measure to guide or restrict behaviour), the behaviour must have certain qualities to it. It must not just be a moral wrong (something which we ought not to do) but actually cause or risk causing harm. I then use this conceptualisation as an apparatus for identifying the deceptive representations which are made by Westminster politicians that warrant a regulatory response. Through this task I identify two types of representations which embody these qualities: those which are made to Parliament and those which are made to the public.

In Part 2 I ask whether the current regulatory framework is effective at addressing these two types. I use theoretical and functionalist analysis to run diagnostics on each of the individual mechanisms, asking whether there are faults and whether there is anything to be done to improve upon what is in place. In Chapter 3 I focus on mechanisms which are generalist and underpin both types of representations, while in Chapters 4 and 5 I explore those which only apply to a particular type (I term these specialist mechanisms).

My argument is that each part of the framework is flawed but for different reasons. The broader mechanisms which underpin all political conduct do discourage or mitigate the impact of deception. Whilst they are not that successful in this task, their limitations must be acknowledged. These are supporting mechanisms, encouraging changes in political and social practices but never designed to be a sufficient response on their own.

The main force of the regulatory response lies with the specialist mechanisms, which tend to be enforceable. While there are individual theoretical and functional problems with most of the mechanisms, there is a clear difference between the two types of specialist mechanisms. The regulation for deceptive representations to Parliament is successful in the sense that there are mechanisms in place to cover the representations. The regulation for deceptive representations to the public is more complicated. The mechanisms are niche and are only applicable to very specific types of representations, offering little coverage for this part of the issue. Even though part of the problem may be ameliorated with my suggested improvements, this part of the framework would still not be up to par. Thus, I also argue in favour of new mandatory and enforceable mechanism to appropriately recognise and sanction a class of representations, which is currently being neglected.

In the third and final Part, I argue in favour of introducing a new criminal offence to cover politicians making deceptive representations to the public. Specifically, it would recognise and sanction the most egregious deceptive representations which are made to the public. I

begin with Chapter 6 and build upon my conceptualisation of regulation in Chapter 2. In particular, I turn my focus away from general regulation to criminalisation, asking what type of behaviour justifies coercive measures. In keeping with my account in Chapter 2, I rely on a liberal model, using Duff's account to argue that this should be subject to criminalisation. I progress through the model to put forward an argument of why criminalisation is not just a response which can be taken but that it is the right one to take.

In Chapters 7 and 8 I turn to indicating how imposing criminal liability could work, paying attention to demonstrating how it could be drafted so as not to give rise to frequently cited logistical and free speech objections. In Chapter 7 I suggest that we should be addressing the most egregious deceptive representations which are made to the public. I put forward a set of features which capture what the most egregious instances are, and suggest how these could be incorporated into a new offence. In Chapter 8, I consider the sanctions which should be attached to this offence. My suggestion is that the sanctions should be; disqualification from standing as an MP or sitting in the House of Commons or House of Lords for three years, fines and community orders. The culmination of the work in this thesis is a suite of recommendations for how we could strengthen and improve upon our regulatory approach. The originality of this piece lies with the interdisciplinary approach that I take to this issue, the detail of the inquiry and the argument that I make.

PART 1: LAYING THE THEORETICAL AND CONCEPTUAL GROUNDWORK

Chapter 1: The typology of deception

The terminology surrounding deception lacks universal definitions. Terms like lying, misleading, falsity and deception are used synonymously and carelessly. Due to their significance to this thesis, it is imperative that I put forward definitions and outline the normative characteristics of each from the start. It is important to stress that my aim is not to offer an in-depth assessment of all the different linguistic and philosophical differences. I recognise that there is a wealth literature on this, and it is beyond what I can achieve in this thesis to engage with it all. However, for my purposes, it is sufficient to simply put forward an argument for how I define this terminology. To do so, I construct a framework to organise and characterise these terms. This will act as a way to chart these terms but also provide a vehicle in which I can justify my choice of a particular interpretation of a term over another.

I posit that deception is an umbrella term, which has different strands. I suggest that there are three separate but interrelated strands: lying, paltering and passive deception and I explain how each of these manifests within deceptive representations. To make this argument I engage in a three-part process. I begin by offering a definition and normative characterisation of what I mean by deception, and I then proceed to do the same with the different types of deception. By drawing on the work of linguistic philosophers I make the point that not only are there formal and semantic distinctions between lying, paltering and passive deception, but also normative. In the final section I then apply the theoretical framework to deceptive representations, demonstrating how the types of deception manifest with real-life examples of deceptive political representations. This exercise is designed to show how these examples are deceptive.

It is worth noting that I use linguistic intuitions as well as communicative realism to guide my interpretation of each term. My concern with intuition means that I recognise normative differences. I frequently refer to blame (our 'reaction to something of negative normative significance about someone or their behavio[u]r'),[21] responsibility (attributing a certain consequence from the fact that the person possesses and has exercised powers and

[21] Neal Tognazzini and Justin Coates, 'Blame' *The Stanford Encyclopaedia of Philosophy* (Summer edn, 2021) https://plato.stanford.edu/entries/blame/#:~:text=First%20published%20Tue%20Apr%2015,about%20someone%20or%20their%20behavior accessed 2 June 2024.

capacities)[22] and inclusive culpability ('the combination of wrongdoing and responsibility that together make the agent blameworthy and deserving of blame and punishment').[23] Familiarity with these terms is helpful for the sake of understanding the drafting of the definition. It is also useful to be acquainted with concepts which recur in the thesis, particularly in my later discussion of criminalisation in Part 3 of this thesis.

Defining deception

Deception is commonly used to mean inducing another into believing something which is false.[24] While this understanding offers an indication of how the term is used, it is not sufficient as a definition. In particular, there are three important and determinative issues which are not clarified, these being: intention (what intention must the deceiver have), the act (what the act of deception is) and the concept of falsity (what constitutes a false belief). It is necessary to explore each of these to understand what deception is and why it should be interpreted in a particular way. Using the common understanding as a starting point, I build my own definition of deception, exploring and expanding upon the issues which require clarification. In doing so, I create a rationalisation of why I interpret deception in a particular way and conclude the first section with a complete interpretation.

A knowing or reckless intention

Intention is an important and controversial point of discussion in the matter of deception. The question of whether a deceiver (the person making the deception) needs to know that they are being deceptive is a pervasive but contentious point. There are many who take the view that intention is not always necessary to a definition of deception, as argued by Chisholm and Feehan,[25] Demos,[26] Fuller,[27] Adler,[28] and Gert.[29] Under such an interpretation, A causing B to

[22] Mathew Talbert, 'Moral Responsibility' *The Stanford Encyclopaedia of Philosophy* (Fall edn, 2023) https://plato.stanford.edu/entries/moral-responsibility/ accessed 2 June 2024. Note that this is the definition for moral responsibility, as opposed to causal responsibility (i.e. someone's actions caused the outcome).
[23] David O Brink, *Fair Opportunity and Responsibility* (Oxford Academic 2021) 156. See also 167.
[24] E.g., Hyman's definition 'deception implies that an agent acts or speaks as to induce a false belief in a target or victim', per Ray Hyman, 'The Psychology of Deception' (1989) 40 Annual Review of Psychology 133, 133. E.g., in the Oxford English Dictionary to deceive is defined as '[t]o cause to believe what is false; to mislead as to a matter of fact, lead into error, impose upon, delude, 'take in''. As per, Oxford English Dictionary, 'Deceive' (*OED*, 2024) https://www.oed.com/dictionary/deceive_v?tab=meaning_and_use#7316061 accessed 13 October 2024.
[25] Roderick M Chisholm, and Thomas D Feehan, 'The Intent to Deceive' (1977) 74(3) The Journal of Philosophy 143, 144-148. Note that these six critics may include intent in their own definitions but they still acknowledge that there is inconsistency across the literature and everyday use.
[26] Raphael Demos, 'Lying to Oneself' (1960) 57(18) Journal of Philosophy 588, 588.
[27] Gary Fuller, 'Other-Deception' (1976) 7 The Southwestern Journal of Philosophy 21, 21.
[28] Jonathan E Adler, 'Lying, Deceiving, or Falsely Implicating' (1997) 94(9) The Journal of Philosophy 435, 435.
[29] Bernard Gert, *Morality: Its Nature and Justification* (Oxford University Press 2005) 188.

believe something which they know to be false would qualify as deception, as would A causing B to believe something false when A believed it to be true. The point being that one can deceive through a mistake.

The justification for this view is primarily based on causal logic, or to use Fuller's words, a focus on the 'chain of reasoning […]'.[30] The premise is that whether someone mistakenly induces another to have a false belief or does so intentionally makes no difference. In either scenario the deceiver is responsible for bringing out a false belief in another. It does not matter because it is the effect that counts[31] and in terms of causal responsibility the cases are the same.[32]

I can appreciate the logic behind this position. I understand that based on this perspective alone, the result you would end up with is that both cases are the same. Whilst I can understand that *if you take* this perspective you are led to the conclusion that intention is unimportant, this is *not the right* perspective to take. Only focussing on causal responsibility is myopic, ignoring the other significant normative underpinnings of what it means to be deceptive.

I agree with those such as Carson who place emphasis on there being a decision to deceive (intention). This presence is necessary to capture our shared usage of the term and possess the normative attributes that we associate with it. Carson argues that deception is popularly conceived as, having 'negative evaluative connotations'.[33] Or, to quote Michel Lynch, we 'dislike […]' deception.[34] This dislike can be attributed to two reasons. One, is the potential consequences. Deception is an attempt 'to interfere with one's plans, to change them, or to simply make them go awry. Either way, we are less likely to get what we want. […] There are exceptions of course, but generally speaking, we hate to be deceived because deception has negative practical consequences'.[35] The interference with our agency and with achieving our goals, evokes negative emotions.

The other reason is that it is generally seen as poor behaviour which invites deep reproach and condemnation. In this sense we have a deep sense of blame towards the deceiver. Logic

[30] Fuller (n 27) 27.
[31] Demos (n 26) 588.
[32] Chisholm and Feehan (n 25) 145-147.
[33] Thomas L Carson, *Lying and Deception: Theory and Practice* (Oxford Academic 2010) 148.
[34] Michael P Lynch, 'Deception and the Nature of Truth' in Clancy W Martin (ed) *The Philosophy of Deception* (Oxford University Press 2009) 197-198.
[35] ibid.

dictates that if we need to assign blame, then the deceiver must have done something which is worthy of blame.[36] It is as put by Carson, self-contradictory to have unintentional deception because under such circumstances the so-called deceiver has not acted in a way to deserve reproach. They are unaware that what they have said is false or misleading and so are blameless. In practical terms, the deceiver must have made a decision to deceive, there must be a discrepancy between what the deceiver presents and what they know or believe.[37] To do otherwise would unpick the normative foundation of what the term is.

Understanding deception as requiring intention raises the question of where exactly the line should be drawn. Evidently, intention includes actually knowing that what they are presenting is false or misleading but I posit that it should extend to reckless deception (knowing that there is a risk that the deception is false or misleading). Even though the deceiver does not know for certain, the deceiver is aware of the likelihood, thus creating the duplicity.[38] From this view they have still made a decision to engage in deception, meaning that intention is present and the deceiver is worthy of blame.

By contrast, concepts like carelessness (e.g. failure to do due diligence to check whether what they are presenting is false) or Frankfurt's characterisation of bullshit (an individual has a laxity and 'indifference to how things are'),[39] are not sufficient for showing intention. In both of these cases, the so-called deceiver is not intending to deceive. Instead, they are unaware or ambivalent to what the situation is (whether it be truth or falsity).[40] Whilst these are indicative of a disregard for what is true, they have not actually made a decision to try and induce false beliefs in another. Of course, we can blame them to a small degree for not being more attuned to the situation, but this is not behaviour which invokes a deep dislike. They have not made the decision to engage in deception and thus have not acted in such a blameworthy way to warrant being subject to reproach and called a deceiver.

Characterising the act of deception

Another issue which needs resolving in our understanding of deception is what the act of deception involves. On this issue, I make two points: one, that deception does not need to be

[36] Carson (n 33) 47-48.
[37] Carson (n 33) 47.
[38] Although in the context of lying, Siegler makes similar points in his work Frederick Siegler, 'Lying' (1966) 3(2) American Philosophical Quarterly 128, 129-130.
[39] Harry G Frankfurt, *On Bullshit* (Princeton University Press 2005) 14-20, 24, 34-35.
[40] ibid.

successful, and two, its delivery can be varied (i.e., it can be through a commission or omission).

Deception is often characterised as something which needs to be successful and there are good reasons for this.[41] First, on a conceptual basis, the term implies 'a success or achievement […]'.[42] As put by Gilbert Ryle in his work into philosophy of the mind, it is 'not merely that some performance has been gone through, but something has been brought off by the agent going through it'.[43] I can see the rationale behind this, particularly when we refer to Mahon's work and the stylised example that he uses.

> If A, who is not yet twenty-one years old, shows B a fake driver's license with the intention that B will believe that this is a genuine driver's license and that A is over twenty-one years old, and B does not come to have the false belief that this is a genuine driver's license, or that A is over twenty-one years old, because B recognizes that the fake driver's license is a fake driver's license, then A does not deceive B.[44]

Second, this aligns with the normative understanding of this term being something that we dislike and which evokes a strong sense of blame. There is a clear normative difference between someone who engages in unsuccessful deception versus successful. Indeed, the consequences are very different. The success of deception determines whether the agency of the recipient has actually been influenced and whether there are practical consequences i.e., plans being influenced. From a normative perspective, this has implications- we are more inclined to say that someone who is successful in deception is worthy of more blame than someone who has not.

I can appreciate these points, and I understand the importance of the normative and conceptual associations. Even though they are valid, there is a point which ultimately overrides these concerns. That is, it is simply not communicatively realistic to make deception contingent upon success, especially when the deceiver is delivering their deception to a wider audience. It is more workable in an interpersonal communication- so A deceiving B. However, it fails to appreciate how the term works when there is a wider audience.

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[41] Marcia Baron 'What is Wrong with Self-Deception?' in Brian P McLaughlin (ed) *Perspectives on Self-Deception* (University of California Press 1988) 444. See also Gilbert Ryle, *The Concept of the Mind 60th Anniversary Edition* (Taylor and Francis 2009) 114.
[42] James E Mahon, 'A definition of deceiving' (2007) 21(2) International journal of Applied Philosophy 181, 183.
[43] Ryle (n 41) 114,
[44] ibid, 183. See also 190.

This is a very significant point because this thesis is concerned with political speech which often has lots of recipients. So, to take Mahon's example, A would not just be showing B a fake driver's license but also C, D, E etc. In this light, deception being contingent upon success becomes deeply problematic. For instance, what if A is successful in convincing B, but not C, D and E? Perhaps some sort of ratio of success could be used but this raises logistical issues, such as how would this be determined. It would also become difficult if the recipients were convinced for a short period of time and then changed their mind.

My point is that my definition of deception needs to be a realistic representation of the term, particularly of the context which I am exploring. How deception is popularly conceived in the philosophical literature is not equipped to deal with the type of communicative exchange that I am focussing on in this thesis. Thus, whilst I respect the normative and conceptual points, the need for realism overrides it, and I use the term to mean any attempt at deception regardless of its success.

The second point relating to the act of deception is its delivery. There are a few philosophers, such as Ray Hyman, who argue that deception is something which only occurs through commissioning i.e., speech or action.[45] This is an unpopular interpretation and is often rejected on account of its lack of communicative realism or appreciation of normative features. Of course, deception can be through a commission (some sort of active proposition whereby feelings, perceptions or thoughts are exchanged)[46] but it can also include omissions (inaction or even silence).[47] Whether A tells B something or fails to disclose something - there is an overarching normative similarity.

Although there are subtle shades of normative difference which I will discuss in the second section of this chapter, there is a general similarity. In either scenario, there has been an attempt by A to alter B's view of the world[48] (there has been an attempt on B's agency). Regardless of whether A made a direct falsehood or failed to say something, A is still responsible for trying to infringe upon B's agency. In the words of Chisholm and Feehan 'but

[45] Hyman (n 24).
[46] Augustine of Hippo, *Delphi Collected Works of Saint Augustine (Illustrated)* (Translated by Reverend H Browne, Delphi Classics 2016) De doctrina Christiana, Book II Chs 2-3 "Of the Kind of Signs We Are Now Concerned With" and "Among Signs, Words Hold the Chief Place". See also De doctrina Chrstiana, Book I Ch 36 "That Intrepretation of Scripture Which Builds Us Up In Love Is Not Pernciously Deceptive nor Mendacious, Even Though It Be Faulty. The Interpreter, However, Should Be Corrected".
[47] Sissela Bok, *Lying: Moral Choice in Public and Private Life* (Quartet Books 1978) 13-15.
[48] Christopher Mills, 'Manipulation and Autonomy' in Ben Colburn (ed) *The Routledge Handbook of Autonomy* (Routledge 2023) 223.

for […]' the behaviour of A the belief would not be present in the mind of the B at all.[49] Because A is causally responsible for the attack on B's agency, we still see him as blameworthy (setting aside all other factors). Thus, regardless of whether an individual deceives through omission or commission it is still deceit and a definition of deception should reflect this.

It is for the same reason of communicative realism that I hold that my definition of deception needs to account for the different ways deception can be delivered. By this I mean that deception occurs when the deceiver is either attempting to cause the false belief in another or allowing the false belief to persist. Let us say that A is asked by B whether they have had a coffee that morning. A answers with yes (when they have not). This is clearly a straightforward case of A attempting to *cause* B to have the false belief that they have already had a coffee. Yet, let us change the scenario. B says to A do you want to get another coffee, (falsely believing that A has already had one). A fails to correct B, allowing him to *persist with* his false belief that A has already had a coffee.[50]

Again, to have a communicatively realistic definition of deception, we need to reflect the different ways deception can manifest in conversation. Furthermore, from a normative standpoint A is also responsible for the attempt to undermine B's agency and by extension, we can hold A as blameworthy. On this point, I agree with the bulk of the literature, e.g., the works of Fuller,[51] Chisholm and Feehan,[52] Mahon,[53] Carson[54] and Shiffrin,[55] who all uphold the idea that causing someone to have a false belief or allowing someone to persist with a false belief both qualify as deception.

At this point we have made significant progress from how the term is used to my interpretation. Yet, we are still missing conceptual understanding of what we mean by false belief. This brings me to my third and final part of the definition.

[49] Chisholm and Feehan (n 26) 144.
[50] Mahon (n 42) 185.
[51] Fuller (n 27) 28.
[52] Chisholm and Feehan (n 26) 144.
[53] Mahon (n 42) 189-190.
[54] Carson (n 33) 50.
[55] Seana Valentine Shiffrin, *Speech Matters: On Lying, Morality, and the Law* (Princeton University Press 2014) 19.

A false belief

The third issue to resolve is what we actually mean by a false belief, particularly whether deception is an act which is limited to false beliefs (as in excluding attempts to try and cause someone to lose stock in a true belief) and whether the false belief must actually be false.

First, I should stress that I construe deception only in terms of trying to induce or maintain false beliefs. Others, (notably, Roderick Chisholm and Thomas Feehan) opt for a more inclusive interpretation.[56] In their view, deception is not just limited to a false belief. It can also include attempting to deprive another of gaining a true belief or cause another to lose stock in a true belief.[57] For example, A could intentionally distract B. A knows B is forgetful, and B forgets the truth. As a result, A has caused B to lose a true belief. [58]

Another example is offered by van Frassen's;

> Suppose that a certain bridge is dangerous, and I do not know this, that I really have no evidence that makes it less likely than not, for me, that the bridge is safe. But suppose in addition that I think it would be very good for me if you believed the bridge to be safe, and I successfully persuade you to believe this falsehood. Then I have certainly deceived you, although I did not know that the information was false. [59]

I recognise that these are examples of duplicitous and unsavoury behaviour, but they are not deception. Deception is a type of duplicitous behaviour which is associated with strong feelings of blame towards the deceiver. Understood through these normative and linguistic intuitions, I disagree with the idea that attempting to cause someone to lose a true belief is equivalent to attempting to cause or maintain a false belief. The practical implications as well as the impact on personal agency are less intrusive, and thus the amount we blame them is less. I suggest that it is inconsistent with our normative understanding to include behaviour which is a lower level of wrongdoing and which invites a lower level of blame within our definition. The importance of preserving and capturing the essence of deception, particularly how we perceive and normatively classify the term is fundamental.

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[56] Chisholm and Feehan (n 25) 44-145. See Mahon's commentary on Chisholm and Feehan in, James E Mahon, 'The Definition of Lying and Deception' *The Stanford Encyclopaedia of Philosophy* (Winter edn, 2016) https://leibniz.stanford.edu/friends/preview/lying-definition/ accessed 6 June 2024.
[57] Chisholm and Feehan (n 25) 144-145. See also Mahon, 'A Definition of Deceiving' (n 42) 186-187.
[58] Mahon, 'The Definition of Lying and Deception' (n 56).
[59] Bas C Van Fraassen, 'The Peculiar Effects of Love and Desire' in Brian McLaughlin and Amélie Oksenberg Rorty (eds), *Perspectives on Self-Deception*, (University of California Press 1988) 124.

Moreover, there are conceptual reasons for keeping the distinction. As Mahon puts it keeping someone ignorant of the truth is not deception.[60] Deception is a positive act- it is trying to give rise to or maintain false beliefs, which is conceptually distinct to the negative act of trying to take away a true belief. Even the philosophers who began the investigation into deception (Aquinas and Augustine) hold that 'keeping back the truth'[61] or 'hid[ing] the truth […]'[62] are not acts of deception. The core point of deception is that there needs to be a false belief and there are good normative and conceptual reasons for preserving this narrow interpretation.[63]

Having settled on deception being strictly limited to false beliefs, the final point I make relates to how we should interpret falsity. Evidently, it needs to be something which is believed to be false by the deceiver but the more pertinent question is does it actually need to be false. I argue that falsity should be interpreted as having a double threshold- it should be a subjectively false belief (as in what the deceiver knew or knew was likely to be false) and objectively false (as in the belief is verifiably false).[64] Let us suppose that A asks B where C is. B responds to says that C is by the trees, when he believes C is by the river.[65] Unbeknownst to B, C had actually changed their mind and gone to the trees instead of the river. The result is that A did not end up having a false belief.[66] Under my definition, this would not count as deception because the belief that B caused A to have, was not false.

The argument for objective falsity tends to be grounded in conceptual reasoning. By this I mean that our pre-theoretical intuitions require the dual-threshold. Philosophical experiments in which participants have categorised false or misleading statements, such as those conducted by Stritchartz and Burton[67] as well as Turri and Turri,[68] support the need for the two qualifications. The results from these studies indicate that there is a distinction between statements which have deceptive motivations (are made with the aim of inducing a false belief but are actually true) and statements which are deceptive (are believed to be and are

[60] Mahon, 'The Definition of Lying and Deception' (n 56).
[61] Augustine (n 47) De praedestinatione sanctorum (On the Predestination Of the Saints), Book II, Ch 40.
[62] Thomas Aquinas, *Delphi Collected Works of Thomas Aquinas* (Illustrated) (Delphi Classics 2020) Question 110 (Of the Vices Opposed to Truth and First Lying).
[63] Mahon, 'The Definition of Lying and Deception' (n 56).
[64] John Turri, 'Objective falsity is essential to lying: an argument from convergent evidence' (2021) 178 Philosophical Studies 2101, 2102, 2107.
[65] James Edwin Mahon, 'Two Definitions of Lying' (2008) 22(2) International Journal of Applied Philosophy 211, 219. See also Angelo Turri and John Turri 'Lying fast and slow' (2019) 198 Synthese 757, 768-769.
[66] Turri and Turri, 'Lying fast and slow' (n 65) 768-769.
[67] Abigail Strichartz and Roger Burton, 'Lies and truth: A study of the development of the concept' (1990) 61 Child Development 211, 211–220.
[68] Turri and Turri 'Lying, fast and slow' (n 65) 758-759, 768, 772.

actually false). In fact, external factuality had a strong bearing on whether the behaviour was judged to be deceptive by participants and those without the component of objective falsity tended not to be classified as deceptive. These results are explained by consequentialist reasoning, and the logic that when the deception is not actually false there is never any potential for harm. Even if A had believed B's false statement about C's location, there has been no actual damage to A- his agency and plans are intact. I recognise that B has acted in a way which is duplicitous and worthy of blame but not to the same degree as someone who has made an attempt to cause false beliefs which are actually false.

Based on an analysis of different definitions of deception, I offer a rationalisation of why I interpret deception in a particular way. Drawing on normative and conceptual understandings as well as the need for communicative realism, I have explored three determinative issues surrounding deception and argued for a particular interpretation of each. In doing so, I constructed my own definition.

I posit that deception *is an intentional attempt to make the recipient/s of the deception have or persist with a false belief.*

- *A false belief is defined as something which is both believed to be false by the deceiver and is actually false.*
- *An attempt is defined as an omission or commission.*
- *Intention is defined as knowingly or recklessly.*

I accept that there is disagreement about how deception should be defined, and my interpretation could be reproached in different ways. However, my purpose is not to offer a definition which will be universally accepted. Instead, my purpose is to explain why I interpret deception in a particular way, drawing on the most significant components of deception to construct my own take. With a view to providing further clarity, I now move onto mapping the rest of my theoretical framework. In the second section in this chapter, I explore the different types of deception. I suggest that there are three different strands of deception and provide detail on how they should be characterised, both semantically and normatively. I then finish with some practical application and offer a demonstration of how these types manifest in deceptive political representations.

The three strands of deception: Lying, paltering and passive deception

In this section, I elaborate on the bulk of my theoretical framework, which is comprised of a focus on the three strands of deception: lying, paltering and passive deception. I will explore each of these, charting their semantic and then normative properties. As with the first section, I completely acknowledge that there is disagreement with what each of these terms are, but again, I do not seek to offer a cure-all. Rather, my aim is just to justify why I interpret each strand in a particular way.

I will begin by outlining the semantic properties. Due to the fact that I suggest that each of these is a type of deception and much of the semantic analysis overlaps with that of deception, I will use my definition of deception as a base formula and just discuss what needs to be added to it to make it reflective of that particular strand of deception. Once I have put forward definitions, I explain how each strand manifests as a representation and then turn to the normative properties.

The semantic properties: lying paltering and passive deception

It is relatively agreed upon that lying involves commissioning a false belief- inviting someone else to believe what you are asserting. What this means is that there must be an active proposition of exchanging feelings, perceptions or thoughts.[69] In other words a statement. Yet, it must not just be a statement but a false one. In the words of Augustine, it must not just be a 'feigned narration […] [but have a false] signification […]'.[70] Although this was first postulated by Augustine in 395,[71] it is generally accepted within the literature, that this is the basis of what a lie is, with twentieth century academics like Siegler,[72] Williams[73] and Fallis,[74] transplanting, into their own models. Essentially, acknowledging that a key component of lying is saying something which is false.[75]

Paltering is what I use to mean the commissioning of a false belief through a different type of statement- a truthful one. In paltering, the truth is used to convey misleading information through emphasis or interpretation. Although paltering uses the technical truth, the message aims to induce a false belief in another. In this way it is a step down from a lie. Such

[69] Augustine (n 46) De doctrina Christiana, Book II Chs 2-3 "Of the Kind of Signs We Are Now Concerned With" and "Among Signs, Words Hold the Chief Place".
[70] Augustine (n 46) Contra Mendacio (To Consentius: Against Lying).
[71] ibid.
[72] Siegler (n 38) 128. See also 130-131.
[73] Bernard Williams, *Truth and Truthfulness: An Essay in Genealogy* (Princeton University Press, 2002) 96.
[74] Don Fallis 'What is Lying' (2009) 106(1) The Journal of Philosophy 29, 33.
[75] Siegler (n 38) 128.

deceivers 'can justify their behavio[u]r by pointing to the fact that they made truthful statements'.[76] For this strand of deception, there is an element of self-justification, where any doubt or concern can be mitigated by the fact that the deceiver knows what they have said is true. Put simply, the deceiver can reassure themselves that they are being truthful, and maintain self-deniability.[77]

Whilst some have used this meaning and given it the term implicatures, [78] this is too broad. Afterall, not all implicatures are a form of deception. For instance, if I say to A that B and C went shopping, I may be implying to A that B and C went shopping together when they did not. Yet, just because A has made the inference that B and C are shopping together, it does not necessarily follow that I am being deceptive. I may just have made the comment unaware that A will infer something in a particular way.[79] Of course, one answer to this would be to use deceptive implicatures instead. By this I mean, just those implicatures which are done with the intention of inducing a false belief. I admit, this term captures the essence of what I am dealing with here,[80] I have just chosen to use the term paltering.

The term paltering is relatively uncontentious, only having been conceived and popularly discussed in recent years, such as in the works of Schauer and Zechauser,[81] Gerdeman, [82] and Rogers et al.[83] Across, all of these works there is an agreement that that paltering falls short of literal or exact falsity,[84] and instead is the active use of truthful statements to create a false belief.[85] Paltering can manifest in a number of ways including: equivocations, exaggerations,

[76] Todd Rogers, Richard Zeckhauser, Francesca Gino, Michael I Norton and Maurice E Schweitzer, 'Artful Paltering: The Risks and Rewards of Using Truthful Statements to Mislead Others' (2017) 112 (3) Journal of Personality and Social Psychology 456, 459.
[77] Derek Powell, Lin Bian, and Ellen M Markman, 'When intents to educate can misinform: Inadvertent paltering through violations of communicative norms' (*PLOS ONE*) https://journals-plos-org.ezphost.dur.ac.uk/plosone/article?id=10.1371/journal.pone.0230360#sec001 accessed 28 April 2022.
[78] H Paul Grice, 'Logic and Conversation' in Peter Cole and Jerry L Morgan, *Syntax and Semantics, Vol 3 Speech Acts* (Academic Press 1975) 43-58; H Paul Grice, 'Further Notes on Logic and Conversation' in Jonathan E Adler and Lance J Rips (eds), *Reasoning: Studies of Human Interface and its Foundation* (Cambridge University Press 2012) 765-773.
[79] Alex Wiegmann, Pascale Willemsen and Jörg Meibauer, 'Lying, Deceptive Implicatures, and Commitment' (2021) 8(50) Ergo 709, 712.
[80] ibid 709, 709-732.
[81] Frederick Schauer, and Richard Zeckhauser, 'Paltering' in Brooke Harrington (ed) *Deception: From Ancient Empires to Internet Dating* (Stanford University Press 2009) 39-43.
[82] Dina Gerdemdan, 'How the 2016 presidential candidates misled us with truthful statements' (5 December 2016) Harvard Business School Working Knowledge https://hbswk.hbs.edu/item/paltering-in-action accessed 28 April 2022.
[83] Rogers, Zeckhauser, Gino, Norton and Schweitzer (n 76) 456.
[84] Schauer and Zeckhauser (n 82) 43.
[85] Rogers, Zeckhauser, Gino, Norton and Schweizer (n 76) 456.

and minimalization.[86] Equivocations are the making vague or ambiguous statements to conceal the truth or avoid committing oneself, exaggerations are overstating the truth and minimizations are making understatements.[87] Having an awareness of all the different categories of paltering provides useful background information, however, it is important to frame this issue in terms of this thesis. My purpose is to explore deceptive representations (statements of fact), and as such I will not be looking at examples of deception which are not made with that certainty i.e., equivocations.

Passive deception is used fairly consistently by academics (here I refer to Handel,[88] Caddell,[89] and Sharpe),[90] and is generally being regarded as a form of behaviour which is primarily based on secrecy through the withholding or concealment of information. The emphasis here, is that unlike lying or paltering, it is not necessary to actually commission information, and nothing inviting the recipient/s to believe.

With this view, it is important to stress that there is a distinction between merely failing to convey information and passive deception. As argued by Mahon, an individual may intentionally keep information from others simply because they believe that sharing information is not necessary in the context of the conversation.[91] For example, if A fails to disclose that they have received employment to B it does not automatically follow that it is a type of deception. However, if the deceiver is withholding information this can constitute deception if there is a clear expectation, promise, or obligation that the information will be provided or should be disclosed. So, if B gifted A money under the expectation that they were unable to pay their rent due to A's unemployment, and A fails to disclose that they have become employed, this would be deception.[92] The distinction here, is that the individual is strategically withholding information, to deceive another and create a false belief.

Whilst passive deception can involve saying nothing at all, it is again important to re-emphasise the types of deception I am looking at in this thesis. I am exploring statements of fact which require there to be a proposition to be made. As such, I am concerned with the

[86] Eli B Cohen, 'Deception: Types, Principles and Tactics' (2019) 22 Informing Science: The International Journal of an Emerging Trans discipline 137, 139.
[87] ibid 139.
[88] Michael Handel 'Intelligence and deception' (1982) 5(1) The Journal of Strategic Studies 122, 128, 133.
[89] Joseph Caddell, *Deception 101- Primer on Deception* (Strategic Studies Institute 2004) 6.
[90] Alex Sharpe, 'Expanding Liability for Sexual Fraud Through the Concept of 'Active Deception': A Flawed Approach' 2016 80(1) Journal of Criminal Law 28, 29.
[91] James E Mahon, 'Kant on keeping a secret' (2009) 44 Journal of Religion and Culture 21, 28.
[92] ibid 28.

way that passive deception can manifest in representations, which occurs with a deceiver providing an incomplete version of the truth and conveying a misleading message.

A good way to demonstrate this is the famous example of then-US president Bill Clinton being asked about whether he had an improper relationship with Monica Lewinsky. His response to the question was 'there is no improper relationship'. Technically speaking Clinton was being truthful because he used the present tense. At the time he was asked the question, he was not having an improper relationship with her. Where he has engaged in deception is by not offering a complete answer- he intentionally omitted relevant information to try and create a false belief. He has chosen not to say that in the past there was an improper relationship.[93] Thus, although not exactly a false statement, it is a misleading one.

Having charted the semantic differences between the different terms, I can now move on to outlining the normative differences: as in the variations in blame, responsibility and culpability (here I refer to inclusive culpability).[94]

Normative differences

Within the literature it is generally agreed upon that there are normative distinctions between each of the strands of deception. The general tenet is that variances in blame and responsibility lead to a liar being more culpable than a palterer, and a palterer being more culpable than a passive deceiver. In the words of Saul, this tradition holds that 'one act of deception could be better than another, despite having the very same consequences and motivation. It could be morally superior simply due to the *method* of deception chosen'.[95] The order of this ranking is relatively accepted, as per the work of Strudler,[96] Williams,[97] Chisholm and Feehan.[98] All of these scholars argue that there are variations, which can be attributed to differences in faith and commitment. Those such as Adler go one step further and suggest that the increased effort involved in paltering and passive deception indicates

[93] Jennifer M Saul, *Lying, Misleading and What is Said: An Exploration of Philosophy of Language and in Ethics* (Oxford University Press 2012) Ch 1.
[94] See definitions in (n 21, n 22 and n 23).
[95] Saul (n 93) 69.
[96] Alan Strudler, 'The Distinctive Wrong in Lying' (2010) 13 Ethical Theory and Moral Practice 171, 173-176.
[97] Williams (n 78) 108.
[98] Chisholm and Feehan (n 25) 151-152.

more respect for the deceiver.[99] Regardless, the normative differences and the order remain the same.

Now, I agree with this tradition and uphold the fact that there are differences in the normative properties which influence the culpability ranking. Lying, for instance, deserves a high ranking of culpability. If A lies to B, A is presenting the false belief as their own opinion- they are fully committing to that falsity and creating the impression that they are imparting their own view. In doing so, he is inducing B to believe that he is a reliable and credible source. Thereby, inviting B to trust him. Seen in this way, A is not only worthy of a high level of blame because he has acted in a way which is highly duplicitous, but is also highly responsible for the false belief in B. By presenting the false belief as his own opinion, he has left no room for ambiguity or doubt, in which B may take some of the responsibility by failing to pick up and question these points.

Paltering, by contrast, deserves a medium culpability ranking. While A would not be fully committing to the false belief, they would still be inviting B to believe him. By putting forward some form of commission, A is giving B a statement (albeit a technically truthful but misleading one) to rely on and trust. Yet, unlike with a liar, B now has to take some self-responsibility because A will have had to leave some points unclarified. B could have picked up on these points and made a concerted effort to delve into the truth of the situation; rather than simply believing the dubious and selective statement of the palter. Of course, A is still mostly responsible for B's false belief and thus is mostly to blame, but B now bears some of the responsibility, mitigating the amount of blame A has. As such, paltering can be placed centrally within the culpability spectrum, and a palterer receives a ranking of middle culpability.

Finally, passive deception deserves the lowest ranking. If A passively deceives B, then he is even less responsible for B's false belief. A may have made a statement and invited B to rely upon it, but the deception comes from what is not said which B then uses to infer A's meaning. Thus, although A is wrong for not disclosing relevant information and is both somewhat responsible for B's belief and has engaged in blameworthy behaviour, both of these are lower for this strand. The path to truth is much closer for B and B could take action and inquire into whether his inference is correct. Thus, in passive deception B has a higher

[99] Jonathan Adler, 'Lying and Misleading: A Moral Difference' in Eliot Michaelson and Andreas Stokke (eds) *Lying: Language, Knowledge, Ethics, and Politics* (Oxford Academic 2018) 306-309. For discussion on the interpretation of the nuances in normative differences see, Saul (n 93) Ch 4.

level of self-responsibility. Based on the levels of blame and responsibility associated with the passive deceiver, I give passive deception the lowest culpability ranking.

Understanding the typology of deception in relation to its normative properties is useful. In particular, it provides a helpful organisational tool for understanding the typology. Nevertheless, this is the extent of my use of the normative distinctions. While I acknowledge that graduations in blame, responsibility and culpability exist between the three stands that is not to say that I think this warrants different treatment from regulatory (including legal) mechanisms. Although there is a notion that we are more indulgent[100] of paltering or passive deception than we are of lies, in my view this is misguided. [101]

Regardless of the method of deception, the effect is the same- there has been an attempt to corrupt the mind.[102] From a consequentialist perspective, each type has the same effect: attempting to undermine the agency of the deceived. Or, to draw on the work of Saul, it is shooting with a different type of gun- the end result is the same.[103] While the types of deception do have different normative properties, the effect is interchangeable because the deceit has not only attempted to change what we know but how we think about things. In the words of Kupfer, it underpins how someone sees something- whether it is 'a threat or a boon'.[104] This informs our practical reasoning. Irrespective of whether someone has deceived me with a lie or a palter, my agency has been infringed upon to the same degree. My plans, as well as how I see the world, have been tainted. Thus, although the normative differences aid understanding of the term and their existence should be acknowledged, they are not something which I will focus on this thesis, or use to tease out different types of treatment for different deceptive political representations. I do not suggest that the normative differences should be used as a basis for legal or regulatory distinction.

Having set out how I define the different terms, I will now use the theoretical framework as an apparatus to show how deceptive representations manifest in the political sphere. I use real-life examples from Westminster politicians to explain what I am concerned with in this thesis.

[100] Strudler (n 96) 177.
[101] Derek Edyvane, 'The Ethics of Democratic Deceit' (2015) 32(3) Journal of Applied Philosophy 310, 310.
[102] Chisholm and Feehan (n 25) 147.
[103] Jennifer Saul, 'Just Go Ahead and Lie' (2012) 72 Analysis 3, 3.
[104] Joseph Kupfer, 'The Moral Presumption against Lying' (1982) 36(1) The Review of Metaphysics 103, 107.

Applying the theoretical framework: examples of deceptive political representations

As said at the start of this chapter, representations are statements of fact which offer the recipient/s something to rely on. They are made with an apparent certainty and sincerity which induce the recipient/s of the statement to believe it and rely upon it. Such statements become deceptive when there is an intentional attempt to make the recipient/s of the deception have or persist with a false belief. This can be done through making false statements of fact (as with lying) or by making misleading ones (as with paltering or passive deception).

We can see these in prolific examples of deceptive representations. To be sure, there are clear-cut instances of politicians actually lying e.g., using falsehoods. A fairly obvious example is from the 1960's, when then-Secretary of State for War John Profumo denied having a sexual relationship with Christine Keeler to Parliament. In a statement to the House on the 22 March John Profumo made the claim that;

> I last saw Miss Keeler in December, 1961, and I have not seen her since. I have no idea where she is now. Any suggestion that I was in any way connected with or responsible for her absence from the trial at the Old Bailey is wholly and completely untrue. My wife and I first met Miss Keeler at a house party in July, 1961, at Cliveden. […] Between July and December, 1961, I met Miss Keeler on about half a dozen occasions at Dr. Ward's flat, when I called to see him and his friends. Miss Keeler and I were on friendly terms. There was no impropriety whatsoever in my acquaintanceship with Miss Keeler.[105]

Later on (in June) he admitted that he did have a sexual relationship with Christine Keeler.[106] Obviously, what he was inviting Parliament to believe in his original statement was false. He was categorically denying a relationship with Christine Keeler. This was something he knew to be false and was false by objective standards.

Moving forward, we can see instances of lying present in more recent politics. For instance, in the 1990's John Major lied about the fact that he was not engaging in peace talks with the IRA.[107] He explicitly said in a speech at the Lord Mayor's banquet;

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[105] HC Deb 22 March 1963, vol 674, cols 809-10.
[106] Francis Boyd, 'Profumo admits lie and resigns seat in parliament – archive, 1963' (*The Guardian*, 6 June 2023) https://www.theguardian.com/uk-news/2023/jun/06/profumo-admits-lie-and-resigns-seat-in-parliament-1963 accessed 9 November 2024.
[107] Bevins, Mallie and Holland (n 5).

> [Those] who decline to renounce violence can never have a place at the conference table in our democracy but if the IRA end violence for good, then after a sufficient interval to ensure the permanence of their intent, Sinn Fein can enter the political arena as a democratic party and join the dialogue on the way ahead'.[108]

In fact, behind the scenes Major had authorised peace talks. Clearly, Major knew that what he was trying to induce attendees of the banquet to believe was that he had a particular political stance in regards to peace talks. The reality of the situation was obviously diametrically opposed to what he presented and we can easily label this as a lie.

A final more recent example of a lying in politics was when Boris Johnson deceived Parliament about the Partygate scandal.[109] He made a number of false claims to the House of Commons about his engagement in covid-19 social distancing breaches. Such as, that the lockdown rules and guidance were followed at all times; that events in Number 10 were in accordance with the rules and guidance; and that the rules and guidance had been followed at all times when he was present at gatherings. Following investigations by Sue Gray and the Privileges Committee, such representations were deemed to be false.[110]

Although lies are present within the political domain, representations often include combinations of palters and passive deception. A prominent example which falls in this category is Tony Blair's deception over the Iraq War. In an interview on Breakfast with Frost Blair implied that there was strong and credible evidence that Iraq had weapons of mass destruction, when this was not the case[111]. Specifically, he said '[w]hat we have is the intelligence that says that Iraq has continued to develop weapons of mass destruction; that what he is doing is using a whole lot of dual-use facilities to continue to develop weapons of mass destruction; and what we know is there is an elaborate programme of concealment which is pushing this stuff into different parts of the country. […]'.[112] 'What was not mentioned […] were the qualifications and conditions that the various JIC assessments had attached to them, which meant that statements made with certainty could not be supported by

[108] 'Mr Major's Speech at the 1993 Lord Mayor's Banquet – 15 November 1993' (*John Major Archive*) https://johnmajorarchive.org.uk/1993/11/15/mr-majors-speech-at-the-1993-lord-mayors-banquet-15-november-1993/ accessed 17 October 2024.
[109] Ravikumar, MacLellan and James (n 10).
[110] House of Commons *Committee of Privileges Matter referred on 21 April 2022 (conduct of Rt Hon Boris Johnson): Final Report* (n 11) p4 para 6.
[111] Committee of Privy Counsellors, *The Report of the Iraq Inquiry: Executive Summary* (n 7).
[112] BBC, 'Breakfast with Frost' (n 6).

that kind of evidence'.[113] What he was doing was excluding relevant information to exaggerate the strength of the evidence. In doing so, he was trying to induce false beliefs about the strength of the evidence of Iraq having weapons of mass destruction.

Another instance which uses this same formula of paltering and passive deception is Boris Johnson's claim that the UK would make a gain of £350 million a week if it left the EU.[114] Technically speaking he is making a true statement. But it is a true statement which misses out important information to exaggerate and induce a false belief. The implication was that this figure was a net gain, when in fact it 'did not take into account the rebate or other flows from the EU to the UK public sector […]'.[115] Boris Johnson continued to make the claim without acknowledging the limitation, even once it was pointed out.

Another example is Suella Braverman who made the claim that, '[t]here are 100 million people around the world who could qualify for protection under our current laws. Let us be clear - they are coming here'[116] in the discussion of the Illegal Migration Bill. There are instances of various types of deception which convey misleading information. The implication from the figure is that there are 100 million people who are displaced and qualify for protection in the UK, but the use of the figure is misleading. It actually refers to a UN study into people who are forcibly displaced but Braverman fails to mention that most of the people who are displaced will not come to the UK. Her omission of relevant information pertaining to the study exaggerated concerns surrounding immigration.[117]

The point of this exercise is to use the theoretical framework that I created for the typology of deception. I use it as a tool for classifying and understanding different types of real-world deceptive representations in Westminster politics. In turn, this provides guidance on the types of deception which I am concerned with and why.

My aim in this chapter was to create understanding and contextualisation for the entire thesis. By creating a theoretical framework for important terminology, I identified and defined key terms. I began with my umbrella term (deception) and then the three strands of deception-lying, paltering and passive deception. In doing so, I mapped the semantic and normative

[113] Liaison Committee, *Oral evidence: Follow up to the Chilcot Report* (n 7) Q12.
[114] Asthana (n 8).
[115] Office for National Statistics (n 9).
[116] Illegal Migration Bill 7 March 2023, vol 729, col 152.
[117] Smith (n 13). See also Good Morning Britain, 'On what planet is that likely and how is that not inflammatory language?' (n 13).

properties, making a case for why I interpret these terms in a particular way. My hope is that this provides a guide, for the rest of this thesis.

While I have explored what deceptive representations are, it is also important to understand the types which warrant regulation. Conceptualising and applying a model for regulation, provides an apparatus for identifying the types of deceptive representations which we should be concerned with. It helps to distinguish the types of deceptive political representations which warrant a regulatory response from those which do not.

Chapter 2: Conceptualising regulation and understanding deceptive representations: Where and when does behaviour justify the deployment of regulation?

Putting forward a regulatory threshold for behaviour provides a useful and versatile demarcation. It acts as a conceptual barrier which helps to distinguish between poor behaviour, and behaviour which we should be concerned with to the extent that we should impose measures to guide and control it. As one of the purposes of this thesis is to test and explore the regulatory framework surrounding deceptive representations, it is imperative that I ask what type of behaviour justifies the deployment of regulation. Once I have put forward an answer, I can then use this as a conceptual tool to determine which types of deceptive representation satisfy this threshold.

In pursuit of this argument, I engage in a two-part process. I begin by advancing a theory of the regulatory threshold, paying particular attention to acknowledging and explaining the importance of political expression within democratic institutions. It is essential to put these representations within the broader class of political speech to understand how sensitive the issue of regulation is and part of the appeal to my theory. I then move onto putting forward my account of when and where deceptive representations justify the deployment of regulation, according to my conceptual threshold. To start, I examine representations which are made to Parliament, and then turn to those which are made to the public.

A conceptual threshold for regulation

It is worth noting that I take a loose and inclusive definition of regulation. I use the term to mean a set of rules or standards, which can also be accompanied by a body that monitors whether these rules are followed and sanctions for non-compliance.[118] This definition reflects the fact that there is a multiplicity to regulation.[119] Its form can vary being: mandatory or voluntary, principally-based (discretionary guidance) or rule-based (explicit standards for behaviour). It includes measures like pledges, codes of conduct and promises, as well as explicit rules (e.g., like legal or organisational rules). The question which naturally follows is what qualities should behaviour have in order to justify regulation.

[118] As per Elizabeth David-Barrett, 'Nolan's Legacy: Regulating Parliamentary Conduct in Democratising Europe' (2015) 68 Parliamentary Affairs 514, 519, 523.
[119] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992) 3-4.

I advocate for a theory of regulation which is liberally-based, and where the restriction on personal liberty is narrowly construed.[120] The theory is that to justify regulation, behaviour needs to have two qualities to it. It needs to be a form of wrongful conduct (behaviour which we tend to see as morally bad or reprehensible) and cause or risk causing significant harm (a set-back to the interests or rights of others).[121] The theory is dualistic, in the sense that neither one of these is qualities is sufficient in their own right. While my theory does not posit how these qualities intersect, this level of detail is unnecessary. I am not dealing with a controversial context (like offensive or insulting conduct) in which using one theory over another, will yield a different result on whether to regulate. It is sufficient for my purposes to simply put forward a broad theory of regulation.

In the past, legal and regulatory theory has tended to be based around one of the two qualities. In particular, there is a long tradition of focussing on harm and a minimal conception of liberty.[122] This evolved from John Stuart Mill's harm principle, whereby '[t]he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.' His own good, 'either physical or moral is not sufficient'.[123]

Yet, modern legal and regulatory theory has increasingly sought to go beyond the minimal principle of liberty and offer a more significant interpretation which offers extra protection.[124] In particular, there have been developments in which to reconcile wrongdoing and harm. Feinberg for instance brings wrongfulness to the harm principle, going so far as to say that harms '[e]xcused or justified wrongdoing is not wrongdoing at all, and without wrongdoing there is no harming, however severe the harm that might have resulted'.[125]

Similar theories can be seen in the literature on regulation more broadly. Those such as Benedict Sheehy and Donald Feaver have suggested that the action has to have a significant

[120] Note, that my theory is a general theory of regulation. There are however, further considerations which need to be taken into account when deciding whether to regulate free speech. I consider these throughout this thesis but particularly in Chs 2, 3 and 7. For further detail on these considerations see, Kent Greenawalt, 'Free Speech Justifications' (1989) 89 Columbia Law Review 119, 119-155; Eric Barendt, *Freedom of Speech* (2nd edn, Oxford University Press 2007) Ch 3.
[121] John Stuart Mill, *On Liberty* (4th edn, Longmans, Green, Reader and Dyer 1863) Ch 5. See also Han Somsen, 'Cloning Trojan Horses' in Roger Brownsword and Karen Yeung (eds) *Regulating Technologies: Legal Futures, Regulatory Frames and Technological Fixes*, (Bloomsbury Publishing Plc, 2008) 234.
[122] Greenawalt (n 120) 122.
[123] Mill (n 121) 22. See also 149-150.
[124] Greenawalt (n 120) 122.
[125] Joel Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (Oxford University Press 1984) 109.

meaning, otherwise 'it will not attract social and regulatory attention and hence no regulation will follow'. Additionally, they hold that unless the behaviour is likely 'to be significantly harmful to society or to the individual or nature which sustains human life, it is [un]likely to be prohibited'.[126] Karen Yeung, another regulatory theorist, posits that regulation is introduced when it is not just a 'wrong-doing' but also when it is 'thought to be of value to the community in order to ameliorate its unwanted adverse side-effects'.[127]

There are compelling reasons for taking an approach to regulation which requires the presence of both qualities. One prominent reason, is that this fits with our intuitive interpretation of what regulation is. It is not often that either wrongdoing or harm is sufficient on its own to satisfy our instinctive reaction of behaviour that is worthy of intervention. We can see this clearly with an example. Let us say that A and B both have sandwich shops. A moves location and sets up shop next to B. A's sandwiches are more popular and as a result B is put out of business. Instinctively, this is not something which we view as being worthy of regulation. Of course, B has been harmed by A, but we cannot say that A has committed a moral wrong. We cannot convincingly say that A ought not to have set up a sandwich shop, simply because B may be harmed.

Alternatively, we can see that a wrong which causes no harm also does not satisfy our instinctive approach. Let us say, that B goes around to A's shop and calls him an idiot. On an instinctive basis we would not say this is worthy of regulation either. Of course, B has been inconsiderate and disrespectful of A (he has acted in a way which he ought not to), but A has not been harmed according to the harm-principle. A has not had their interests set-back.

When only one of these qualities is present in the behaviour, it becomes difficult to match our instinctive preferences, but when both wrongdoing and harm are present this aligns with what we believe should be subject to regulation. Let us change the scenario again and say that B goes around to A's sandwich shop and steals supplies from it. This, is what would fit with our idea of when regulation should be deployed. It is at this point that imposing measures to control the behaviour becomes justifiable. B has done something which is not just morally wrong but has actually caused harm to A. Their financial interests have been set back and A's

[126] Benedict Sheehy and Donald Feaver, 'Designing Effective Regulation: A Normative Theory' (2015) 38(1) University of New South Wales Law Journal 392, 395-396, 402.
[127] Karen Yeung, 'Towards an Understanding of Regulation by Design' in Roger Brownsword, and Karen Yeung (eds) (n 121) 104.

ability to enjoy his work has been infringed upon.[128] Thus, the threshold provides a useful tool for reflecting our intuitive preferences surrounding regulation. It is an accurate measurement of our preferences.

Another compelling reason for using this interpretation of regulation is that it creates regulatory constraint. The presence of the two qualities (regardless of how they intersect) is more demanding than a theory which requires the presence of just one. As theorist von Hirsch describes it, one can refer to the absence of wrongfulness to prevent the regulation of conduct which has remote harmful consequences. Conversely, one can use the lack of significant harm as means for restricting the control of wrongful acts which cause or risk causing no harm.[129]

From a liberal perspective this has benefits because it creates a narrowly construed conceptualisation of regulation, which places greater value on autonomy and self-determination.[130] Afterall, it is important that some wrongdoings can be made, so that as individuals and a society we can progress.
As put by Fukayama,

> [n]ot all wrongdoings require regulation what we consider to be the highest and most admirable human qualities […] are often related to the way that we react to, confront, overcome, and frequently succumb to pain, suffering, and death. In the absence of these human evils there would be no sympathy, compassion, courage, heroism, solidarity, or strength of character. A person who has not confronted suffering or death has no depth.[131]

This degree of constraint is particularly important for assessing whether to deploy regulation in this context. In their most simple form, deceptive representations are forms of political expression (such speech can be written, verbal, or another means of communication). It does not need to be strictly political in its content, but can be part of the broader public debate about some issue of public interest, such as a matter of 'social or political importance'.[132] In

[128] Andreas von Hirsch, 'Harm and Wrongdoing in Criminalisation Theory' (2014) 8 Criminal Law and Philosophy 245, 248.
[129] ibid 250-251.
[130] ibid 251.
[131] Francis Fukuyama, *Our Posthuman Future. Consequences of the Biotechnology Revolution* (Profile Books 2002) 172-173.
[132] Stefan Sottiaux and Stefan Rummens, 'Concentric Democracy: Resolving the Incoherence in the European Court of Human Rights' Case Law on Freedom of Expression and Freedom of Association' (2012) 10(1) International Journal of Constitutional Law 106, 119. See also, for instance, *Jersild v Denmark* App no

fact, political expression can range from information or ideas which are favourably received, to those which are regarded as indifferent, and even those which offend, shock or disturb.[133] Accordingly, political expression includes straightforward ideas, such as those which challenge the current constitutional order[134] but also more controversial and offensive types like where a political applicant engaged in hateful and hostile rhetoric.[135]

Free political expression is the prerequisite to a thriving and healthy liberal democracy. It is the engine to the democratic machine: serving a number of different purposes, which it is important to at least acknowledge. From a functionalist perspective, political expression creates an open platform where any view or idea can be put forward.[136] All views, however critical or controversial, including those made by individuals who seek to expose the wrongdoings of public officials (e.g., whistleblowers, journalists, and pressure groups) are provided with a platform to do so, and can disseminate information freely.[137] In turn, this supports two democratic functions.

One, is the public scrutiny function. It facilitates the ability of the public to scrutinise the actions of their political representatives, and hold them to account.[138] Political representatives (like the government) acting or failing to act must not only be subject to the close scrutiny of legislative and judicial authorities but also public opinion.[139] As put by Lord Steyn in *Simms*, political debate 'acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country […]'.[140] Another is the quality function. That is to say, that free political speech improves the quality of public deliberation and participation. Rather than public discussion being dominated by

15890/89 (ECtHR, 23 September 1994) paras 28 and 35; *Ceylan v Turkey* App no 23556/94 (ECtHR, 8 July 1999) para 31.

[133] *Eğitim ve Bilim Emekçileri Sendikası v Turkey* App no 20641/05 (ECtHR, 25 September 2012) para 67, citing *Handyside v United Kingdom* App no5493/72 (ECtHR, 7 December 1976) para 49, and *Jersild v Denmark* (n 132) para 37.

[134] *Eğitim ve Bilim Emekçileri Sendikası v Turkey* (n 133) paras 70-74.

[135] See, for instance, *Jersild v Denmark* (n 132); *GÜNDÜZ v. TURKEY* App no 35071/97 (ECtHR, 4 December 2003); *Erbakan v Turkey* App no 59405/00 (ECtHR, 6 July 2006).

[136] Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (HarperCollins Publishing 2001) 26. See also 86.

[137] Greeanwalt (n 120) 127-130; Barendt (n 120) Ch 3. See also Vincent Blasi, 'The Checking Value in First Amendment Theory' (1977) 2(3) American Bar Foundation Research Journal 521, 538-539.

[138] E.g., Raz refers to the public good that expression serves. See Joseph Raz, 'Free Expression and Personal Identification' (1991) 11(3) Oxford Journal of Legal Studies 303, 308. E.g., Glasius who explores how the flow of information aids accountability. See Marlies Glasius, 'What authoritarianism is and is not: A practice perspective' (2018) 94(3) International Affairs 515, 527-528.

[139] *Ceylan v Turkey* (n 132) para 34. See also *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986) paras 41-42.

[140] *Regina v Secretary of State for the Home Department* [2000] 2 AC 115 (HL) 126 (Lord Steyn).

certain narratives or rhetoric, the idea is that open and unabridged political expression nurtures a discussion which has a balanced and rich ecosystem, complete with a diverse range of views, opinions and critical assessments.[141] Exposure to this, should mean that the public is better informed, and when called to engage in democratic procedures they can do so more effectively.[142] As put by Raz, the 'better informed the governed are […], the better able they are to evaluate the information at their disposal […]'.[143] All this feeds into the idea of self-governance, a theory developed by Alexander Meiklejohn. Meiklejohn posits that free speech serves to enhance the public's understanding of the decisions being made by their representatives, and improving communication between them.[144] In the words of Peter Coe, the theory is that the purpose of free speech is 'to protect the right of citizens to understand political matters in order to facilitate and enable societal engagement with the political and democratic process'.[145]

From a developmental perspective, free political speech improves individual and societal growth. 'This is required by the values inherent in a democratic system, such as pluralism, tolerance and social cohesion'.[146] The fact is that fewer restrictions on political speech make the public debate richer. Its permeation with information from a wide range of sources should promote the growth of a mature and cohesive society. While encountering matters which offend, shock, disturb or even are just different to one's own may not be easy, it develops the capacity for social integration. If we were to, as Sunstein puts it 'excise [certain forms of] […] speech from [the] political debate, [then we may have] […] severely truncated our discussion of such important matters as civil rights, foreign policy, crime, conscription, abortion and social welfare policy'.[147] Moreover, being exposed to different viewpoints, even if controversial, should prompt individuals to not only recognise why people have different beliefs, but also to respect them. Participants being free to set out their reasoning and testimony is important. Even drawing upon emotion (revealing the 'anger, hate, or delight in

[141] ibid. See also *Abrams et al v United States* (1919) 250 US 616 Supreme Court no 316, 630 per Justice Holmes reference to 'the competition of the market'.
[142] Meiklejohn (n 136) 22-27.
[143] Raz (n 138) 308. Note that Raz is making this comment in relation to a slightly different context. He is referring to how the public debate can be used to invoke the government's response. Nonetheless, the point stands.
[144] Meiklejohn (n 136) 3-6, 22-27.
[145] Peter Coe, 'Tackling online false information in the United Kingdom: The Online Safety Act 2023 and its disconnection from free speech law and theory' (2023) 15(2) Journal of Media Law 213, 226.
[146] *Eğitim ve Bilim Emekçileri Sendikası v. Turkey* (n 133) para 70.
[147] Cass Sunstein, *Democracy and the Problem of Free Speech* (Free Press 1995) 186.

another's pain, that someone actually feels […]')[148] has expressive value and helps to explain to fellow participants why a particular belief is held. It also indicates the strength of their conviction. In turn, participants should grow to understand and respect the views of others. On a cumulative level, this should result in a society which is cohesive and built upon democratic values of pluralism, tolerance and broadmindedness.[149] These considerations are important to take into account, and support my theory of regulation (which hinges upon constraint).

It is for these reasons that I argue for this interpretation and that to justify regulation, these two qualities need to be present. Using this conceptualisation as an apparatus, I now identify the types of deceptive representations which warrant a regulatory response.

A two-fold account of when and where deceptive representations justify regulation

All deceptive representations raise basic moral issues because they all have the potential to undermine the agency of another and how they view the world.[150] The characterisation of wrongness is not new, with a number of critics drawing attention to the potential implications for agency, such as the change in internal attitudes (how we view the world) and external relations (such as our ability to understand the consequences of a particular behaviour). The crux of the issue is succinctly put by Christopher Mill who characterises the similar concept of manipulation in the following way;

> [c]onsider a belief, preference, or desire that you believe that you formed through your own volition or some behaviour that you believe that you performed due to your own self-governing choices. Perhaps you have formed particular habits or made particular decisions that are important to you. Now suppose you discover that this feature of your life was in fact deliberately designed and determined by someone else. Your assessment of this feature of your life might now change. You might question the relationship between this feature of your life and your broader life plans.

[148] Jane Mansbridge, 'Everyday Talk in the Deliberative System' in Stephen Macedo (ed) *DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT* (Oxford University Press 1999) 223.

[149] *Mouvement raëlien suisse v Switzerland* App no 16354/06 (ECtHR, 13 July 2012) para 49 citing, *Stoll v Switzerland* App no 69698/01 (ECtHR, 10 December 2007) para 101 and *Steel and Morris v the United Kingdom* App no 68416/01 (ECtHR 15 May 2005) para 87. These democratic values are also discussed in, *Gorzelik and Others v Poland* App no 44158/98 (ECtHR, 17 February 2004) para 92 and, *Ouranio Toxo and Others v Greece* App no 74989/01 (ECtHR, 20 October 2005) para 42.

[150] E.g., Helen Norton, 'The Government's Lies and the Constitution' (2015-16) 91 Indiana Law Journal 73, 76. See also, Kupfer (n 104) 105-107.

> Furthermore, you might worry that this intervention made it more difficult for you to live your life according to those plans.[151]

The fact that deception can infringe upon an individual's agency in a number of ways, means that it is generally classed as a wrongdoing. Nevertheless, there are certain types of deceptive representations which go beyond this baseline and actually cause or risk causing significant harm to others, by setting back their democratic interests. These types of deceptive representations are the ones which I will focus on in this thesis.

Deceptive representations to Parliament

Of the two, the type which is more well-recognised is deceptive representations to Parliament. These representations have the potential to infringe upon one of parliaments primary functions- to scrutinise the government and hold them to account. Acting as an executive watchdog is an important parliamentary function. Although much of the everyday decision-making is done by the Government, their power and use of it is checked by our Westminster Parliament. The Government's survival, in fact, depends upon undergoing this scrutiny (activity which examines and challenges governmental expenditure, administration and policies)[152] and thus keeping the continued confidence of the House of Commons.[153]

There are a number of methods for parliamentary scrutiny, which can be classed into three groups. First, there is the ability to focus on general Government policy, which could involve Ministers being asked to explain the actions of their department and being held to account for those actions.[154] Debates which are particularly inclined towards this include: the commons backbench business debates (where backbench members of parliament can bring forwards debates of their choice), opposition day debates (where the opposition can choose the topic of debate) and adjournment debates (short debates at the end of each day).[155] In the House of Lords, there are less set opportunities for governmental scrutiny, but there are measures like Short Debates, which backbench members can propose a topic for discussion,

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[151] Christopher Mills, 'Manipulation and Autonomy (n 48) 223. See also Joseph Raz, *The Morality of Freedom* (Oxford University Press 1986) 377-378; Cass Sunstein, *The Ethics of Influence: Government in the Age of Behavioural Science* (Cambridge University Press 2016) 88-89.

[152] Hannah White, *Parliamentary Scrutiny of Government* (Institute for Government) 3.

[153] Meg Russell and Lisa James, 'Parliamentary scrutiny: what is it, and why does it matter?' (*The Constitution Unit*, 12 September 2023) https://constitution-unit.com/2023/09/12/parliamentary-scrutiny-what-is-it-and-why-does-it-matter/ accessed 10 August 2024.

[154] Note that this is the convention of individual ministerial responsibility.

[155] White (n 152) 17-18. For a complete breakdown of scrutiny and accountability procedures in each House see 37-38.

as well as general debates which take place throughout the year, and in which each party is given the opportunity to propose debates.

Another method is more targeted scrutiny. For example, parliamentary select committees can investigate particular issues or oversee particular departments. These 'specialist select committees […] [can span across both Houses and] shadow government departments',[156] producing reports on what is being done and putting forward recommendations for what the Government should do.[157]

Third, there is legislative scrutiny, in which a Bill is outlined, debated, and then voted on in Parliament.[158] Although there are exceptions, most of the legislation is proposed by the Government. Thus, parliamentary consideration of a Bill acts as another means of testing the government's policy and rationale. Together, these three methods of scrutiny bring 'policies and actions to the light, compelling or enabling the Government to set out its view and its policy (or lack thereof) in public'.[159] Undertaking such scrutiny and pressing the government to publicly justify their behaviour and 'policies in front of an audience […] provides transparency and accountability, and helps to ensure that policies are seen as legitimate'.[160]

What can subvert and infringe upon Parliament's watchdog function is something which prevents them from acquiring information which is accurate and meaningful.[161] For example, when a Minister or House Member makes a deceptive representation to Parliament (either to the House or a select committee). It taints the debate, potentially to the point that the subsequent discussion will be based on inaccurate information. Parliament is not able to ask the right questions to scrutinise and hold the Government or Ministers to account for their actions.

As put by constitutional law scholars Griffith and Rye, 'securing information is at the heart of the debating or scrutiny process. Ill[-]informed debate cannot be effective [and as a result ..,] the price of democracy is eternal scrutiny […]'.[162] An illustrative example of when a

[156] Meghan Benton and Meg Russell, 'Assessing the Impact of Parliamentary Oversight Committees: The Select Committees in the British House of Commons' (2013) 66 Parliamentary Affairs 772, 772.
[157] ibid 774.
[158] Note that in the House of Commons there are also Public Bill Committees which examine the details of a Bill, following their second reading. The composition of the Committees matches the size of the parties in the House and they have the power to take evidence.
[159] White (n 152) 18.
[160] Russell and James (n 153).
[161] Adam Tomkins, 'A Right to Mislead Parliament' (1996) 16 Legal Studies 63, 63.
[162] ibid citing, JAG Griffith and M Ryle, *Parliament: Functions, Practice and Procedure* (Sweet and Maxwell 1989) 15-16 and 517.

deceptive representation has infringed upon Parliament's watchdog function is when John Profumo lied to the House of Commons about having an affair with Christine Keeler. The matter was relevant to Parliament for a number of reasons. The leading reason is because she was simultaneously having an affair with a Soviet military diplomat (and thus presented a national security risk). It is also possible that Profumo's position (Secretary of State for War) and his close connection to national security, was an influential factor.[163] By inducing Parliament to believe something which he knew was false, he subverted parliament's ability to assess the potential security risk and his behaviour more generally.

My point is that this kind of deceptive representation has the potential to cause significant harm, and set-back the democratic interests of the public. Under my conceptual threshold, the deployment of regulation is justified. However, this part of my account is relatively uncontentious because the implications of these statements are well-recognised. What is more controversial is the second part of my account, in which I posit that deceptive representations to the public justify regulation. This requires rigorous substantiation and qualification because there are a number of critics who are sceptical of this position.

Deceptive representations to the public

In my view, political representations which are made to the public are a problem and understanding why returns to the broader question of how the public forms political preferences. Elite influence as a whole, is widely appreciated as being a significant factor in shaping political opinions. 'Citizens have clear incentives to take political cues from those more knowledgeable, typically experts or elites whose views are conveyed by the media'.[164] Politicians (particularly those in Parliament and the Government) are fundamental to forming and shaping public opinion. They have the unique position of not only being professionals in the political field but also being informed of and party to the inner workings of policy. [165]

This is something which the majority of the public is not well-versed in, so the ideal is that the public compensates for their knowledge-deficits, by deferring to and drawing upon the expertise of those who are particularly knowledgeable: politicians.[166] The issue is that this

[163] HC Deb 22 March 1963, vol 674, cols 809-10.
[164] Martin Gilens and Naomi Murakawa, 'Elite Cues and Political Decision Making' (2002) 6 Political Decision Making, Deliberation and Participation 15, 15.
[165] Thomas Christiano, 'Rational deliberation among experts and citizens' in John Parkinson and Jane Mansbridge (eds) *Deliberative Systems* (Cambridge University Press 2012) 28.
[166] ibid 44. I accept that there will be some discrepancy in how knowledgeable politicians are. My point is that as a general rule, politicians have the position and access which should mean that they achieve a high level of specialist expertise.

labour division is threatened when politicians deceive because the information being corrupted.[167] It is then possible that the public forms political opinions from a knowledge base which is comprised of false or misleading information.[168]

With that being said, how the public forms political opinions is a multi-faceted issue. In particular, the importance of heuristic factors (cognitive short-cuts which enable the public to 'be knowledgeable in their reasoning about political choices without necessarily possessing a large body of knowledge about politics')[169] are increasingly recognised. This school of thought evolved from the Downsian economic view of public reasoning. In Downs's view, acquiring and evaluating information is a costly activity.[170] It requires a considerable amount of time and effort which most rational men are not willing to expend. Essentially, the assumption is that men see doing activities which require more cognitive processing as an inefficient[171] so they turn to other more efficient resource-saving devices.[172]

Since Downs, a number of scholars have analysed how the public actually forms political preferences, and what has ensued is a growing appreciation and catalogue of heuristic influences.[173] LePoutre for instance, puts great emphasis on the influence of social group membership. He argues that there is an 'assum[ption in democratic theory] that […] [the public is] trying to form accurate or reliable political judgments. But there is ample evidence suggesting that, when it comes to politics, people simply accept whatever their social group tells them to believe' (this could be race, gender, ethnicity or party).[174] This occurs through intuitive[175] (social or emotional) reasoning.[176] The core idea is a social group is partly defined through an exposure to a 'distinctive set of shared social constraints and enablement's by the laws, norms, and physical infrastructure that constitute the social context'.[177] The by-product is a commonality in how members of the social group think (a shared social perspective),

[167] ibid 28, 30-34, 43, 45.
[168] See Oppenheimer for a discussion on how preferences inform choices (rational choice theory). Joe Oppenheimer, *Principles of Politics* (Cambridge University Press 2012) 15.
[169] Paul M Sniderman, Richard A Brody, and Phillip E Tetlock, *Reasoning and Choice: Explorations in Political Psychology* (Cambridge University Press 1991) 19.
[170] Anthony Downs, *An Economic Theory of Democracy* (Harper & Row 1967) 207.
[171] ibid 42.
[172] Jeffrey J Mondak, 'PUBLIC OPINION AND HEURISTIC PROCESSING OF SOURCE CUES' (1993) 15(2) Political Behaviour 167, 168.
[173] E.g. Christopher Achen and Larry Bartels, *Democracy for Realists: Why Elections Do Not Produce Responsive Government* (Princeton University Press 2016) 272 and Ilya Somin, *Democracy and Political Ignorance: Why Smaller Government is Smarter* (2nd edn, Stanford University Press 2016) 62-79.
[174] Maxime Lepoutre, 'Democratic Group Cognition' (2020) 48(1) Philosophy & Public Affairs 40, 41.
[175] ibid 40, 41, 43, 51.
[176] Achen and Bartels (n 173) 232.
[177] Lepoutre (n 174) 48.

with shared constraints and experiences at the forefront. LePoutre argues that this perspective can be influential when group members look to form political preferences. Rather than engaging in the laborious cognitive process of seeking out and interpreting information, members can take a cognitive shortcut, trusting and using the opinion of other more informed members as a cue on how to form their own political preferences. This is on the assumption that the more informed members will share certain priorities and a way of thinking with the uninformed members.[178]

Political partisanship is another heuristic which guides the publics preferences. Say, for instance, that you are affiliated with a particular political party and the party approves of a particular immigration policy. You as a member of the public, are uninformed about the policy and have not yet formed an opinion. To shape your opinion you may use the stance your party takes, placing trust in the opinion of other members of the party because you assume that they will have a similar outlook and values.[179]As Kuklinski and Quirk note, '[b]y merely attending to party labels, voters can compensate for a lack of reliable information […]'.[180] The classic example of using party affiliation to act as an opinion cue is when people are called to vote on political candidates. Often the public does not to explore the stance and policies of a particular candidate. Instead, they will look to the party the candidate is affiliated with to decide on how to vote. In this sense, the public takes a 'rule of thumb […]' approach, assuming and trusting that the candidate will have a particular outlook because they have a certain party-membership.[181]

A final heuristic factor is instinctive or emotive influence. Popkin in his pioneering work on the low-reasoned voter and voting preferences in the US places strong emphasis on the likeability of a party or candidate, as well as the inferences which can be made about their character or conduct e.g., their sincerity.[182] These inferences can then be used by the public to influence how they form a political opinion e.g., whether a policy is viewed favourably. Seen in this light, political opinion formation needs to be recognised as a complex and multi-faceted theory.

[178] ibid 50-51.
[179] Mondak (n 172) 182-184.
[180] James H Kuklinski and Paul J Quirk, 'Reconsidering the Rational Public: Cognition, Heuristics, and Mass Opinion' in Arthur Lupia, Mathew D McCubbins and Samuel L Popkin (eds) *Elements of Reason Cognition, Choice, and the Bounds of Rationality* (Cambridge University Press 2012) 155.
[181] Samuel L Popkin, *The Reasoning Voter: Communication and Persuasion in Presidential Campaigns* (University of Chicago Press 2020) 7.
[182] ibid 7, 44, 65. See also, Kuklinski and Quirk (n 180) 153-159.

While it is important to stress that this is not a straightforward issue and that a politician's influence may not be determinative in how opinions and preferences are formed, it still has a role and is therefore important.[183] Even new empirically-based studies of how political opinions are formed, continue to note its significance. Take, for instance, Clarke et al's mass observation project into how people voted in the Brexit referendum.[184] The results indicated that when developing opinions, panellists often fell back on feelings.[185] The findings showed that '[m]any panellists looked to the campaign for help, at least initially. They read leaflets and newspapers, watched television and listened to the radio'.[186] The problem was that the misleading, unverified and contradicting claims left them feeling uninformed, and the public was forced to use their instinct to fill that deficit.[187] These findings are consistent with Mitchell's analysis of the Scottish independence referendum. He too, noted that the diversity of opinions on EU membership led to division within parties, 'and opinions on each side of the debate limited the extent to which clear differences could emerge on position issues'.[188] The contradiction did not provide voters with clear information to use and develop their preferences.

Another example is Arceneaux's cross-national analysis of the impact of election campaigns as informational tools and their use by voters. Based on survey data from 9 European countries across 12 years, it was determined that voter learning improved when parties campaigned. Although Arceneaux observed 'voters' pre-existing attitudes and assessment of things beyond the control of political campaigns, like the economy, have the strongest impact on voting decisions, [he still noted that] campaigns play a major role in producing these effects'.[189] In other words, the heuristic factors do not invalidate the fact that the information being imparted by politicians can and does have an influence on the publics opinions and understanding.

[183] Gregory B Markus, 'The Impact of Personal and National Economic Conditions on the Presidential Vote: A Pooled Cross-Sectional Analysis' (1988) 32 American Journal of Political Science 137, 137–149.
[184] Nick Clarke, Will Jennings, Jonathan Moss, and Gerry Stoker, 'Voter Decision-Making in a Context of Low Political Trust: The 2016 UK EU Membership Referendum' (2023) 71(1) Political Studies 106, 110 -118.
[185] ibid 107.
[186] ibid 113.
[187] ibid 115-116.
[188] James Mitchell, 'The Referendum Campaign' in Aileen McHarg, Tom Mullen, Alan Page, and Neil Walker (eds.) *The Scottish Independence Referendum: Constitutional and Political Implications* (Oxford University Press 2016) 93.
[189] Kevin Arceneaux, 'Do Campaigns Help Voters Learn? A Cross-National Analysis' (2005) 36 British Journal of Political Studies 159, 160. See also 164-169.

Similar findings can be seen in Stevenson and Vavreck's analysis of different campaign lengths and their impact on voters. An analysis of 113 elections in 13 democracies supported the finding that campaigns of sufficient length (over 6 weeks) gave voters more time to be exposed to competing messages. The extra time meant that voters were able to learn about the state of the economy and the policy positions of candidates.[190] Much like Arceneaux, Stevenson and Vavreck accept that other variables are important,[191] but their analysis does suggest that voters do rely on the information being imparted by candidates and parties.[192]

The point I am making is that even if we accept that the information that politicians impart is just one of the factors shaping political preferences, the fact remains that it is still important. If we follow this reasoning, then we can also hold that deceptive representations being made by politicians to the public is problematic because it is giving them a flawed knowledge base on which to make decisions. This is something which has broader democratic implications when the public then engages in democratic procedures whether it be institutional e.g., voting in referendums or elections, or alternative and ongoing signalling procedures e.g., protesting, petitioning or the critiquing of policy decisions.[193]

Typically, there has been a tendency to focus on the electoral and referendum context. Academics such as Rowbottom,[194] Horder,[195] Renwick and Palese,[196] have all taken this approach, as have the legislative responses. This can be seen with recent developments in Western democracies such as section 81 of New Zealand's Electoral Amendment Act 2002 which stipulates that;

> [e]very person is guilty of a corrupt practice who, with the intention of influencing the vote of any elector, at any time on polling day before the close of the poll, or at any time on any of the 2 days immediately preceding polling day, publishes, distributes, broadcasts, or exhibits, or causes to be published, distributed, broadcast, or exhibited,

[190] Randolph V Stevenson and Lynn Vavreck, 'Does Campaign Length Matter?' (2000) 30 British Journal of Political Studies 217, 217-224, 230-231.
[191] ibid 230.
[192] ibid 222-223, 232.
[193] See Sofie Marien, Henrik Serup Christensen 'Trust and Openness: Prerequisites for Democratic Engagement?' in Kyriakos N Demetriou (ed) *Democracy in Transition Political Participation in the European Union* (Springer 2012) 109-113, for discussion on alternative forms of activism.
[194] Rowbottom (n 14) 507-535.
[195] Jeremy Horder, 'Criminal Law at the Limit: Countering False Claims in Elections and Referendums' (2021) 84(3) Modern Law Review 429-255.
[196] Alan Renwick and Michela Palese, 'Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK be Improved?' (The Constitution Unit 2019) 20-38 on different jurisdictions implementing legislation tackling the claims made in electoral campaigning.

> in or in view of any public place a statement of fact that the person knows is false in a material particular.[197]

A similarly narrow focus is evident in French Law no. 2018-1202, Art.L163-2-1.[198] This provision permits the curtailment or temporary removal of false information likely to alter the sincerity of an upcoming election. These statements need to be disseminated: deliberately, on a large scale and through an online communication service. Such information has to be disseminated in the three months before a general election, and applies until voting has ended.[199] The assumed premise behind the focus on institutional procedures has been a thin version of democracy. Here, the public's primary form of expression and influence is their capacity to vote a party, representative or policy out (as in an election or referendum).

Although academic and regulatory attention has been directed towards elections, I depart from this view. I posit that this fails to give enough credit to the fact that deceptive representations are not episodic and threaten democratic engagement, both within and beyond the electoral context. These representations influence how the public forms political preferences, which in turn can influence their choice and engagement in democratic procedures. Of course, this *can be* institutionalised procedures e.g., elections or referendums, but it *can also be* non-institutionalised procedures. By this I mean 'citizens participat[ing] more actively, influencing government bodies' agendas and policy outcomes not just by voting but by commenting, petitioning, proposing, and critiquing'.[200]

Both institutionalised and non-institutionalised democratic procedures are important conduits for signalling changes in the public's behaviour. Of the two, the procedures which have *the greatest* direction on Government and policy are institutionalised procedures like elections and referendums. However, that is not to say that other forms of democratic procedures are not also well-used and do not also have a practical influence (albeit to a smaller degree). At the very least, non-institutionalised procedures have *the potential* to influence change. Accordingly, we should worry about deceptive political statements to the public, regardless of the time-period.

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[197] ibid 35.
[198] The judge can use any of the measures outlined in 2 of I of Article 6 of Law No. 2004-575 to ensure confidence or if this fails, use proportionate and necessary measures to stop the distribution.
[199] Rachael Craufurd-Smith, 'Fake news, French law and democratic legitimacy: Lessons for the United Kingdom?' (2019) 11 Journal of Media Law 52-53.
[200] Vicki C Jackson, 'Knowledge Institutions in Constitutional Democracies: Preliminary Reflections' (2021) 7 Canadian Journal of Comparative and Contemporary Law 156, 199.

Indeed, there is evidence to support my position, as a number of political scholars have indicated that there is a trend within Western democracies of non-institutional activism increasing.[201] More to the point, it has practical influence. Slavina's analysis of the cross-national data from the 2014 International Social Survey Program supports this assertion. The work drew on responses from 33,767 individuals across 33 countries. As part of the study, respondents were asked questions relating to their level of political and civic engagement. The survey contained data on eight non-institutional engagement items: 'contacting the media; contacting politicians or civil servants; expressing political views on the internet; donating money or raising funds for a political or social cause; boycotting certain products; signing petitions; attending political meetings or rallies; and attending demonstrations) and two institutional engagement measures (voting and political party membership)'.[202] The responses indicated that Britain has an overall 82.5% participation in non-institutional forms of political engagement- the majority of which (79.3%) are individualised e.g., signing petitions, boycotting certain products and donating money.[203] This points to the fact that democratic engagement beyond the institutionalised context is thriving and well-used.

Furthermore, we can actually refer to anecdotal instances where engagement in non-institutionalised democratic procedures has influenced the actions of the executive. The 2015 petition to abolish the sales tax on sanitary products which was eventually implemented in January 2021.[204] Another example is the successful petition to give police dogs and horses greater legal protections if attacked on duty. The petition was debated and resulted in the Animal Welfare (Services Animals Act) 2019, and since June of 2019 those who attack or injure service animals will not be able to claim self-defence.[205]

Even if it does not *necessarily* follow that engaging in non-institutionalised procedures will result in change (compared to a referendum or an election), there is at least potential for it to have this effect. It is based on this evidence that we should worry about deceptive political

[201] Anna Slavina, 'Unpacking non-institutional engagement: Collective, communicative and individualised activism' (2021) 64(1) Acta Sociologica 86, 86-87.
[202] ibid, 91.
[203] ibid 93-94.
[204] GOV.UK, 'Tampon tax abolished from today' (*GOV.UK*, 1 January 2021) https://www.gov.uk/government/news/tampon-tax-abolished-from-today#:~:text=The%20Chancellor%20announced%20that%20the,tax%20on%20all%20sanitary%20products accessed 12 August 2024.
[205] Note that this is known as Finn's Law. UK.GOV, 'Finn's Law' delivered to protect brave service animals' (*UK.GOV*, 8 June 2019) https://www.gov.uk/government/news/finns-law-delivered-to-protect-brave-service-animals accessed 12 August 2024. See also, BBC News, 'Brexit debate: Do petitions ever work?' (*BBC News*, 26 March 2019) https://www.bbc.co.uk/news/world-47693506 accessed 12 August 2024.

representations to the public, both within and beyond the electoral and referendum contexts. As a result, I reflect this by adopting a thicker version of the importance of public participation and democratic procedures. Thus, if deceptive political representations pose a threat to how the public forms political preferences and their broader democratic interests, then we need to acknowledge the fact that it is a broader problem and respond with regulation which reflects this. Simply put, we need to respond with regulation which covers engagement in institutionalised and non-institutionalised democratic procedures.

My purpose in this chapter was to put forward a theory of regulation, and then use this as a conceptual apparatus for arguing which deceptive political representations justify regulation. Through this process, I argue that there are two types of which warrant some sort of intervention: deceptive representations which are made to Parliament and those which are made to the public. The aim was to identify what the regulatory framework should be addressing. In this sense, we can put this at the forefront of analysis, using it as a conceptual threshold for determining what the framework should be addressing.

In the following chapters I run a diagnostic test on the mechanisms which address deceptive representations to Parliament and the public. I test how well these mechanisms operate, looking at their design (coverage) and their actual performance (implementation) capabilities. The upcoming chapters will detail what the current approach to addressing these types of representations is and suggest what can be done to improve how we respond.

Part 2: DIAGNOSING WEAKNESSES IN THE REGULATORY FRAMEWORK

The current regulatory framework tackles these types of representations with a piecemeal approach. The regulation can be categorised into three key areas. First, there are broader mechanisms (which I term generalist mechanisms). These underpin all political conduct and attempt to discourage from occurring or mitigate the impact it has. While none of these mechanisms are that successful in this task, these are supporting mechanisms. They encourage changes in social or political practices but are never designed to be a sufficient response on their own.

The main force of the regulatory response lies with the specialist mechanisms, which tend to be enforceable. While there are individual theoretical and functional problems with most of the mechanisms, there is a clear difference between the two types of specialist mechanisms.

The regulation for deceptive representations to Parliament is successful in the sense that there are mechanisms in place to cover the representations. The regulation for deceptive representations to the public is more complicated. The mechanisms are niche and are only applicable to very specific types of representations, offering little coverage for this part of the problem. While part of the issue may be ameliorated with certain improvements, this portion of the framework would still not be up to par. Thus, I also argue in favour of new mandatory and enforceable mechanism to appropriately recognise and sanction a class of representations, which is currently being neglected.

I structure Part 2 of this thesis across three chapters, each corresponding to a different part of the framework. I begin with Chapter 3 in which I explore the generalist mechanisms, whilst in Chapters 4 and 5 I focus on the specialist. Throughout, I take a theoretical and functionalist perspective with the aim of diagnosing areas of weakness or success in their coverage or enforcement. I recognise issues and respond by putting forward a package of recommendations to strengthen what is already in place.

Chapter 3: The generalist mechanisms: How are both types of problematic deceptive representations being addressed?

The generalist mechanisms in the regulatory framework underpin both types of deceptive representations. While being broad, they have limitations in the sense that they are not enforceable. Instead, they optimise different regulatory strategies, such as discouraging the use of deceptive representations or attempting to mitigate the impact of the deception. There are two mechanisms in this portion of the framework: the self-correcting public debate theory and the Principles of Public Life.

Self-correcting public debate theory

One prominent mechanism is the theory of correction through the public's discussion. This theory is advanced by a number of free speech scholars including Mill,[206] Brandeis and Holmes,[207] and Mieklejohn,[208] who have all suggested that the public debate has the capacity to identify problematic speech (e.g., false or dangerous rhetoric) and remove it from circulation. In this sense, it is able to correct the discussion towards truth.

This theory was originally put forward by John Stuart Mill in *On Liberty*. He presented public discussion as an effective means to recognising and removing false opinions. In fact, he presents the success of public discussion as rendering state interference with speech unnecessary. Mill makes this argument across four limbs. He begins with conceptual concerns, arguing that we cannot know for sure what is a false opinion.[209] Second, he posits that a false belief often has value, perhaps having glimmers of truth within it which can be teased out through discussion.[210] Third, he suggests that the process of public discussion (the interrogation of different opinions) and examination of evidence, leads to discovery of the truth. Mill adds that undergoing this rigour is necessary. Unless the truth is able to withstand being challenged it will not be convincing, instead, 'it will be held in a manner of prejudice

[206] Mill (n 121).
[207] *Abrams et al v United States* (n 141) at 630-631 per Justices Holmes and Brandeis.
[208] Meiklejohn, *Free Speech and its Relation to Self-Government* (n 136) 26-27. See also Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Harper 1960) 27.
[209] Mill (n 121) 34. For the list of Mill's reasons see 94-97.
Note that this point is heavily criticised. Greenawalt for example, says that 'Mill's sense of truth is broad [and does not have to be infalliable. It can] cover […] correct judgments about issues of value as well as ordinary empirical facts and embracing knowledge conducive to a satisfactory personal life as well as facts of general social importance'. Greenawalt continues, the 'government is likely to judge more accurately than a dissident minority […]', per Greenawalt (n 120) 131.
[210] ibid 83-84. See also 94-97

with little comprehension or feeling of its rational grounds'[211] and potentially ignored.[212] Finally, diversity of the public debate is needed for epistemic advancement and personal growth. The public needs to have the opportunity to become wiser through the process of understanding other beliefs (e.g., knowing the 'real and heartfelt conviction from reason or personal experience'[213] underpinning a belief), engaging with it, and then admitting their own beliefs in practice.

The three last limbs of Mill's position are of particular relevance because they are the basis of Mill's justification for not only why regulation is unnecessary but also the importance of public discussion. These ideas form the premise behind the marketplace of ideas theory, which expands on the idea of discussion being used to identify and defeat falsity. The key proponents of this theory are US scholars Justices Brandeis and Holmes. Under their interpretation, public discussion is something which identifies and removes false or misleading information. The theory is that unconstrained public discussion provides an open platform for any idea to be put forward- all ideas start off as having equal status. As time and the discussion develop, the public is able to scrutinise and challenge ideas, leading to some being defeated and removed from circulation. While some ideas are able to withstand the scrutiny, others are defeated once their weaknesses and flaws are exposed. The premise of the marketplace of ideas theory is that the best and most rational idea emerges victorious.

As described Lord Bingham in *Animal Defenders International;*

> The fundamental rationale of the democratic process is that if competing views, opinions and policies are publicly debated and exposed to public scrutiny the good will over time drive out the bad and the true prevail over the false. It must be assumed that, given time, the public will make a sound choice when, in the course of the democratic process, it has the right to choose. But it is highly desirable that the playing field of debate should be so far as practicable level. This is achieved where, in public discussion, differing views are expressed, contradicted, answered and debated.[214]

[211] Mill (n 121) 95.
[212] ibid 38-39.
[213] ibid 95.
[214] *Regina (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15**,** (2008) 1 AC 1312 (HL) 1346 [28]. See also Greenawalt (n 120) 130-140.

Under this interpretation a deceptive representation can be introduced into public discussion, but it will eventually be identified and exposed as being untrue,[215] in this sense the discussion acts as a 'search engine for truth […]'.[216] As put by Justice Brandeis, '[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence'.[217] Seen in this way, regulatory measures preventing or deterring speech from occurring is not the solution. Rather, the public debate should be enriched to help identify it and mitigate its impact. More speech and counter speech ('communication that seeks to counteract potential harm that is brought about by other speech')[218] should be added to help identify and discredit the deceit.

We do have measures to identify and counter both types of deceptive political representations. Politicians, for example, fact-check each other (something which we see frequently in PMQ's, parliamentary debates, or select committee investigations). We also have fact-checking measures to identify deceptive representations in the form of democratic watchdogs like the media, public bodies (e.g., the UK Statistics Authority) or other independent fact-checking organisations (e.g., Full Fact) are used to correct the narrative. While we have fact-checking measures in place in both the parliamentary and public sphere, their success is varied. In Parliament, this process seems to work fairly well, as demonstrated by anecdotal evidence. There are several instances where political representatives have successfully called out others for making false or deceptive representations. When Nadine Dorries made the representation that Channel 4 was publicly funded, she was challenged by MP Damien Green. She responded by acknowledging her mistake and clarifying that she meant it is funded with public money (as in through advertisements), not publicly funded through the government spending.[219] External bodies also help to correct the narrative. For instance, when Boris Johnson made the representation that Keir Starmer failed to prosecute Jimmy Savile,[220] a CPS report was circulated confirming that Starmer was not personally involved in the case.[221] Boris Johnson responded by revising his statement three days later.

[215] *Abrams et al v United States* (n 141) 630-631.
[216] Anthony Lewis, *Freedom for the Thought That We Hate: A Biography of the First Amendment* (Basic Books 2010) 185.
[217] *WHITNEY v. CALIFORNIA. No. 3*. 274 US 357(1927), 377 per Justices Brandeis and Holmes. See also, Rowbottom (n 14) 522.
[218] Bianca Cepollaro, Maxime Lepoutre, Robert Mark Simpson 'Counterspeech' [2023] Philosophy Compass 1, 2.
[219] Digital, Culture, Media and Sport Committee, *Oral evidence: Work of the Department* (23 November 2021, HC 44) Q175-178.
[220] HC Deb Monday 31 January 2022, vol 708, col 26.
[221] Alison Levitt, *IN THE MATTER OF THE LATE JIMMY SAVILE: Report to the Director of Public Prosecutions* (CPS 2013)

He said that he was referring to Starmer's leadership of the CPS not his personal involvement in the case.[222] Another example of an external body challenging an incorrect representation was in 2022, when the Office for National Statistics rebuked Priti Patel and Boris Johnson for claiming that crime had fallen 14%.[223] This figure was misleading in the sense that it excluded fraud and computer misuse, something which was not made clear in their use of the statistic.

The anecdotal evidence is indicative of the theory being a success in addressing deceptive representations in Parliament. This success is perhaps due to a number of contributing factors, such as very speedy fact-checking or quick admissions of inaccuracy and clarification. Importantly, there seems to be a relatively equal debate (in the sense that all Member's views are afforded equal claim on people's attention) as well as a strong component of open-mindedness and willingness to accept that they may been wrong. Although the public debate theory works well for addressing representations to Parliament, it does not have the same success in addressing those which are made to the public. In this regard, I take a similar to the position to other scholars such as Coe,[224] and Rowbottom.[225] The main issue is that our cognitive processes are not framed in a way which makes us easily-susceptible to changing our beliefs. The evidence suggests that members of the public are not only biased towards evidence which is familiar[226] but that which fosters confirmation of their previous beliefs.[227] Even when people are confronted with evidence to the contrary, the original deceit can exert a 'lingering influence on people's reasoning after it has been

http://www.cps.gov.uk/news/latest_news/dpp_statement_about_savile_cases/executive_su accessed September 2024.

[222] Aubrey Allegretti, 'Johnson backtracks on comment that Starmer failed to prosecute Savile' (*The Guardian,* 3 February 2022) https://www.theguardian.com/politics/2022/feb/03/boris-johnson-backtracks-on-comment-that-starmer-failed-to-prosecute-savile accessed 19 November 2024.

[223] HC Deb 31 January 2022, vol 708 cols 24 and 50. See also Andy Gregory, 'Boris Johnson and Priti Patel rebuked by watchdog over 'misleading' claims crime has fallen' (*Independent*, 4 February 2022) https://www.independent.co.uk/news/uk/politics/boris-johnson-priti-patel-crime-b2007401.html accessed 26 August 2024.

[224] Coe (n 145) 223-227.

[225] Rowbottom (n 14) 522-524.

[226] Ullrich K H Ecker, Stephan Lewandowsky, John Cook, Philipp Schmid, Lisa K Fazio, Nadia Brashier, Panayiota Kendeou, Emily K Vraga and Michelle A Amazeen, 'The psychological drivers of misinformation belief and its resistance to correction' (2022) Nature Reviews Psychology 13, 15-17. Ecker et al refer to this as the continued influence effect.

[227] ibid 13. See Rowbottom (n 14) 522-523.

corrected […]' or even reinforce it.[228] This is particularly the case for beliefs which form part of our identity (such as political or cultural beliefs). [229]

Numerous political studies, such as those conducted by Lord, Ross and Lepper,[230] Tabler and Lody,[231] and Nhyan and Reifler,[232] demonstrate this effect, particularly the fact that the public has a tendency to be overly accommodating of evidence which supports their view whilst dismissive of evidence which challenges their beliefs.[233] In these studies, individuals were presented with information which challenged their initial assumptions on controversial political issues, such as: affirmative action, gun control,[234] capital punishment,[235] weapons of mass destruction, stem cell research or tax cuts.[236] Regardless of the political topic, individuals were not convinced by the contradicting evidence. There was a tendency to be resistant to the evidence or to use the opposing evidence to reaffirm their commitment to their belief.[237] These findings are unsurprising. In the words of Mackenzie and Bhatt, people are drawn to polarising and false speech like conspiracy theories and generalisations: they are 'allured by patently false [information] […] dogmatically persist[ing] with [the] belief […]' in the face of evidence exposing it as false.[238] This is likely due to people wanting to protect a belief which shapes their identity, or wanting to create certainty and stability when a number of opinions are present. Regardless of the reason, the empirical studies demonstrate the general issue with the public discussion theory. If the public is not able to be open to identifying and correcting their misperception, then the deceit will not be defeated and removed.

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[228] Ecker, Lewandowsky, Cook, Schmid, Fazio, Brashier, Kendeou, Vraga and Amazeen (n 226) 13. See also Emily Thorson, 'Belief echoes: The persistent effects of corrected misinformation' (2016) 33(3) Political Communication 460, 461. Thornson refers to the reinforcement of the false belief as the belief echo.
[229] Dan M Kahan, 'Misinformation and Identity-Protective Cognition' (2017) Yale Law & Economics Research Paper No. 587, 5-6 https://ssrn.com/abstract=3046603 accessed 22 June 2024. See also Thorson (n 228) 461.
[230] Charles G Lord, Lee Ross, and Mark R Lepper, 'Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence' (1979) 37(11) Journal of Personality and Social Psychology 2098.
[231] Charles S Taber and Milton Lody, 'Motivated Skepticism in the Evaluation of Political Beliefs' (2006) 50(3) American Journal of Political Science 755.
[232] Brendan Nyhan, and Jason Reifler, 'When corrections fail: The persistence of political misperceptions' (2010) 32(3) Political Behaviour 303.
[233] Taber and Lody (n 231) refer to this as asymmetrical scepticism.
[234] ibid 757-767.
[235] Lord, Ross and Lepper (n 230) 2105-2108.
[236] Nyhan and Reifler (n 232) 314-323.
[237] ibid. See also Lord, Ross and Lepper (n 230) 2099-2100.
[238] Alison MacKenzie and Ibrar Bhatt 'Bad Faith, Bad Politics, Bad Consequences: The Epistemic Harms of Online Deceit' in Alison MacKenzie, Jennifer Rose, and Ibrar Bhatt (eds), *The Epistemology of Deceit in a Postdigital Era: Dupery by Design* (Springer 2021) 11.

Of course, one could accept that the theory is flawed, but respond by advocating for a modified version, whereby the theory is supported by regulatory measures. To a degree I can recognise this. Studies by those such as Kuklinski, Quirk, Jerit, Schweider and Rich have demonstrated that the public can be induced to correct their belief.[239] The determinative difference is that the counter speech needs to be more sophisticated than the mere counteraction of a particular view by ordinary citizens or the media.[240] Instead, there needs to be some sort of authoritative statement provided by a recognised source, such as a state actor acting on society's behalf. These would assist the self-correction model.[241]

Fact-checking news and current affairs is becoming more commonplace, with organisations or even podcasts taking the initiative to do this.[242] Although there is some progress, we do not have a single authoritative, unbiased and independent body to check political statements. The Advertising Standards Authority (the ASA, an independent media regulator)[243] has sometimes been posed as being an appropriate body for correcting political advertisements. However, it is ill-suited for a number of reasons,[244] the most fundamental problem being that if the ASA did take on this role it would only be covering political advertisements and not representations more generally. On the odd occasion, we have tried to use the UK Statistics Authority to correct misperceptions. In the midst of the Brexit campaigning, for instance, the UK Statistics Authority (an impartial and independent statutory body) intervened and highlighted the limitations of the claim that £350 million will be invested in the NHS if we leave the EU,[245] thereby attempting to correct the narrative. While I do not dispute the efforts

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[239] James H Kuklinski, Paul J Quirk, Jennifer Jerit, David Schwieder, Robert F Rich, 'Misinformation and the Currency of Democratic Citizenship' (2000) 62(3) The Journal of Politics 790, 792.
[240] Rowbottom (n 14) 523.
[241] Cepollaro, Lepoutre and Simpson (n 218) 3.
[242] E.g., Full Fact and the BBC's More of Less podcast do this. See, Full Fact, 'Full Fact' https://fullfact.org/?gad_source=1&gclid=EAIaIQobChMIouPn4Yq6hAMVkphQBh3HnwBDEAAYASAAEgKmGPD_BwE accessed 22 June 2024; BBC, 'More or Less' (*BBC*, 2024) https://www.bbc.co.uk/programmes/b006qshd accessed 22 June 2024.
[243] Whilst there is a code of best practice, the ASA does not regulate this material, see, ASA Rules 7.1-7.2 at ASA, 'Non-Broadcast Code' (ASA) https://www.asa.org.uk/codes-and-rulings/advertising-codes/non-broadcast-code.html accessed 22 June 2024.
[244] One prominent reason is that the ASA is primarily targeted towards regulating television and radio broadcasts, while non-broadcast advertising (e.g., newspapers, social media, websites etc) is covered by self-regulation. Broadcasting political advertisements is prohibited under the Communications Act 2003, s321. Another reason is that the ASA is funded by advertisers, so its independence is disputable compared to a statutory body. A final reason is that the ASA primarily deals with commercial advertising (and was ill-suited to regulate non-commercial advertising). See, ASA, 'Why we don't regulate political ads' (*ASA*, 26 April 2023) https://www.asa.org.uk/news/why-we-don-t-regulate-political-ads.html accessed 22 June 2024.
[245] UK Statistics Authority, 'UK Statistics Authority statement on the use of official statistics on contributions to the European Union'(*UK Statistics Authority*, 27 May 2016) https://uksa.statisticsauthority.gov.uk/news/uk-statistics-authority-statement-on-the-use-of-official-statistics-on-contributions-to-the-european-union/ accessed 30 May 2024 .

of this body, the narrative was not corrected. This is poignantly represented by Clarke, Jennings, Moss and Stoker's study of the Brexit campaign, where panellists found that it was 'increasingly hard to decipher and believe' the different counter-claims put forward.[246] Part of the issue was that the UK Statistics Authority was not established as the leading authority on correction, so when public figures were throwing their weight behind a wide range of claims, it was still difficult for the public to identify the deception. From this view, we perhaps would need to distinguish this authority from the rest of the communicators and recognise it as being the fact-checker for the state. In this sense, give it a superior status to other communicators in public discussion. [247]

Yet even if the UK Statistics Authority had been able to distinguish itself as being *the* leading authority on exposing false or misleading representations, it would still encounter a number of logistical issues. This is particularly the case if it was used with greater frequency and on a wider scale. First, effective countering would be logistically difficult. It would require a burdensome amount of time and resources to; one interrogate and investigate the claims made, and two; spread the exposure of the deceit to the public. In particular, to do the latter effectively requires a lot of effort. The message needs to be spread with sufficient accessibility,[248] reach and frequency[249] so as to correct the discussion. In the words of Kuklinski et al 'it takes an extraordinarily obtrusive presentation of that information' to achieve this effect.[250] There may be particular difficulty in correcting the discussion when the representation is circulated right before a fixed democratic procedure (e.g., days before a referendum or election). Under such circumstances, there simply would not be time to investigate and then correct the narrative: the damage would already be done.[251] Thirdly, and as said above, the public is fairly dogmatic with their political beliefs, tending to 'believe messages that are already dominant socially or that serve unconscious, irrational needs'.[252] So even if the UK Statistics Authority did do all of this, the public would likely still be unconvinced.

[246] Clarke, Jennings, Moss, and Stoker, (n 184) 114.
[247] Greenawalt (n 120) 134.
[248] ibid 114.
[249] Brian G Southwell, Emily A Thorson and Laura Sheble *Misinformation and Mass Audiences* (University of Texas Press 2018) 5.
[250] Kuklinski, Quirk, Jerit, Schwieder, and Rich (n 239) 792.
[251] Renwick and Palese note this in relation to New Zealand's approach, noting that 'New Zealand's rules against false statements in the final days of the campaign – simply do not work'. See, 'Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK be Improved?' (n 196) 39.
[252] Greenawalt (n 120) 134.

While the self-correcting public debate theory does appear to be successful in addressing deceptive representations in Parliament, it does not have the same success in relation to those which are made to the public. Attempting to correct the public's narrative is problematic because beliefs have already been formed and there is an unwillingness to change opinion, unlike in the parliamentary setting. Understood in terms of cognitive processing exposes the deep issues with the theory in its original or even in its modified state. I recognise these difficulties and do not recommend reform. Even creating a leading authority which has the power to correct deceptive representations which are made to the public would encounter serious cognitive and logistical difficulties. On balance, this would not be worthwhile, it is likely to have minimal effect and invoke significant costs.

The Principles of Public Life

At the heart of all public conduct are the seven principles of public life (selflessness, integrity, objectivity, accountability, openness, honesty, leadership).[253] These are the quintessential basis of what political behaviour should be and act as normative principles of guidance of all public conduct. The most relevant principles are; honesty- that public office holders 'should be truthful'[254] in the statements they make or promote;[255] openness- that they should be honest and transparent 'unless there are clear and lawful reasons for [not] doing so'; and, accountability -the scrutinization of behaviour.[256] They are incorporated into the codes of conduct for Members across Westminster Parliament (such as the Ministerial Code, as well as the House of Commons and House of Lords codes of conduct). [257]

For the most part, non-compliance with these principles does not result in punitive action. Of course, the Standards Committee (for the House of Commons) and the Commissioners for Standards (for the House of Lords) can take a breach of these principles into account when investigating breaches of rules. Breaching these principles is treated as an aggravating or mitigating factor for determining how severe the breach is. Yet, they are not actionable in

[253] The Committee on Standards in Public Life, *Standards in Public Life Vol 1* (Cm 2850-1, 1995) p14 para 55.
[254] GOV.UK, 'The Seven Principles of Public Life' (*GOV.UK*, 31 May 1995) https://www.gov.uk/government/publications/the-7-principles-of-public-life/the-7-principles-of-public-life--2 accessed 22 June 2024.
[255] Richard Thomas, 'Fake news and the Nolan Principles' (*CSPL*, 6 March 2017), https://cspl.blog.gov.uk/2017/03/06/fake-news-and-the-nolan-principles/ accessed 22 June 2024.
[256] GOV.UK, 'The Seven Principles of Public Life' (n 254).
[257] Cabinet Office, 'Ministerial Code' (*Cabinet Office*, 6 November 2024) para 1.4 https://www.gov.uk/government/publications/ministerial-code/ministerial-code accessed 28 December 2024. See also House of Lords, *Code of Conduct for Members of the House of Lords, Guide to the Code of Conduct, Code of Conduct for House of Lords Members' Staff* (2023, HL 255) p3 para 12, p10 para 11; House of Commons, *The Code of Conduct together with The Guide to the Rules relating to the Conduct of Members* (2023, HC 1083) pp2-3.

their own right for regular Members.[258] Instead, the principles tend to be used as part of an integrity-based model,[259] relying on individual consciences, rather than an overseeing body to regulate behaviour.[260] The premise is, that ethical principles are not enforced, but embedded into political culture,[261] over time becoming internalised norms of what is acceptable.[262]

Yet political practice still seems to be fraught with scandals and poor behaviour,[263] which indicates that an approach relying on individual consciences is flawed. As MP Liz Saville puts, when putting forth the Elected Representatives Bill 2022-23, 'we are no longer in [a] […] world [where] chivalry and words as bonds […]'[264] are enough to regulate most political behaviour. Indeed, you only have to look at the plethora of deceptive political representations over the last three decades to see how these normative standards have not been that successful in stopping politicians from deceiving Parliament or the public. Of course, there are tweaks which can be made to improve the normative force of these principles. A 2023-24 report from the Standards Committee proposed that Members of the House of Commons undertake an oath to follow the Principles of Public Life.[265] It would be similar to the affirmation of allegiance which is made to the King before they take their seats.[266] There would be 'a declaration of commitment to the Nolan principles at the start of a Member's parliamentary career, renewed every time they are re-elected to the House […]'.[267] Specifically, they propose the following, 'I solemnly declare that in my conduct as a Member of Parliament I shall uphold the Seven Principles of Public Life: selflessness, integrity,

[258] House of Commons Committee on Standards, *The House of Commons standards landscape: how MPs' standards and conduct are regulated* (2023-24, HC 247) p26 para 107.
These principles are very broad and if breaching the Principles of Public Life was enforceable for ordinary Members of each House, it would be overly burdensome. For reference, there are only 141 Ministerial posts compared to 650 Members of the House of Commons and an unfixed number of Members in the House of Lords.
[259] Franklin M Lartey, 'Integrity-Based and Compliance-Based Ethics Programs: A Critical Analysis of Key Differences' (2021) 5(5) International Journal of Business Economics Management' 43, 44.
[260] Elected Representatives (Prohibition of Deception) Deb Tuesday 28 June 2022, cols 183-185 (Liz Saville).
[261] The Committee on Standards in Public Life, *Standards in Public Life Vol 1* (n 253) p3 para 6.
[262] Paul Spicker, 'Seven Principles of Public Life: time to rethink' (2014) 34(1) Public Money & Management 11, 11-12.
[263] Martin Bull 'Whatever happened to the Nolan principles? Sleaze in the government of Boris Johnson' (*LSE*, 17 May 2021) https://blogs.lse.ac.uk/politicsandpolicy/nolan-sleaze-johnson/ accessed 22 June 2024.
[264] Elected Representatives (Prohibition of Deception) Deb Tuesday 28 June 2022, cols 183-185 (Liz Saville).
[265] House of Commons Committee on Standards, *The House of Commons standards landscape: how MPs' standards and conduct are regulated* (n 258) pp26-27 paras 108-113.
[266] ibid p26 fn 89. The Parliamentary Oaths Act 1866 sets out the requirement to take the oath, the place in which it is to be administered and the penalties applicable to any Member who takes part in parliamentary proceedings without having taken the oath; the Promissory Oaths Act 1868 sets out the wording of the oath; and the Oaths Act 1978 prescribes the form and manner of administering and taking it.
[267] House of Commons Committee on Standards, *The House of Commons standards landscape: how MPs' standards and conduct are regulated* (n 265) p27 para 113.

objectivity, accountability, openness, honesty and leadership'.[268] Whilst unconfirmed, I assume that if the proposal was accepted that a similar oath would be implemented in the House of Lords. Afterall, Members of the House of Lords make the same oaths as Members of the House of Commons (such as with the oath of allegiance to the Crown).

An oath goes beyond a promise or a pledge. It is not just promising not to do something, it is a 'performative utterance with moral weight that encumbers the speaker'.[269]

As put by Sulmasy;

> an oath changes who one is. It is a self-performative utterance. It is not merely a commitment to do something or not to do something. It is a commitment to be a particular sort of someone. And this is why a violation of an oath seems so serious. A promise does put the promisor at risk of losing his or her reputation. But an oath risks the hono[u]r and person of the one who swears in a much deeper way.[270]

In this sense, an oath is a more serious undertaking and should have more of a binding force.

As Hannah White from the Institute of Government said in the consultation;

> The aspiration should be to put at the forefront of Members' minds, at the point at which they take up their role in the House, that they are expected to use their judgement. […] I also think it would be really good […] for the public to see Members doing that. […] Actually showing at the start of a Parliament that Members come with all the right intentions and are reminded themselves of why they are here and how they should behave would be very important from a public point of view, as well as for Members.[271]

I recognise that an oath would be a positive step. Obviously, the substantive content of the principle is the same whether it is an oath as part of the Code,[272] but empirical evidence

[268] ibid p28 para 116.
[269] Daniel P Sulmasy, 'What is an oath and why should a physician swear one?' [1999] 20 Theoretical Medicine and Bioethics 329, 331.
[270] ibid 332.
[271] House of Commons Committee on Standards, *The House of Commons standards landscape: how MPs' standards and conduct are regulated* (n 265) p27 para 109, fn 93 Q102.
[272] Boudewijn de Bruin, 'Pledging integrity: Oaths as forms of business ethics management' (2016) 136(1) Journal of Business Ethics 23, 26.

supports the fact that oaths are more successful in guiding behaviour (e.g. studies into pledges[273] on virginity,[274] healthy eating[275] and non-smoking,[276] point towards their success).

In particular, de Bruin's work has identified the properties which makes an oath successful. According to his analysis of oaths in business settings it must satisfy certain formal conditions to enhance compliance. These are; 'publicity, ceremony, compliance and transcendence'.[277] Such principles are 'intended to ensure that oaths have greater moral weight and binding force than mere promises, thereby making oaths a supposedly attractive form of ethics management'.[278] If we use this as a scaffold for what a successful oath should be, can measure the Standards Committee's proposal against de Bruin's criteria. From this, I can diagnose whether any further work needs to be done to make the proposal more successful.

The first criterion is that the oath has to be made in public (as in it is acknowledged in the public sphere and made before witnesses). 'The public character of an oath may be witnessed by the general public itself, or by some specific public body, such as a government, a church, or a profession'.[279] The publicity component is significant for improving how much people comply. As put by de Bruin '[t]he existing empirical work offers initial support for the view

[273] I accept that these are studies into pledges as opposed to oaths but the point is still valid due to the high level of shared characteristics.
Note that promises, pledges and oaths are all types of performative utterances. A promise carries the lowest level of moral force. A promise is concerned with a specific behaviour and is made in private i.e. between individuals. A pledge is like a promise in the sense that it tends to relate to a specific behaviour. It differs, however, because a pledge is a more formalised commitment i.e. it is public. For a definition on pledges see, Terri R Day, 'Nasty as They Wanna Be Politics: Clean Campaigning and the First Amendment' (2009) 35 Ohio Northern University Law Review 647, 654.
Of the three, an oath carries the most moral weight. In the words of de Bruin (n 272) 25-26 who cites Sulmasy; 'oaths are viewed as promises that are made publicly and ceremonially that commit oath-takers to treating particular beneficiaries in certain generally described ways, and that are motivated and justified by the function the oath-taker fulfils in society. Promissory oaths have greater moral weight and binding force than mere promises, moreover, due to their element of transcendence and the regulation of sanctions they imply on non-compliance, even though these sanctions are not necessarily referred to in the oaths themselves'. See also Sulmasy (n 269) 26.
[274] Peter S Bearman and Hannah Brückner, 'Promising the Future: Virginity Pledges and First Intercourse' (2001) 106(4) American Journal of Sociology 859, 859-912.
[275] Sekar Raju, Priyali Rajagopal, and Timothy J Gilbride, 'Marketing healthful eating to children: The effectiveness of incentives, pledges, and competitions' (2010) 74(3) Journal of Marketing 93, 93–106.
[276] John H Hallaq, 'The pledge as an instrument of behavioral change' (1976) 98(1) Journal of Social Psychology 147, 147–148.
[277] de Bruin (n 272) 38. See also 32-36.
[278] ibid 25. See also House of Commons Committee on Standards, *The House of Commons standards landscape: how MPs' standards and conduct are regulated* (n 265) p27 para 110, fn 94 Q102 (Meg Russell).
[279] Sulmasy (n 269) 332.

that oaths obtain their increased moral weight and binding force mostly from the publicity of the oath-taking and from the associated ceremony'.[280]

One reason for this is that it creates a community of 'people who have pledged the oath to form and mutually reinforce compliance. It is, simply put, the solemnity of the occasion that makes promises made under oath more efficacious than mere promises'.[281] The culture of reinforcement should make them more likely to be followed. Another reason is that publicity invites external scrutiny and accountability. Increased visibility like this should mean that if the oath-taker fails to follow what they promised, then the repercussions will be stronger, impacting not just their reputation (trustworthiness) but also their honour.[282] The publicity criterion is easily satisfied by the Committee's proposal. The oath-takers would be promising to uphold the principles in front of Members of the House, thereby, not only having witnesses from other Members, but also being recognised in the public domain with the proceedings of the House being reported on by the media and in Hansard.

The second criterion is that the oath must be ceremonial as in a 'solemn declaration […] to be a certain type of person or to perform certain types of acts'.[283] For instance, when you take wedding vows, or when you become a British citizen and take an oath of allegiance to the King, there is a serious nature and structure to the proceedings. The idea is to increase the moral weight and binding force of the oath, making those partaking more likely to comply with it. This condition is reflected in the Standards Committee proposal with the emphasis on the formal procedure and setting. It 'would be made immediately following the Member's swearing-in, while they are standing at the Table of the House',[284] which emulates the seriousness of the undertaking.

Third, the oath has to include a general commitment which in this case would be committing to upholding the Seven Principles. Again, this harks back to what an oath is, compared to say a promise or pledge. An oath goes deeper than a pledge or promise. As opposed to being focussed on a particular behaviour, 'involves the whole person of the oath[-]taker rather than

[280] de Bruin (n 272) 31.
[281] ibid.
[282] de Bruin (n 272) 25.
[283] Sulmasy (n 269) 333.
[284] House of Commons Committee on Standards, *The House of Commons standards landscape: how MPs' standards and conduct are regulated* (n 258) p28 para 115.

an isolated action'.[285] The theory is that this should make the oath more binding, because it is a more serious and deep undertaking.

The fourth criterion, is that there must be an identifiable class of beneficiaries and the fifth is that it must be clear what broader purpose the oath serves (i.e. what is the function of the profession).[286] These serve to make the oath more significant and make it clear that there are identifiable harms by the oath not being followed (i.e. to the beneficiaries or the profession more broadly). In this context, the obvious beneficiaries are politicians and the public who will both benefit from more honourable conduct. This will also aid the political profession more broadly, whose purpose is to serve British political affairs in some respect (i.e. working on behalf of the public, a political party, or for a specific role).

Another criterion is that the oath needs to have a consequence for its breach, which adds to the seriousness of the undertaking. Previously this was contained in oaths with clauses like '[m]ay I suffer a painful and ignominious death if I fail to carry out my solemn oath to defend the honour of the king',[287] however this is not necessary. What is important is that the oath-takers understand the consequence of breaking the oath.[288] I appreciate that for my context, the consequences of breaching the Principles of Public Life are already understood. Afterall, the Standards Committee or the Commissioners in the House of Lords use breaches of the principles as an aggravating or mitigating factor in determining the nature of the breach of one of the House rules.

What the oath is lacking, is de Bruin's last criterion- that there is transcendence to the oath (that it appeals to something that transcends the oath-taker and the 'public witnesses of the ceremony e.g., a religious deity).[289] The premise is that this increases how morally binding the oath is, and how seriously it is treated. Currently, the Standards Committee's proposal does not invoke a religious entity but this could be easily added. If you take the oath of allegiance to the King as guidance, the oath could start with the phrase 'I swear by Almighty God that […]',[290] which would satisfy the condition of invoking a religious deity. I am not convinced that this is strictly necessary for an oath. Afterall, religious entities do not have the same weight they once did in British society. With that being said, if it makes the

[285] de Bruin (n 272) 25.
[286] ibid 34-35. See also Sulmasy (n 269) 331–332.
[287] Sulmasy (n 269) 333.
[288] de Bruin (n 272) 25.
[289] de Bruin (n 272) 25.
[290] Promissory Oaths Act 1868, s2. Oaths Act 1978, s1-6.

commitment have a greater moral weight to those who *are* religious then it is worthwhile adding it.

The creation of an oath to uphold the Principles of Public Life does have potential to be successful, according to de Bruin's criteria. It should invoke a stronger level of commitment to the principles and improve what is already in place. Essentially, 'prick[ing] the conscience of those who have sworn the oath and are tempted to violate one of its precepts'.[291] Additionally, Members reaffirming commitment to the principles every time they are re-elected should remind them of what they should be striving for and put it at the forefront of their minds.

While I do recommend an oath be introduced, the limitations of this mechanism need to be recognised. Of course, an oath may to a small extent improve how much people comply with the Principles of Public Life but it will not make a substantial change to political conduct. The obvious flaw with an oath is that those partaking have to have the intention and desire to uphold it.[292] If they are unwilling to do so, the oath is devalued and it becomes very easy to create a culture where the oath is simply a performance.[293]

Unfortunately, I can see the value in this critique. If politicians were willing to be committed to the principles and used them to guide their behaviour, then there would not be a problem to address. As aptly put by Dave Penman, General Secretary of the FDA in the Standards Committee Report, '[i]f you think [signing an oath] is going to make a difference, you probably have the wrong people doing it in the first place. You are either committed to those principles or you are not'.[294] Indeed, political practice and especially recent events such as Partygate, the Brexit campaign and the election betting scandal suggest that some politicians are not committed to these principles.

Thus, whilst introducing an oath-taking may to a small extent *enhance* compliance with the Principles of Public Life (particularly amongst those who already uphold them) its effect on political behaviour more broadly is always going to be limited. It is unlikely to convert politicians who breach the principles to upholding them. I would still recommend introducing the oath, because it may have some limited effect and it logistically would not face

[291] Sulmasy (n 269) 339.
[292] Herbert J Schlesinger, *Promises, oaths, and vows: On the psychology of promising* (Taylor & Francis 2011) 44.
[293] House of Commons Committee on Standards, *The House of Commons standards landscape: how MPs' standards and conduct are regulated* (n 265) p28 para 114.
[294] ibid p27 para 111, fn 97 Q198.

difficulties (unlike a modified version of the self-correcting public debate theory). But we should bear in mind that its impact on political behaviour and discouraging deceptive representations is going to be small.

The generalist mechanisms in the regulatory framework have an excellent level of coverage- they underpin both types of deceptive representations. As opposed to being enforceable and mandatory regulation, they use different strategies- such as attempting to identify deception and mitigate its impact, or discouraging the use of deceptive representations. Although there are small improvements which can be made, the small role that these play in addressing deceptive representations should be kept in mind. The substantive force of the framework rests with the specialist mechanisms, which, for the most part, impose mandatory standards or rules and enforceable regulation. By this, I mean that there is a body monitoring compliance which has the power to impose sanctions for breaches. In the next two chapters, I run diagnostic tests on the specialist mechanisms, using theoretical and functionalist perspectives to identify weaknesses with design and implementation.

Chapter 4: The first half of the specialist mechanisms: How are deceptive representations to Parliament being addressed and is the framework effective?

The first half of the specialist mechanisms is successful in the sense that the mechanisms have good coverage. By this I mean that there are mechanisms in place to address any deceptive representation which is made to Parliament. From a theoretical perspective, all representations could be recognised and responded to. Most of the issues however, lie with the actual use and enforcement of these mechanisms, which I put forward a number of improvements to address. There are three mechanisms in this part of the framework: correcting the record, contempt of Parliament (which can involve the Privileges Committee or a substantive motion of the House) and the Ministerial code.

Correcting the record

Correction is the process by which certain politicians can amend the parliamentary record ex post facto, regardless of whether the statements are mistakenly inaccurate or intentionally so. The system is currently in place for Ministers and Members of the House of Commons. They are able to make non-substantive (i.e. editorial changes) by simply writing a letter to Hansard, while more substantive changes (i.e. misuse of figures) can be done by making a correction on the floor of the House (i.e. making a point of order) or by submitting a written correction.[295] Corrections can be done on a Member or Minister's own initiative, or they can be encouraged to so on the basis of fact-checking from recognised sources (i.e. pressure from the media, independent organisations or fellow politicians). The responsibility, however, is with the individual and they cannot be compelled to correct.

Just from a practical perspective, there is an obvious deficiency with this process, namely, it is limited to those in the House of Commons.[296] While Ministers in the House of Lords are also able to correct the record, there is nothing in place for ordinary House of Lord members.

[295] House of Commons Procedure Committee, *Correcting the Record Fourth Report of Session 2022–23* (2022-23, HC 521) pp21-22 paras 45-46.
See also UK Parliament 'Making a Correction to Parliament' (*UK Parliament*) https://guidetoprocedure.parliament.uk/articles/wT3DdG7k/making-a-correction-to-hansard accessed 21 November 2024. Note the correction is available for debates in either House, written ministerial statements, public bill and other general committees but does not include select committees.
[296] HC Deb 24 October 2023, vol 738, cols 796-802. See also, House of Commons Procedure Committee (n 295) pp20-22.

The Cabinet Office guidance sets out the correction procedure for Ministers in the House of Lords, which is broadly similar to that for Ministers and MP's in the House of Commons.

> In the first instance, Ministers should email the House of Lords Hansard to see whether the correction is something their team can progress with. […] [House of Lord] Hansard does not have a Ministerial Corrections facility, so only minor changes can be made via this route. If […] Hansard cannot make the change, a letter is drafted from the Minister directly to the relevant Peer [which] […] will then be issued to the relevant Peer and other Peers who attended the debate. It will then be deposited in the Libraries of both Houses. […] [Similar to the House of Commons,] Lords Corrections can also be made through a Written Ministerial Statement, verbally by the Minister in their next appearance or through a Personal Statement.[297]

The most prominent weakness, is that there is no provision for ordinary members of the House of Lords.

There are two ways in which this discrepancy could be justified, neither of which are particularly convincing. One reason could be on the ground of political significance. Afterall, the House of Lords is politically inferior to the Commons. Debates in the House of Commons tend to be directed towards scrutinising government action and ascertaining whether legislation should even be introduced. In contrast, debates in the House of Lords tend to be less focussed on scrutinising government action in this way, with no measures in place like back-bench debates or PMQs. Moreover, the House of Lords tends to take direction from the House of Commons in regards to legislation. Typically, they focus on the detail of legislation rather than whether it should be introduced.

While I recognise that the House of Lords does have less significance, this does not negate the fact that truthful and accurate discourse is important and helps to serve the broader democratic functions. Afterall, the House of Lords still serves important parliamentary functions, particularly in terms of finalising the details of legislation. Deceptive representations (as well as incorrect claims more broadly) have the potential to taint the discussion and could mean that decisions are being made on the basis of false or misleading information.

[297] Office of the Leader of the House of Commons, 'Guide to Parliamentary Work' (*Cabinet Office*, 19 November 2024) paras 259-262 https://www.gov.uk/government/publications/guide-to-parliamentary-work/guide-to-parliamentary-work-html#house-of-lords-arrangements accessed 21 November 2024.

Another potential reason is the perceived lack of need. Debates in the House of Lords have a greater focus on time-sensitivity which helps ensure points are concise and accurate.

> In debates at all stages on public bills other than second reading, all members opening or winding are expected to keep within 15 minutes, with the exception of ministers winding up who are expected to keep within 20 minutes. Other speakers are expected to keep within 10 minutes. […] In other debates where there are no formal time limits, members opening or winding up, from either side, are expected to keep within 20 minutes. Other speakers are expected to keep within 15 minutes, but shorter advisory limits may be adopted for backbench speakers (including those moving an amendment to a motion), with a view to managing the business on a given day.[298]

Consequently, '[t]he results tend to be a series of short, informed and often highly informative speeches', as opposed to those in the House of Commons which tend not to have the same time constraints or impose the added incentive to be accurate and honest.[299] Thus, it is unsurprising that the House of Lords does have the reputation of creating a culture which incorporates honesty and truth.

While this point can be readily appreciated, a close analysis exposes the flaws with this interpretation. Indeed, inaccurate statements do occur in the House of Lords. Lord Peter Lilley is known for making false and possibly deceptive claims on climate change. In a January 2024 debate, he referred to an IPCC report, noting that '[f]or most economic sectors, the impact of climate change will be small relative to the impacts of other drivers […] [like c]hanges in population, age, income, technology, relative prices, lifestyle, regulation, governance, and many other aspects of socioeconomic development […]'.[300] Whether it was intentional or otherwise, Lord Lilley's presentation of climate change was misleading. The source he was using was published in 2014 and did not represent the most up-to-date assessment of the impact of climate change at the time of the debate. Similarly, House of Lords Peer Michelle Mone made multiple denials of any association between her and PPE Medpro. Although she lied to the public through the press and not the House, it supports the supposition that peers do partake in deception on political matters.[301] It is also worth stressing

[298] House of Lords, *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords* (2022) p58 paras 4.40A-4.41.
[299] Phillip Norton 'House of Lords' in Bill Jones, Philip Norton and Isabelle Hertner (eds) *Politics UK* (10th edn, Routledge 2021) 458-459.
[300] HL Deb 25 January 2024, vol 835, cols 842-844.
[301] Bob Ward, 'Misinformation in the UK's House of Lords' (*LSE*, 22 October 2024) https://www.lse.ac.uk/granthaminstitute/news/misinformation-in-the-uks-house-of-lords/ accessed 28 October

that we are likely unaware of how many instances of inaccuracy actually take place. Part of the reason we are aware of the vast number in the House of Commons is due to the fact that we have a process for correcting the record, so we are aware when someone corrects the record. As this is absent for ordinary Members of the House of Lords, we have to rely on other watchdog scrutiny to expose them. Relying on this is deeply problematic because there is a tendency for the media to focus on the politically superior House of Commons. As such, it is probable that what we are aware is taking place is a significant understatement of reality. Thus, neither of the potential reasons for the discrepancy are convincing. Truthful and accurate information is important for both chambers of the House, and we should have mechanisms to help reflect this. As such, one of my recommendations is to expand the process of correcting the record to House of Lord peers.

From a theoretical standpoint, it is clear that there is a deficiency with the coverage of the correction process. It is important to stress, however, that just because the House of Commons has a procedure in place for MP's and Ministers, it does not automatically follow that it runs well. If we switch to a functionalist perspective, it is clear that there are also some difficulties with implementation. The data on correcting the record is somewhat mixed. In some respects, it seems to work well (for a voluntary mechanism) with roughly 100 corrections being made a year just from Ministers who have made inaccurate statements (not including Backbench Members). Yet, this mechanism depends on the willingness of the politician to make the correction. Most Members of the House of Commons are quite amenable to doing so and there have only been 44 MPs in the last two years who have not corrected the record after being requested to.[302] Nevertheless, there are issues.

As the Institute for Democratic and Constitutional Research notes in their recent report on *A Model for Political Honesty*,

> According to Full Fact, under the Sunak and Starmer regimes, […] cabinet ministers have made 46 misleading statements of sufficient seriousness to require public correction (see Appendix 1). None appear to have corrected the record and none were required to do [s]o by the Westminster regime. The Full Fact numbers are likely a

2024. Caroline Davies and David Conn, 'How the Michelle Mone scandal unfolded: £200m of PPE contracts, denials and a government lawsuit' (*The Guardian*, 17 December 2023) https://www.theguardian.com/uk-news/2023/dec/17/how-the-michelle-mone-scandal-unfolded-200m-of-ppe-contracts-denials-and-a-government-lawsuit accessed 30 December 2024.

[302] FullFact, 'MPs who have not corrected the record' (*FullFact*) https://fullfact.org/campaigns/mps-who-have-not-corrected-the-record/ accessed 21 November 2024. Counted between 21 January 2022- 3 May 2024. MP's who made multiple failures to correct have only been counted as doing so once.

> significant understatement. The organisation makes clear that it does not fact check every statement and spends more time on the most senior cabinet members. The data compiled for this submission was limited to cabinet members. It is likely, therefore, that the real number of false statements is significantly higher.[303]

The Institute suggests that the correction process should be reformed to pivot from being voluntary, to, mandatory and enforceable. Their suggestion is that courts should impose correction notices, giving the politician 7 days to correct the record. Failure to do so would give rise to electoral sanctions like disqualification from standing.[304] I understand the appeal of this approach, as it would remove the reliance on a politician's integrity or political pressure and impose a significant disincentive to not making the correction. Although the appeal of this suggestion can be recognised, I am not persuaded. As I will outline in the next section of this chapter, there are clear and established mechanisms in place to recognise and address MP's and Ministers who deceive Parliament. The existing mechanisms in place are sufficient for recognising and sanctioning politicians who fail to correct. While, there are improvements which can be made for these mechanisms, introducing correction notices is unnecessary and instead we should be taking advantage and optimising what is already in place. The core question is how can this be made to be more effective.

Contempt of Parliament

Deceiving Parliament can trigger further consequences and can be classed as a form of parliamentary contempt. Contempt of Parliament is based on exclusive cognisance (the right of Parliament to discipline its members for poor conduct). Essentially, '[i]f Parliament is sovereign, then another authority cannot compel it or its members to act in a particular way'.[305] Deceptive representations to Parliament are a breach of parliamentary privilege and can be treated as a form of contempt by either parliamentary chamber.[306] A contempt of Parliament is not necessarily a breach of any specific privilege, but it obstructs or impedes one of the Houses of Westminster in the performance of its functions. There is no set list but previous instances show that it can include:

[303] Institute for Constitutional and Democratic Research, *A Model for Political Honesty* (White Paper, October 2024) p10 para 12.
[304] ibid p18. That is if upon the balance of probabilities, the statement is false, it is not trivial and it is not a false or misleading statement for the purposes of national security or law enforcement.
[305] John Benyon, David Denver and Justin Fisher, *Central Debates in British Politics* (Taylor and Francis 2002) 393.
[306] House of Lords and House of Commons, *Parliamentary Privilege* (1998-99) ch 6 para 264.

> deliberately misleading the House, being complicit in a campaign of abuse and attempted intimidation of the Committee, leaking select committee papers to the media or to the Government, failing to ensure the security of select committee papers and failing in duty of care to staff, providing an inaccurate answer to a select committee and making an inaccurate statement to the House.[307]

Up until recently, any inaccurate statement (whether it be unintentional or otherwise) had the potential to qualify as a contempt. However, '[i]n 1963, the House [of Commons] resolved that in making a personal statement which contained words which they later admitted not to be true, a former Member had been guilty of a grave contempt'.[308] With that being said, more recent developments have narrowed the interpretation and now only when inaccurate statements are made with deliberate or knowing intent (deception) can be a form of contempt.

In 2006 the Committee on Standards and Privileges investigated Minister Stephen Byers (then Secretary of State for Transport, Local Government and the Regions) whether he had misled the Transport Sub-Committee. The Sub-Committee had been investigating a range of issues relating to railway policy, including the implications of Railtrack going into administration[309] (a private infrastructure of companies that owned British railway and track).[310] In doing so, the Sub-Committee interviewed Mr Byers about the course of events.

The allegation of contempt related to his response to Question 857, 'was there any discussion, theoretical or otherwise, in your Department before 25 July about the possibility of a future change in status for Railtrack, whether nationalisation, the move into a company limited by guarantee, or whatever?'. A question which Mr Byers responded with 'not that I am aware of'.[311]

Following the interview, Mr Byers made a statement to the House, acknowledging that had had been inaccurate and apologising. He stressed that he had not intended to deceive, but had interpreted the word 'discussion' differently to the Sub-Committee.[312] In 2001 Mr Byers had

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[307] Committee on Standards, *The House of Commons standards landscape: how MPs' standards and conduct are regulated* (n 258) p13 para 46.
[308] *Erskine May* (UK Parliament) para 15.27, fn CJ (1962–63) 246.
[309] Other matters included in their investigation ranged from the potential implications of the Government's draft policy statement on rail franchising, to the role of the Strategic Rail Authority.
[310] Committee on Standards and Privileges, *Mr Stephen Byers (Matter referred on 19 October 2005)* (2005-6, HC 854) p1 para 1.
[311] ibid p4 para 9.
[312] David Hencke, 'Byers to apologise to Commons' (*The Guardian*, 1 February 2006) https://www.theguardian.com/politics/2006/feb/01/uk.houseofcommons1 accessed 20 August 2024. Mr Byers took a narrow interpretation cf to the Sub-Committee, ibid p5 para 11.

asked for an options paper on the future of Railtrack plc to be drawn up. This was what he viewed as contingency planning, as opposed to a set course of action. However, he recognised that his request for this work to be carried out 'could be interpreted as a discussion, and that would make [his] reply to the Select Committee factually inaccurate' (as the Sub-Committee did). He emphasised that the key meeting 'took place on 25 July when the Chairman of Railtrack outlined to me the financial difficulties that the company faced. It was only after that meeting[,] that substantive discussions began about the possibility of changing the status of the company'.[313]

The investigation by the House of Commons' Standards and Privileges Committee did hold that Mr Byer's answer was factually inaccurate.[314] Despite this admission, the Committee marked the distinction between mistaken inaccuracy and deception, clarifying the line of parliamentary contempt. The Privileges Committee applied the guidance from the Clerk of the House. 'In order to find that Mr Byers committed a contempt in the evidence session of 14 November 2001, the Committee will need to satisfy itself not only that he misled the Sub-Committee, but that he did so knowingly or deliberately'.[315] While Mr Byers did give an inaccurate answer, the issue stemmed from a lack of clarification on what constituted the start of the discussion. Mr Byers did not intend to give the Sub-Committee false beliefs and thus it was not deception.[316] It followed that Mr Byers was not held to be in parliamentary contempt.

Deception can be classed as a contempt by either House.[317] Both Houses have 'the right to institute inquiries and require the attendance of witnesses and the production of documents, and wilful failure to attend committee proceedings or answer questions or produce documents could be judged to be a contempt'.[318] Members of the House are not allowed to accuse each other of being deceptive informally and doing so will be met with 'prompt intervention by the Chair and often a requirement on the Member to withdraw the words, include the imputation of false or unavowed motives […]'.[319]. Instead, the Speaker needs to agree and put it forward as a motion for the House to debate. If the allegations are not withdrawn, the Speaker can eject Members from the chamber (as was the case with Dawn Butler and Ian Blackford who

[313] Committee on Standards and Privileges, *Mr Stephen Byers* (n 310) p5 paras 11.
[314] ibid p8 para 29.
[315] ibid p9 para 30.
[316] *Erskine May* (n 308) para 15.27. See also, Committee on Standards and Privileges, *Mr Stephen Byers* (n 310) p5 paras 11-12, p9 para 31, p12 para 43.
[317] House of Lords, *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords* (n 298) p239 para 12.2.
[318] ibid p242 paras 12.14-12.15.
[319] *Erskine May* (n 308) para 21.24.

both refused to withdraw the allegation that Boris Johnson had deceived Parliament).[320] The purpose of the motion is to preserve the character of the parliamentary debate, maintain order and prevent vexatious claims.[321] Once the matter is put forward as a motion, it can either be dealt with through the Privileges Committee or directly by the House.

Whilst parliamentary contempt can occur in either House, the House of Lords has not had to address this since the nineteenth century and does not have a set procedure in place to investigate and sanction.

As put in the *Parliamentary Privileges* report;[322]

> The House of Lords has in modern times found it unnecessary to take formal steps to defend its privileges. The Lords have not investigated or punished a contempt for at least a hundred years. One factor is that the House has a long and successful tradition of informal self-regulation, and its formal mechanisms for dealing with contempt are accordingly modest. The committee for [procedure and] privileges would be the body responsible for dealing with any issues of contempt that might arise, although the committee's work this century has been largely confined to occasional disputed peerage claims.[323]

The lack of a set procedure in the House of Lords means that there is no data in which to run a diagnostic test. Thus, I will use the data which is available and focus on the procedure in the House of Commons, considering how we could improve upon it. While the results and recommendations for improvement are based on House of Commons data, the findings should be useful for addressing future instances of contempt in either House. Whether it be

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[320] Meg Russell, 'The misleading of parliament greatly troubles the public: something should be done' (*The Constitution Unit*, 20 February 2023) https://constitution-unit.com/2023/02/20/the-misleading-of-parliament-greatly-troubles-the-public-something-should-be-done/ accessed 22 August 2024. Other examples where the Speaker has had to intervene can be found in *Erskine May* (n 308) para 21.24 fn 7. Some recent examples include; HC Deb 15 January 2013, vol 556, cols 721-777; HC Deb 19 March 2013, vol 560, col 852; HC Deb 26 February 2014, vol 576, col 347.

[321] *Erskine May* (n 308) para 21.21. See also Alice Lilly, 'Misleading parliament and correcting the parliamentary record' (*IfG*, 13 April 2022) https://www.instituteforgovernment.org.uk/explainer/misleading-parliament-correcting-record accessed 14 August 2024.

[322] In fact, the House of Lords has not imposed a punishment on any Member this century. See, House of Lords and House of Commons, *Parliamentary Privilege* (n 306) ch 6 para 276.

[323] ibid ch 6 para 286. The quote has been updated to reflect the title changes in the House of Lords committees. Note that per ibid para 281 the Procedure and Privileges Committee would need to; 'give adequate opportunity to take legal advice and have legal assistance throughout; the opportunity to be heard in person; the opportunity to call relevant witnesses at the appropriate time; the opportunity to examine other witnesses; the opportunity to attend meetings at which evidence is given, and to receive transcripts of evidence'. Effectively, this mirrors the power and requirements on the Privileges Committee in the House of Commons.

improving upon the procedure already in place (as with the House of Commons) or introducing a new procedure (as with the House of Lords).

The Privileges Committee

Most allegations of contempt are first referred to the Privileges Committee. The advantage of this is that the Committee has the power to investigate the matter further and it gives the Member the opportunity to set out their case.[324] From 1996 to 2012 an allegation of contempt would have been referred to the committee on Privileges and Standards (as was the case with the Stephen Byers investigation).[325] However, these committees have since been separated and the Privileges Committee now has sole purview.

The Privileges Committee is a committee of seven members, which reflects the broader balance of parties in the House of Commons. The current power and structure of the Committee of Privileges was established in 2018 under Standing Order 148A.

In particular this provided that,

> (5) The committee and any sub-committee shall have power—
>
> (a) to send for persons, papers and records, to sit notwithstanding any adjournment of the House, to adjourn from place to place and to report from time to time;
>
> (b) to appoint legal advisers, and to appoint specialist advisers either to supply information which is not readily available or to elucidate matters of complexity within the committee's order of reference.
>
> (6) The committee shall have power to order the attendance of any Member before the committee and to require that specific documents or records in the possession of a Member relating to its inquiries be laid before the committee or any sub-committee.
>
> (7) The committee shall have power to refer to unreported evidence of former Committees on Standards and Privileges and of former Committees of Privileges and to any documents circulated to any such committee. [326]

[324] House of Commons Committee on Standards, *The House of Commons standards landscape: how MPs' standards and conduct are regulated* (n 265) p13 para 44.
[325] House of Commons Committee on Standards, *Sanctions in respect of the conduct of Members* (2019-20, HC 241) p5 paras 10-11.
[326] Public Business 2018, Standing Order 148A.

Though the Committee is bestowed with fact-finding powers, it is important to stress that their power is limited. For example, the Committee has no ability to launch its own investigations and can only consider matters referred to it by the House.[327] Another limitation is that the Committee has no power to impose sanctions. Once the Committee has finished its investigation it publishes a report, giving its opinion on whether a contempt has occurred and a recommended sanction (like a formal admonishment, suspension or expulsion). Both of these are opinions until the House has endorsed the Committee's view. Note that if a Member is suspended for 10 or more sitting days, the Recall of MPs Act 2015 is engaged.[328] Subject to a successful recall petition, a Member may be asked to vacate their seat.

The obvious weakness to the Privileges Committee's power is that they are dependent on political forces. One prominent source of vulnerability is that the findings of the Committee are only opinion until the House passes a motion to uphold it. The power ultimately resides with the House who can debate the report and decide whether to accept or reject it. While it is important to identify this potential weakness, it is also important to consider whether this is just a theoretical concern. Performatively-speaking, the House recognises the Committee's findings and appropriates it as its own. [329] In fact, the convention is 'that the Leader of the House and the Government will normally table and support resolutions brought forward by the Committee of Privileges […]'.[330] Analysis of parliamentary debates indicate that the House upholds the authority of the Committee and takes heed of their findings. Take for instance, the investigation into Boris Johnson for making deceitful representations about covid-19 social distancing breaches. While Johnson resigned on receipt of the draft report, the Committee determined that he had intentionally misled Parliament. Had he still been a Member of the House, they would have recommended that he be deprived of his pass and receive a 90-day suspension.[331] The opinions of the Privilege Committee were passed with a vote of 354 to 7.[332]

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[327] ibid.
[328] Recall of MP's Act 2015, s1(5)(a).
[329] Committee of Privileges, 'Reports, special reports and government responses' (*UK Parliament*) https://committees.parliament.uk/committee/289/committee-of-privileges/publications/reports-responses/ accessed 22 November 2024. See also, House of Commons Committee on Standards, *The House of Commons standards landscape: how MPs' standards and conduct are regulated* (n 258) pp88-89 Annex 3 Section IIII.
[330] HC Deb Thursday 27 October 2016, vol 616, col 445 (Mr Lidington).
[331] House of Commons, *Committee of Privileges Matter referred on 21 April 2022 (conduct of Rt Hon Boris Johnson): Final Report* (n 11).
[332] See also UK Parliament, 'Privilege Motion
Division 258' (*UK Parliament,* 19 June 2023) https://votes.parliament.uk/votes/commons/division/1566 accessed 18 August 2024.

Similar findings can be seen in the investigation into Colin Myler and Tom Crone. Former News of the World Editor Tom Crone and lawyer Colin Myler were found to have deceived the Culture, Media and Sport Committee by falsely answering questions about their knowledge of the News of the World phone hacking.[333] In addition, Mr Crone gave a 'counter-impression of the significance of confidentiality in the Gordon Taylor settlement. He was involved in the settlement negotiations and knew that NGN's [(News Group Newspapers)] desire for confidentiality had increased the settlement amount'.[334] The Privileges Committee recommended that both be formally admonished by the House.[335] Such a motion was passed unanimously.[336] A final example is the investigation into Tom Smith (a researcher to MP Adrian Sanders), who made an unauthorised disclosure of a select committee paper. When the Committee on Standards and Privileges explored the matter, he engaged in deception. Through trying to cover up his own role in the leaking of a sensitive committee document, Mr Smith made significant omissions. He failed to disclose that he had given the date that the document would likely be circulated to someone else (who then leaked it to the Guardian).[337]

In particular, when questioned by the Privileges and Standards Committee, he was asked;

> Q41 […] The Guardian has picked up the date of 6 March. Where do you think they might have got that date from?
>
> Mr Smith [responded with] I have no idea.

The Committee went on to note that 'Mr Smith knew that he had given the 6 March date to Mr Lotinga, but he chose not to tell us this. In our view, this was a significant omission, as the 6 March date, which Mr Lotinga accepts he gave to the Guardian, was supplied to Mr Lotinga by Mr Smith'.[338] When asked why he had not mentioned his e-mail to Mr Lotinga in this initial exchange, Mr Smith claimed that he was unaware that it was relevant, mainly

[333] Committee on Privileges, *Conduct of witnesses before a select committee: Mr Colin Myler, Mr Tom Crone, Mr Les Hinton, and News International* (2016-17, HC 662) p122 para 329. See also, Committee on Standards, *The House of Commons standards landscape: how MPs' standards and conduct are regulated* (n 258) pp88-89 Annex 3 Section IIII.
[334] Committee on Privileges, *Conduct of witnesses before a select committee: Mr Colin Myler, Mr Tom Crone, Mr Les Hinton, and News International* (n 333) p5.
[335] ibid p123 para 336. See also, Committee on Standards, *The House of Commons standards landscape: how MPs' standards and conduct are regulated* (n 258) p89 Annex 3 Section IIII.
[336] HC Deb Thursday 27 October 2016, vol 616, cols 443-459.
[337] Standards and Privileges Committee, *Unauthorised Disclosure of Heads of Report from the Culture, Media and Sport Committee* (2008-9) paras 76-85.
[338] ibid para 76.

because he did not know that the email had been forwarded to a suspect of the leak.[339] The Committee did not accept this reasoning and it was held that Mr Smith had engaged in deception. In lieu of this, the Committee recommended (and the House passed the motion) that his parliamentary pass and network access were withdrawn for 28 days.[340] The point I am making is that analysis of the parliamentary reports establish that the Committee's findings are recognised and adopted. Understanding this issue from a functionalist perspective, helps to determine whether a potential area of weakness is actually a problem. In this case, we can see that there is no real substance to this concern.

Another source of concern is that the Committee has no power to launch its own investigations. For the matter to be referred to the Privileges Committee, it typically needs to go through two stages. First, the Speaker (someone who is politically impartial) needs to agree to give the motion precedence, taking into account that the House should exercise 'its penal jurisdiction […] as sparingly as possible, and when satisfied that to do so was essential in order to provide reasonable protection […] from improper obstruction'.[341] A decision by the Speaker not to give the motion precedence does not mean that the Member's cannot use other procedures to raise the issue (i.e. raise on the floor of the House) but the matter will not be given precedence.

As put by Alice Lilly and Joe Marshall from the Institute for Government,

> [The Speaker ascertains] whether it is business that can be raised in the chamber and take precedence over other scheduled business. If the Speaker decides to give the complaint precedence, they will notify the person making the complaint in writing, and also notify the House orally. At that point, the member raising the complaint will table a motion (for the next day) raising the complaint and either proposing that it be referred to the Committee on Privileges for investigation, or that it be voted on by the whole House, or some other proposition (depending on the precise nature of the complaint). This effectively means that although the government controls the agenda in the Commons most of the time, motions relating to contempt or privilege are ones

[339] ibid paras 83-86.
[340] Committee on Standards, *The House of Commons standards landscape: how MPs' standards and conduct are regulated* (n 258) Annex 3 Section IIII p90. See also, ibid para 85.
[341] *Erskine May* (n 308) para 15.32.

that can be brought to a debate and vote by non-government MPs (if the Speaker agrees). [342]

The benefit of the Speaker making an initial assessment is that it weeds out vexatious claims or matters which do not justify further examination. This is logistically appealing because it saves the Committee expending time and resources unnecessarily. For example, the Speaker has previously denied tabling a motion when the matter has already not been deemed worthy of referral by another committee, as was the case when John Nicholson made the request to table a motion on Nadine Dorries. Nicholson had alleged that Dorries had deceived the Department of Culture, Media and Sport, by making the claim that 'various participants in a programme called Tower Block of Commons […] were "paid actors" rather than members of the public'.[343] The Department of Culture Media and Sport had refused to pursue referring the issue to the Privileges Committee, mainly because 'her claims have not inhibited the work of the Committee and she no longer has a position of power over the future of Channel 4'.[344] Thus, the Speaker helps to determine what is worthy of political resourcing, preventing repeated or unworthy claims. If the Speaker agrees to give the matter precedence the motion will be scheduled and the House will vote and decide whether to refer the matter.

Although the safeguards are understandable, the need for Speaker-approval creates a significant barrier and prevents allegations of contempt being investigated. Anecdotally, we can refer to Speaker Lindsay Hoyle was aware of complaints that Boris Johnson was deceiving Parliament as early as April 2021. Six Westminster leaders met with Hoyle to push for a debate on the matter, alleging that Johnson was using statistics with wrong dates to give a false impression.[345] In spite of the meeting, the complaint was never tabled or discussed by the House.

Nevertheless, the blame cannot be placed solely on the Speaker. Even if Hoyle had given the matter precedence, the motion was unlikely to pass, because the Conservatives (who had the House majority) would have opposed. Thus, the whims and partisanship of the House are also a source of concern.

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[342] Alice Lilly and Joe Marshall, 'Motions' (*IfG*, 15 January 2019) https://www.instituteforgovernment.org.uk/explainer/motions accessed 29 December 2024.
[343] Committee of Privileges, *Matter referred on 29 November 2022: conduct of John Nicolson MP* (2022-23, HC 940) p4-5.
[344] ibid p4 para 9 citing, DCMS Committee, *Fourth Special Report of Session 2022–23* (2022-23, HC 801) para 9.
[345] Justin Parkinson, 'Parties demand Commons debate on PM's 'inaccuracies'' (*BBC*, 26 April 2021) https://www.bbc.co.uk/news/uk-politics-56888298 accessed 29 December 2024.

As Meg Russell points out,

> References need to come from the House of Commons itself, meaning that the Prime Minister could potentially be shielded from investigation by his own MPs. [Johnson's] eventual referral [on a different matter of deception in 2023] indicated just how far he had lost their support over this matter. In any less extreme case even triggering an investigation to examine the facts might have proved politically impossible. [346]

While I conjected at the start, that this part of the mechanism may be susceptible to political influence, the poor performance of the referral process substantiates this claim. In order to improve upon what is in place we need to reform the procedure. The most obvious way to achieve this would be to by-pass the referral system and bestow the Privileges Committee with the power to launch their own investigations. In this sense, delegate more power to Committee and make it more comprehensive. Such an approach is currently operating through the Standards Committee which gives them more autonomous decision-making.

While matters do not need to be referred to the Standards Committee through the House, there is still a figure to act as a safeguard and filter out some of the complaints. The Parliamentary Standards Commissioner is the first port of call into allegations and undertakes a preliminary investigation to determine whether the matter should be given greater consideration and referred to the Standards Committee. They look at whether there is sufficient evidence and determines whether on a balance of probabilities a breach has occurred.[347] As part of this role, the Commissioner has certain powers and duties. The Commissioner can advise the Committee on Standards, make recommendations to the Committee and to investigate specific matters which have come to his attention relating to the conduct of Members. 'In determining whether to investigate a specific matter relating to the conduct of a Member the Commissioner shall have regard to whether in his view there is sufficient evidence that the Code of Conduct […] may have been breached to justify taking the matter further'.[348] In this sense, the Commissioner has the benefit of acting as a filter for complaints, without being subject to the partisanship or political whims of the referral process that is in place for matters of privilege.

[346] Meg Russell, 'The misleading of parliament greatly troubles the public: something should be done' (n 324)
[347] House of Commons Committee on Standards, *The House of Commons standards landscape: how MPs' standards and conduct are regulated* (n 265) p9 para 23.
[348] Public Business 2018, Standing Order 150.

The obvious counter is that replacing the referral system will lead to more complaints of contempt being investigated and identified, leading to subsequent increase in the number of times the House needs to debate the Privilege Committee's findings. This is a valid concern and this would potentially present logistical issues. Avoiding this may be possible by rethinking how much the House needs to be involved in imposing sanctions. Both the Standards Committee and the Standards Commissioner have the power to determine whether a breach of the rules has occurred and impose sanctions without referring the matter to the House. Although this is only in relation to lower-level cases, this alleviates some of the burden on the House.

Sanctioning under the Standards model operates on a tiered system. For minimal infractions the Commissioner 'can, without further reference to the House, invite a Member to acknowledge the breach of the rules, rectify the infringement, apologise and move on'.[349] In moderately serious cases, the Commissioner refers the matter to the Committee,[350] and the Committee has the authority to impose slightly more severe sanctions. This can range from: an apology (either in writing or on the floor of the House), to imposing requirements on the Member (e.g., undergoing training or repaying money), withdrawing services and facilities, and imposing other personal restrictions (e.g., travel) when this will not affect the core functions of a Member.[351] The most serious cases are referred to the House, who is invited to impose a sanction,[352] like the withdrawal of services and facilities from the Member, dismissal from a select committee, suspension, the withholding of salary, and expulsion.[353]

The Standards model is preferable to the Privileges model for a number of reasons. First, it creates perceived and actual independence. With the Standards Model, the partisanship of the House cannot influence whether matters are referred or whether minor or moderate infractions are sanctioned. Thus, it diminishes some of the potential influence from political forces. Another benefit, is that it establishes a system of which has greater accountability. Afterall, the Standards model has an appellant system (i.e. one can appeal to the Independent

[349] House of Commons Committee on Standards, *Sanctions in respect of the conduct of Members* (n 325) pp5-6, para 13.
[350] House of Commons, *Procedural Protocol in Respect of the Code of Conduct* (2023, HC 1084) p12 para 54. Matters which are referred to the committee include those which are; 'unsuitable for the rectification procedure; or b) the Member does not accept their opinion that there has been a breach; or 12 Procedural Protocol in respect of the Code of Conduct c) the investigation raises issues of wider importance— then the Commissioner must make a referral to the Committee on Standards'.
[351] ibid p16 para 79.
[352] House of Commons Committee on Standards, *Sanctions in respect of the conduct of Members* (n 325) pp5-6 para 13.
[353] House of Commons, *Procedural Protocol in Respect of the Code of Conduct* (n 350) p16 para 81.

Expert Panel). As such, the Privileges Committee would be accountable to the Independent Expert Panel for how it ran the investigation and its findings. Third, the Standards model reduces arbitrariness. Having a Commissioner, a Committee, and (potentially) the House, introduces another measure for checking what is being done (compared to the current Privileges model which just has the Committee and the House).[354]

Greater delegation of power from the House to the Privileges Committee would ensure that matters of contempt are being identified, investigated and sanctioned. I recognise partisanship and political influence as obstacles to the current process and recommend reforming how matters of privilege are addressed to mirror the Standards model. I recommend first creating a Privileges Commissioner and second, introducing a tiered sanctioning system, whereby both the Privileges Commissioner and Privileges Committee have the ability to sanction.

Substantive Motions of the House

Although most matters of contempt are dealt with by the Privileges Committee, they can also be addressed by the House. It is possible to do this through a substantive motion setting out an accusation against an MP or Minister,[355] or, through a censure motion (one which seeks to criticise the behaviour of the Government, a Minister, a Government policy, or to express no confidence in the Government.[356] Either way, this circumvents the Privileges Committee and their investigation, rendering them unnecessary. Whether a matter of contempt occurred and whether a sanction is appropriate is debated by the House directly. This is not something which is done regularly because an investigation is usually needed to establish whether a contempt has occurred, a task which the Privileges Committee is better placed to do.

The last time this was used to successfully recognise a deceptive representation to Parliament was in 1963, when John Profumo was the subject of a motion of censure for lying to the House about his relationship with Christine Keeler. The investigation into whether Profumo had lied had already been conducted as part of a police inquiry, at which point Profumo admitted his deceit and resigned. After Profumo's resignation, Iain McLeod put forward a motion asking the House to consider imposing a formal censure.[357] Since then, the House has not successfully passed a substantive motion addressing deceptive representations without

[354] Inspiration for these points are from the Institute for Constitutional and Democratic Research (n 303) pp11-12 para 16. Note that not all points are completely applicable because the report was on the Welsh Senedd, not the Westminster model.
[355] Alice Lilly, 'Misleading parliament and correcting the parliamentary record' (n 321).
[356] House of Commons Procedure Committee, *Correcting the Record Fourth Report of Session 2022–23* (n 295) p18 Box 1.
[357] HC Deb 20 June 1963, vol 679, cols 655-66.

first referring the matter to the Privileges Committee. I admit there was an attempt to in 2016, when a motion was put forward seeking to recognise that Tony Blair had misled Parliament over Iraq having weapons of mass destruction. However, only 70 voted in favour and 439 were against.[358]

A comparison of these two cases offers an explanation for the different results. At its core, the success of the motion depends on how definitively it can be said that the Member deceived. In the John Profumo case, the matter was straightforward. The investigation had already been carried out by the police and Profumo had already admitted to it. Both the police report and the admission of guilt provided a very clear conclusion. By comparison, in regards to Tony Blair the matter was open to interpretation. Not only did Blair constantly deny deceiving Parliament, but the investigation conducted by Sir John Chilcot into the Iraq War was unclear. Throughout the debate on the motion, there was strong disagreement over what Chilcot had concluded on the matter.

For instance, Alex Salmond (a Liberal Democrat MP), made the case that the Chilcot inquiry supported the claim that Blair had deceived Parliament. Specifically, he referred to Sir John Chilcot's response to the Liaison Committee.

> [W]hen Chilcot was asked about weapons of mass destruction. He was asked repeatedly whether a reasonable person could have come to the conclusion the Prime Minister had come to. The best exchanges were between the Chair of the Committee and Sir John Chilcot on the well understood test of a reasonable man. The Chair asked: "Would a reasonable man—another human being—looking at the evidence come to that conclusion?" Sir John Chilcot replied: "If you are posing that question with regard to a statement of imminent threat to the United Kingdom"— The Chair said: "I am." Sir John Chilcot went on: "In that case, I have to say no, there was not sufficient evidence to sustain that belief objectively at the time." Given the length of time the Chilcot inquiry spent considering this exact point, it may be the opinion of many hon. Members that Sir John Chilcot's expression of this carries rather more weight than that of hon. Members desperate to defend the indefensible. [359]

Yet, Mr Hanson (a Labour MP) interpreted the report differently. He responded to Salmond with,

[358] HC Deb 30 November 2016, vol 617, cols 1528-1584.
[359] ibid, col 1529.

> Did not Sir John Chilcot, when asked this question in the Liaison Committee, say: "I absolve him from…a decision to deceive Parliament or the public". We cannot have it both ways. We have had the Chilcot report and parliamentary accountability: Chilcot said that the former Prime Minister did not deceive this House or the public.[360]

Simply put, Chilcot's lack of clarity created doubt over whether Blair had mishandled the matter or engaged in deception. The lack of a definitive answer was a major issue and would have benefitted from an inquiry into that issue alone. While I recognise that there are circumstances which are so straightforward and obvious that an investigation by the Privileges Committee is unnecessary, it is imperative that anything that is more complicated is dealt with externally. In order to avoid situations like the Blair case, the House must be satisfied that a clear and definitive finding that deception has occurred.

The Ministerial Code

The third and final mechanism addressing deceptive representations to Parliament is the Ministerial Code. The Ministerial Code is vitally important in supporting standards in ministerial behaviour. There is an overarching duty on Ministers 'to adhere to the Seven Principles of Public Life […]'.[361] Such principles promote honesty and truthful statements on a general basis but includes those made to Parliament.

Upholding Ministerial standards rests with the Prime Minister. If a Minister breaches this standard, then the Prime Minister can investigate the allegation, typically by first referring the matter to an independent entity (the Independent Advisor).[362] The Prime Minister then has the ability to impose a sanction. If the Prime Minister retains confidence in the Minister available sanctions include; a public apology, remedial action, removal of ministerial salary. If the Prime Minister no longer has confidence in the Minister, they can remove them from office.[363]

While this mechanism exists, it is underutilised. The Prime Minister does not actually investigate potential instances of Ministerial deceptive representation or even inaccuracy. Full Fact has fact checked numerous inaccurate statements made by Ministers in the past year

[360] ibid.
[361] Cabinet Office, 'Ministerial Code' (n 257) para 1.4. See also Independent Advisor on Minister's Interests, 'Independent Adviser on Ministers' Interests Annual Report 2022-2023' (*Independent Advisor on Ministers' Interests,* May 2023) para 1 https://www.gov.uk/government/publications/annual-report-of-the-independent-adviser-on-ministers-interests-may-2023/independent-adviser-on-ministers-interests-annual-report-2022-2023-html accessed 28 October 2024.
[362] ibid para 2.6.
[363] ibid para 2.7.

and there are several which remain uncorrected.[364] Even though this is the case and this is a technical breach of the Ministerial Code, the Prime Minister has not opened investigations. For example, when Suella Braverman claimed that '[t]here are 100 million people around the world who could qualify for protection under our current laws […],[365] she did not correct the record and the Prime Minister did not open an investigation.[366] Another instance of this failure is when Jacob Rees-Mogg (then-Leader of the House) incorrectly claimed that the morning after pill is an abortifacient. He was notified that the claim was untrue but it remains on the record.[367] Of course all of these had the potential to be referred to the Privileges Committee and deemed a contempt by the House itself. However, when a matter is not being investigated for contempt (likely because it does not meet the threshold for obstructing or impeding the House), then the Prime Minister should be doing so. The problem is that this mechanism is not being used.

Now, some of the problem has been alleviated with the Prime Minister not being the sole arbiter. Under previous versions of the Ministerial Code, the Prime Minister was the ultimate judge of what is acceptable. However, since November 2024 Westminster Parliament followed the Scottish Parliament[368] and the Independent Adviser was granted with the power to launch investigations into potential breaches without the Prime Ministers approval.[369] Although it has not been in place very long, the recent change has the potential to increase the number of investigations into instances of Minsters deceiving parliament. Additionally, this has the potential to actually be workable. Afterall, the Independent Advisor's remit would be limited to Ministers alone (which would only be 141 Ministerial posts people (as of December 2024),[370] not Ministers and MP's (which could potentially be over 700).

However, it is important to stress that this is not a cure-all and has some deficiencies. Yes, there is some improvement, particularly in terms of identifying potential breaches of the Ministerial Code and investigating them. It would also take some of the onus off the Prime

[364] 'Written evidence submitted by Full Fact' (CTR 03) (*UK Parliament*) fn 4. https://committees.parliament.uk/writtenevidence/111164/html/ accessed 22 August 2024.
[365] Illegal Migration Bill 7 March 2023, vol 729, col 152.
[366] Smith (n 13). See also Good Morning Britain (n 13).
[367] HC Deb 3 February 2022, vol 708, cols 453-465. See also, 'Written evidence submitted by Full Fact' (CTR 03) (n 364).
[368] Scottish Legal News, 'Ministerial Code investigations to no longer rely on referral from FM' (*Scottish Legal News*, 6 September 2024) https://www.scottishlegal.com/articles/ministerial-code-investigations-to-no-longer-rely-on-referral-from-fm accessed 6 September 2024.
[369] Cabinet Office, 'Ministerial Code' (n 257) paras 2.5-2.7.
[370] Dan Devine, Tim Durrant, Colm Britchfield, Beatrice Barr and Finn Baker, 'Government Ministers' (*Institute for Government*, 21 May 2019) https://www.instituteforgovernment.org.uk/explainer/government-ministers accessed 11 January 2025.

Minister and may mean that some breaches which were previously not investigated result in investigation. Obviously, exactly how the Independent Advisor interprets this power is unknown e.g., would they continue not investigating breaches of deceit or, perhaps only the most egregious. Regardless, this has greater promise than what was in place before with an increased likelihood of Ministerial deceit being identified and investigated.

Nevertheless, this really only addresses the investigative side of the mechanism. Regardless of the findings of the Independent Advisor, the Prime Minister can still opt for minimal sanctions or ignore a finding that a breach occurred.[371] Although the Prime Minister *usually* follows the advice of the Independent Advisor, there are instances where the findings of their investigation have not been accepted. One notorious example, is Boris Johnson who ignored his then-advisor's findings that Priti Patel was bullying members of staff, allowing her to breach the code without repercussion (aside from an apology).[372] What could still be improved upon, is the enforcement side of the mechanism.

I recognise that there needs to be caution taken when expanding upon the enforcement capacity of the Independent Advisor. Afterall, the Prime Minister still needs to oversee and manage the formation of Government and I do not recommend something which unduly interferes upon this. If there was some sort of requirement that the Prime Minister use certain sanctions for specific situations then this function may be compromised. Such inflexibility could be problematic, particularly, if the sanctions were very harsh like dismissal or suspension. Obligating the Prime Minister to remove someone from their position like this would disrupt the oversight of departments. Thereby, impacting the formation and operation of government. Furthermore, I disagree with the idea that the enforcement should be completely removed from the Prime Minister (as with Labour's proposal of an Integrity and Ethics Commission) where a completely separate political entity would be able to enforce sanctions.[373] Such an entity would be able to investigate and sanction without the approval of the House or Prime Minister, and impose potentially harsher sanctions because it has

[371] Sam Blewett, David Lynch, Dominic McGrath, 'Rishi Sunak appoints ethics adviser but accused of preserving 'rotten regime'' (*Press Association*, 22 December 2022) https://www.proquest.com/docview/2756691907?parentSessionId=aS1DldJyXi6ckxmlRJXui4mKevTYJidbaoEyYnh539E%3D&pq-origsite=primo&accountid=14533 accessed 18 June 2024.
[372] Simon Murphy 'Alex Allan: the veteran windsurfing mandarin who quit over Patel row' (*The Guardian*, 20 November 2020) https://www.theguardian.com/politics/2020/nov/20/alex-allan-the-veteran-windsurfing-mandarin-who-quit-over-bullying accessed 18 June 2024.
[373] Institute for Government 'Angela Rayner MP: how Labour would rebuild trust in public life' (*IfG*, 29 November 2021) https://www.instituteforgovernment.org.uk/event/online-event/angela-rayner-mp-how-labour-would-rebuild-trust-public-life accessed 28 October 2024 (52-53 minutes).

statutory footing.[374] It would undermine the Prime Ministers ability to manage and control government.

However, there is still potential for the new approach to go further and place some controls on enforcement. The Independent Advisor, for example, should have the power to determine whether a breach has occurred. In such cases, there should also be a requirement that the Prime Minister introduce *a* sanction. Although the exact nature of the sanction would still be at the discretion of the Prime Minister, an obligation to introduce some sort of sanction would be helpful in recognising that a breach of the Code is problematic. Even if it does not reflect the severity of the breach, the fact that some sort of sanction would be required is an important symbol of poor political conduct being recognised as problematic. Aside from more general Ministerial breaches, the Ministerial Code contains a specific provision that '[i]t is of paramount importance that Ministers give accurate and truthful information to Parliament, […] Ministers who knowingly mislead Parliament will be expected to offer their resignation' to the Prime Minister.[375] An anecdotal analysis of the performance of this mechanism, suggests that it is successful. There is a strong tradition of the convention being adhered to. Boris Johnson resigned upon receipt of the Privileges Committee determination that he had deceived parliament. John Profumo resigned following the police's inquiry and his admission that he had deceived Parliament. Even non-deceptive but still inaccurate statements have resulted in resignations. Take, for instance, Amber Rudd who resigned as Home Secretary for inadvertently misleading a parliamentary select committee about the existence of deportation targets in 2018.[376] All these are indicative of this part of the Ministerial Code being a success.

While I recognise that the convention contained in the Ministerial Code is respected and followed, there are still flaws with how more general breaches of Ministerial standards are addressed. To rectify the underutilisation of this mechanism, I recommend reforming the current approach to sanctioning. Replacing it with a system which has more control over enforcement will go far in identifying breaches of Ministerial Standards and recognising them

[374] ibid (50-53 minutes). Additionally, members of the Commission will be appointed by the Permanent Secretary and so will be truly independent and integral- they will be outside the influence of politicians and the Prime Minister.
[375] Cabinet Office, 'Ministerial Code' (n 257) para 1.6(c).
[376] Mike Gordon, 'Priti Patel, the Independent Adviser, and Ministerial Irresponsibility' (*UK Constitutional Law Association*, 23 November 2020) https://ukconstitutionallaw.org/2020/11/23/mike-gordon-priti-patel-the-independent-adviser-and-ministerial-irresponsibility/ accessed 20 August 2024.

as problematic. Before I conclude this chapter, I will situate my analysis of the three specialist mechanisms in the political context, specifically the change in Government following the 2024 general election. Comparing my recommendations with likely political developments, not only helps to sketch the political backdrop but also establishes the rationale behind my individualistic approach.

The Integrity and Ethics Commission

My recommendations are specific and attuned to the needs of each mechanism. This is diametrically opposed to Labour's general and sweeping policy plans. As early as 2021 the Labour party made a commitment to disinfecting the political sphere of poor political behaviour.[377] To do so, they have advanced a plan of radical institutional reform of the political regulation,[378] with the introduction of an Integrity and Ethics Commission. This Commission will act as the regulator of integrity and ethics across political life, and will have various sub-committees working under it, such as the Committee on Standards, and the Privileges Committee and the Independent Advisor.

The premise is that the Integrity and Ethics Commission will have statutory functions and powers, and this be able to bolster these sub-committees. Through these changes, the sub-committees will have the power to investigate and sanction without the approval of the House or Prime Minister. It is also possible that they will be able to impose potentially harsher sanctions e.g., financial consequences for instances like breaches of the Ministerial Code. Moreover, the Commission seeks to create greater separation between personnel. Members of the Commission will be appointed by the Permanent Secretary and so will be truly independent- they will be outside the influence of politicians and the Prime Minister.[379] Thus, dispelling the awkward appointer/ appointee relationship, where the person who does the appointing being judged by the appointee.

While I can appreciate what the Commission would be trying to achieve, such drastic reform is not necessary (at least from a deception-based perspective). The parliamentary mechanisms which I have discussed in this chapter operate fairly well (or have the potential to) with minor modification. None of these mechanisms are so beyond repair as to warrant a completely new

[377] Institute for Government (n 373) (2-21 minutes).
[378] For a detailed examination of the Commission see, Mike Gordon, 'Creating an Integrity and Ethics Commission in the UK: The Case for Reform and Challenges for Implementation' (*UK Constitutional Law Association*, 22 June 2023) https://ukconstitutionallaw.org/2023/06/22/mike-gordon-creating-an-integrity-and-ethics-commission-in-the-uk-the-case-for-reform-and-challenges-for-implementation/ accessed 6 July 2024.
[379] Institute for Government (n 373) (50-53 minutes).

response. Yet, even if I did concede that a significant overhaul was necessary, the Integrity and Ethics Commission would still be unsuitable. What the Commission would do is concentrate a great deal of power into one body, and remove many of the abilities of the House and Prime Minister.[380] Under such a scheme, a Member of the House or a Minister could be suspended without approval, which may compromise the operation of Government and Parliament. Suppose that the Commission suspends a Minister who has breached the Ministerial Code. The Government could potentially lose a fundamental player which may permeate and have repercussions throughout.

Another reason to object, is that the dispersal of regulatory powers across different committees is advantageous. The pluralistic approach means that there is actual and perceived separation. If one committee is involved in a scandal then the others are usually not brought into disrepute because they are distinct entities. As put by the Committee on Standards in its critique: the 'consolidation of standards regulators would mean all rise and fall together, increasing the vulnerability of the regulatory scheme as a whole. There is less risk in a pluralist approach to ethics regulation […]'.[381] I recognise that there is potential for the Integrity and Ethics Commission to instead be a co-ordinating and convening body. It is possible that the Commission would simply ensure that there are clear processes in place for different types of poor political behaviour or even to 'bridge gaps and increase policy and strategic coherence […]' by encouraging different parliamentary sub-committees to share experiences.[382] This suggestion is more appealing because the sub-committees would still be distinct entities which maintain their own power, but this would be at the expense of the Commission's power. Furthermore, as noted by Mike Gordon, this is not what Labour's proposal seems to be advocating for.

For these conceptual and logistical reasons, I advocate for an approach of reform which appreciates what is already being achieved and is thus nuanced and individualised. While I appreciate that the change in political power makes Labour's proposed reform more likely, in my view it is misguided. At least from a perspective which is based upon deceptive

[380] The Committee on Standards in Public Life, *Upholding Standards in Public Life Final report of the Standards Matter 2 review* (2021) pp49-50 para 2.46. See also House of Commons Public Administration and Constitutional Affairs Committee, *Propriety of Governance in Light of Greensill* (2022–23, HC 888) p35 para 102; Gordon (n 378).
[381] The Committee on Standards in Public Life, *Upholding Standards in Public Life Final report of the Standards Matter 2 review* (n 380) p50 para 2.48.
[382] Spotlight on corruption, 'What could a UK Integrity and Ethics Commission look like?' p6 https://www.spotlightcorruption.org/wp-content/uploads/2022/11/Integrity-and-Ethics-Commission-Options-Paper-1.pdf accessed 8 July 2024. See also p2.

representations, a radical overhaul is not necessary and the proposal which is based on this approach has major flaws.

The purpose of this chapter was to examine the first half of the specialist mechanisms. Following a diagnostic assessment, I both recognise that the coverage of these mechanisms is very good (all deceptive representations to Parliament can theoretically be addressed) but appreciate that there are faults with how the mechanisms are used. To improve upon the current approach, I argue in favour of a package of reforms to strengthen implementation.

These are:

- Introducing a process of correction for ordinary peers in the House of Lords.
- Reforming how matters of privilege are dealt with to conform to the Standards model.
- Only addressing the most straightforward matters of contempt with substantive motions. All other matters should be under the purview of the Privileges Committee and not dealt with by the House directly.
- Introduce controls to ensure that breaches of Ministerial standards are recognised and sanctioned.

The results of my diagnostic tests point to a number of flaws in the first half of the specialist mechanisms. So, this invites the question, are the rest of the specialist mechanisms equally as flawed? Are we able to address deceptive representations which are made to the public more effectively and if so, does the issue lie with the coverage these mechanisms provide, their use, or both?

Chapter 5: The second half of the specialist mechanisms: How are deceptive representations which are made to the public addressed and is the framework effective?

In fact, this part of the regulation is more deficient. There are not only issues with actually using the mechanisms, but there are frequent gaps in the coverage provided. The mechanisms are niche and are only applicable to very specific types of representations. Even though part of the problem may be ameliorated with the recommendations I put forward to improve the coverage and enforceability, this part of the framework would still not be up to par. Thus, I also argue in favour of new mandatory and enforceable mechanism to appropriately recognise and sanction a class of representations, which is currently being neglected. Much like the previous chapter, I will structure my analysis, by working through each of the mechanisms in this part of the framework. These are the Clean Campaign Pledges, The Ministerial Code,[383] and s106 of the Representation of the People Act (RPA) 1983.

Clean Campaign Pledges

Of the three, the most successful is the Clean Campaign Pledge. A pledge is like a promise in the sense that it tends to relate to a specific behaviour, but differs because a pledge is a more formalised commitment i.e. it is public. A Clean Campaign Pledge, is a 'a non-enforceable public promise by a candidate who is running for public office to adhere to certain behaviour. There tends to be a commitment to uphold basic principles like decency, honesty, and fair play' through specific promises to undertake or refrain from certain behaviour.[384] Such a mechanism is voluntary and not enforceable, i.e., there is no monitoring body or formal sanctions for breaching the pledge. The point is that it has to be entered into at the willingness of the politician in question, and the pledge can only encourage better behaviour. While it cannot be enforced, signing the pledge gives the participant the greater credibility, improving their reputation and how they are perceived by the public.[385]

As the exact terms of the pledge are at the discretion of those partaking, they can vary dramatically. For instance, pledges in the past have been used to promise perseverance, as

[383] The Ministerial Code is slightly different for deceptive representations to the public, as opposed to those to Parliament. Thus, I classify it as a specialist mechanism for both.
[384] Day (n 273) 654.
[385] Gleb Tsipursky, Fabio Vottab, James A Mulick, 'A Psychological Approach to Promoting Truth in Politics: The Pro-Truth Pledge' (2018) 6(2) Journal of Social and Political Psychology 271, 278.

was the case in 2019. Following the death of Jo Cox, candidates in Batley and Spen made pledges to run campaigns without fear or intimidation.[386] The exact terms were as follows.

> [That candidates] take responsibility for setting an appropriate tone when campaigning; lead by example to encourage and foster constructive democratic debate and tolerance of other points of view; and promote and defend the dignity of others, including political opponents, treating all with courtesy and respect.[387]

It is also possible for pledges to be used to encourage respect for other candidates. For example, in Hexham's 2019 election some of the candidates signed pledges, promising to campaign in a positive way. The terms of the pledge stated that candidates should not engage in personal attacks and not to make untrue, derogatory or hateful messages about each other on social media.[388]

It is important to note, that pledges have been used to discourage deceptive representations. In the local elections in 2010, some Westminster candidates signed a pledge agreeing not to lie, whilst promising to make honest and reasonable promises to the electorate. Such a pledge was made with Liberal Democrat signatories in South Northamptonshire (including Andrew Simpson for Northampton North, Scott Collins for South Northamptonshire and Paul Varnsvery for Northampton South).[389] Another pledge, making similar promises was signed by cross-party candidates in Reading that same year. Alok Sharma, Rob Wilson (both Conservatives), Rob White, Adrian Windisch, (Green Party candidates), Daisy Benson, Gareth Epps (Liberal Democrats) and Annelise Dodds (Labour).[390] Thus, pledges can and have been used to discourage deceptive representations and other deceptive behaviour in the run-up to Westminster elections.

When entered into these pledges operate well. From a theoretical perspective, this makes sense because it is a self-imposed restriction with major repercussions if the promises are broken. If a politician signs a pledge promising that he will not engage in a behaviour he is

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[386] BBC News, 'General election 2019: Jo Cox constituency rivals pledge 'clean campaign'' (*BBC News*, 18 November 2019) https://www.bbc.co.uk/news/uk-england-leeds-50459911 accessed 27 March 2023.
[387] ibid.
[388] James Robinson 'Hexham's Pledge for a Clean Election' (*Hexham Courant*, 27 November 2019) https://www.hexham-courant.co.uk/news/18064174.hexhams-pledge-clean-campaign/ accessed 27 March 2023.
[389] Scott Collins, Liberal Democrats, 'Liberal Democrats Launch Clean Campaign Pledge' (*Scott Collins, Liberal Democrats*, 8 January 2010) https://scottcollins2.mycouncillor.org.uk/2010/01/08/liberal-democrats-launch-clean-campaign-pledge/#page-content accessed 25 November 2024.
[390] BBC News, 'Call for 'clean' election campaign pledge in Reading' (*BBC News*, 9 April 2010) http://news.bbc.co.uk/1/hi/england/berkshire/8611075.stm accessed 7 April 2023.

putting a moral restriction on his own behaviour. He is staking his reputation on the odds that the promise will be fulfilled, inviting the public and fellow politicians to see that he will honour this. Logically-speaking, a politician would be unlikely to enter into this promise if there was any doubt that he could achieve it. Failure to follow through on the promise would be significant, undermining their credibility and honesty.[391] Thus, a politician is not going to enter into something which they know would have this effect. The reputational costs are a significant threat and act as a check on their behaviour.

One major vulnerability to the UK's model is that it affords discretion on what the terms of the pledge are. In a sense, this is positive because it can be crafted to cover any type of campaign-related deceptive representation. On the other hand, terms can vary from pledge to pledge, with points of contention being removed or changed. It is likely that this is one of the reasons why pledges not to make deceptive representations are fairly rare. It is possible that this could be addressed with one universal pledge, which is drafted by the public or private organisations, as opposed to politicians. A generalised pledge for candidates would ensure that certain aims were present,[392] and establish consistent terms for all candidates (potentially including terms not to make deceptive representations). Such an approach has proven workable in the US. In California, for example, when candidates are considering running, they are given a pledge which they can sign. Equally, some American states have had pledges created by private civic organizations, such as the Citizens for Fair Campaign Practices in Pinellas County, Florida.[393] The point is, that some sort of generalised pledge, with a uniform set of terms, may go some way to encouraging a greater practice of non-deceptive behaviour when campaigning.

The problem with the one pledge idea is that it is unlikely that politicians would agree to sign it. The whole point of a pledge is that it relies on the good will and co-operation of the politicians involved. They have to agree to commit to the restrictions they impose. A politician needs to have a strong intention to restrict their own behaviour,[394] and suppress reservations and second thoughts.[395] It needs to be, in the words of Day, a 'tactical decision […]'.[396] I suspect that presenting candidates with a pre-determined pledge to sign would not

[391] de Bruin (n 272) 23-42. See also, Schlesinger (n 292) 43-44.
[392] Rowbottom (n 14) 531.
[393] Day (n 273) 654-655.
[394] Schlesinger (n 292) 43.
[395] ibid 44.
[396] Day (n 273) 655.

elicit the same response as one that they had drafted themselves. For one, it takes away some of their intention and desire to uphold the moral obligation. There is no initiative from the candidate to impose these restrictions, rather it is being placed upon them. This undermines the very voluntariness of the pledge and what makes it successful. To voluntarily stake their reputation, pledgers need to know that it is unlikely that they will breach the terms.

Second, a uniform pledge removes the pledger's ability to influence and dictate terms. This may pose a problem if the terms are more comprehensive, and harsh e.g., a stipulation of not to make deceptive representations to the public may not generate much support.[397] In fact, it may deter people from signing, creating an opt-out culture. You can already see this with the individualised pledges in the UK. Take for instance, the Clean Campaign Pledge for Reading in 2010. While most candidates agreed to the pledge, Labour candidates Pete Ruhemann and Naz Sarker, as well as UKIP candidate Bruce Hay all refused to agree to the pledge. The latter candidate went so far to say that signing 'would not be appropriate considering what I'm up to'.[398] Thus, if the terms do not fit with the plans of the politician, you can see how easy it is to not sign the pledge. So, the opt-out culture may become more significant if a uniform pledge was involved.

Setting aside the theoretical aspect, another source of vulnerability is with enforcement, i.e., the fact that pledges rely on politicians honouring their commitments. While I recognise that this is an obvious concern with this model, this objection does not have much substance. Obviously, you could impose some sort of enforcement body like a local voluntary civic committee (which they have in some of the American states) or an independent body to formally admonish candidates who break their pledges.[399] The natural options would be the Advertising Standards Authority, the Electoral Commission or even a new a probity body to act as watchdog over campaign statements. Nevertheless, this seems to assume that pledges are not being followed, and that enforcement is required. In this context, the integrity model operates successfully and political practice supports this. The strength of the moral obligation as well as the potential for reputational damage act as significant deterrents to breaching the pledge.[400] Moreover, pledges have safeguards in place to ensure adherence. The public

[397] Tsipurksy (n 385) 280
[398] BBC News, 'Call for 'clean' election campaign pledge in Reading' (*BBC News*, 9 April 2010) http://news.bbc.co.uk/1/hi/england/berkshire/8611075.stm accessed 7 April 2023.
[399] Day (n 280) 649. See also Janet A Hall, 'When Political Campaigns Turn to Slime: Establishing a Virginia Fair Campaign Practices Committee' (1991) 7 Journal of Law & Politics 353, 355.
[400] de Bruin (n 272) 25.

declaration of the pledge establishes accountability and answerability, encouraging candidates to uphold the standards. Not only do pledge-takers monitor each other,[401] but scrutiny is invited from both the public and media. While I recognise that there are small flaws with the pledge model, reforms are unnecessary or ill-advised.

The Ministerial Code

A return to the Ministerial Code, leads to similar conclusions and recommendations as those in Chapter 4. For the sake of a complete analysis and to appreciate the subtle differences, it is worth re-examining this mechanism in a new context.

The Ministerial Code contains an overarching duty on Ministers 'to adhere to the Seven Principles of Public Life […]',[402] (selflessness, integrity, objectivity, accountability, openness, honesty, leadership).[403] These are the quintessential basis for what political behaviour should be. Of these, a select few have particular applicability to addressing political deceit. The most obvious one is honesty- that public office holders 'should be truthful'[404] in the statements they make or promote.[405] There are also associated values of accountability and openness, which encourage transparency 'unless there are clear and lawful reasons for [not] doing so',[406] and, the scrutinization of behaviour. The Code also includes a specific stipulation that Ministers should be as open as possible with Parliament and the public. The refusal to provide information is only permissible when disclosure would not be in the public's interest.[407] While honesty and truth is encouraged throughout Westminster codes of conduct,[408] behaviour which breaches this standard can only be recognised and sanctioned against through the Ministerial Code. The procedure for this is the same as that which I outlined in Chapter 4. The Prime Minister (and now the Independent Advisor) can open an investigation into whether a breach has occurred. But, the arbiter for whether there has been a breach and whether there should be a sanction, is the Prime Minister alone.

[401] Tsipursky (n 385) 277.
[402] Cabinet Office, 'Ministerial Code' (n 257) para 1.4.
[403] The Committee on Standards in Public Life, *Standards in Public Life Vol 1* (n 253) p14 para 55.
[404] GOV.UK, 'The Seven Principles of Public Life' (n 254).
[405] Richard Thomas, 'Fake news and the Nolan Principles' (*Committee on Standards in Public Life*, 6 March 2017) https://cspl.blog.gov.uk/2017/03/06/fake-news-and-the-nolan-principles/ accessed 18 June 2024.
[406] GOV.UK, 'The Seven Principles of Public Life' (n 254).
[407] Cabinet Office, 'Ministerial Code' (n 257) para 1.4(e).
[408] (n 257).

It is important to stress that this mechanism does perform slightly better in addressing deceptive representations to the public. There are a few instances of success such as when then-Prime Minister Theresa May sacked Damien Green as first Secretary of State, after he admitted to lying about the presence of pornographic images on his House of Commons computer.[409] Although it should be noted that this was the result of a police investigation not a referral to the Independent Advisor, the fact remains that lying to the public was recognised as a breach of Ministerial standards and resulted in a sanction.

Nevertheless, it is important to put this data in context because the majority of instances are not even investigated, let alone sanctioned. Annual reports from Independent Advisor indicate that the Prime Minister does not request investigations into such matters.[410] A close examination of the annual reports indicate that very few potential breaches of Ministerial Standards are referred. In total, there have only been 7 referrals since 2010 and none related to deceptive representations to the public.[411]

These are as follows:

- In 2011-2015, the Independent Advisor only conducted one investigation. This was into Baroness Warsi and an alleged conflict of interest.
- In 2021-22 the Independent Advisor conducted two investigations. One was into the Prime Minister and the disclosure of information relating to the refurbishment of Downing Street. The second was into the Chancellor of Exchequer and their declaration of interests.
- In the 2022-23, the Independent Advisor conducted three investigations into alleged breaches of the Ministerial Code. One was into Nadhim Zahawi and his financial interests, another was into Nusrat Ghani and Mark Spencer over their potentially improper conduct, and the third was into Suella Braverman and her receipt of a speeding ticket.
- An additional investigation occurred (as seen in the 2023 report) into allegations of bullying by Dominic Raab. However, this was undertaken by another individual who

[409] BBC News, 'Damian Green sacked after 'misleading statements' on porn claims' (BBC News, 21 December 2017) https://www.bbc.co.uk/news/uk-politics-42434802 accessed 20 August 2024.
[410] Based on the *Annual Reports of the Independent Advisor of Ministers' Interests* (*GOV.UK*) https://www.gov.uk/search/all?organisations[]=independent-adviser-on-ministers-interests&order=updated-newest&parent=independent-adviser-on-ministers-interests accessed 8 September 2024.
[411] ibid for the reports between 2010-2023, on referrals for potential breaches of the Ministerial Code.

was chosen by the Prime Minister. This was due to the absence of an Independent Advisor during this time period.[412]

The underutilisation of the mechanism means that Ministers are allowed to make deceptive representations to the public without repercussion. Suella Braverman was able to make misleading claims about immigration[413] in Parliament, in the Daily Mail and then again on Good Morning Britain,[414] of which none resulted in an investigation. Similarly, when then-Levelling Up Secretary Michael Gove allegedly made the misleading claim that every single PPE procurement decision went through an eight-stage process, there was no investigation.[415]

For brevity, I will not repeat all the points I made in Chapter 4, but suffice to say that the comments and recommendations that I make apply here. To reiterate, I advise reforming the powers of the Independent Advisor to allow them to determine whether a breach has occurred. Additionally, I suggest imposing greater controls on sanctioning, specifically, I suggest a requirement that the Prime Minister impose a sanction when a breach of the Code has been found. If these changes are made, I foresee the Ministerial Code as being effective at recognising breaches of Ministerial standards and sanctioning accordingly. Although this would target any breach of the Code, it would improve the way that deceptive Ministerial statements are dealt with. Thereby, discouraging Ministers from making deceptive representations. The inadequacy of the existing mechanisms to address deceptive representations made by our politicians is one that extends beyond the Ministerial Code and continues into the legal remedies.

Section 106 Representation of the People Act 1983

Section 106 is integral for any inquiry into how deceptive representations are dealt with. Afterall, it is the only legal mechanism which specifically combats it (albeit only electoral

[412] ibid.
[413] Illegal Migration Bill 7 March 2023, vol 729, col 152.
[414] Suella Braverman, 'SUELLA BRAVERMAN: The British people have had enough of migrants pouring over the Channel... That's why stopping the boats is my top priority' (*Daily Mail*, 8 March 2023) https://www.dailymail.co.uk/columnists/article-11832523/SUELLA-BRAVERMAN-British-people-migrants-pouring-Channel.html accessed 13 March 2024. See also Good Morning Britain, 'On what planet is that likely and how is that not inflammatory language?' (n 13).
[415] Rowena Mason, 'Labour accuses Gove of lying about extent of vetting for PPE deals' (*The Guardian,* 16 July 2021) https://www.theguardian.com/politics/2021/jul/16/labour-accuses-gove-lying-extent-vetting-ppe-deals accessed 30 December 2024. The implication from the statement is that all the contracts went through the 8 stage process. This is misleading because this was not the case for almost two-thirds of the contracts awarded e.g., Ayanda Capital or PestFix. In response, health Minister Jo Churchill said that these contracts pre-dated the 8 stage process and were exempt. For further detail, see Rowena Mason and David Conn, 'At least 46 'VIP lane' PPE deals awarded before formal due diligence in place' (*The Guardian*, 6 December 2021) https://www.theguardian.com/world/2021/dec/06/at-least-46-vip-lane-ppe-deals-awarded-before-formal-due-diligence-in-place accessed 30 December 2024.

defamation). Section 106 makes it an illegal practice for a person to make or publish 'any false statement of fact in relation to [a] candidate's personal character or conduct […]',[416] 'before or during an election',[417] 'for the purpose of affecting the return of any candidate at the election',[418] unless, the individual can show that they 'had reasonable grounds for believing, and did believe, the statement to be true'.[419] It draws together criminal, as well as civil actions. For example, a candidate could apply for an injunction in which to restrain the distribution of the deceit.[420] It would also be possible to put forward an electoral petition, requesting that the election be declared void.[421] The election court can then declare the election void and find the candidate guilty of the illegal practice, disqualifying them from being elected to or taking their seat in the House of Commons for three years.[422]

Criminal proceedings 'may also be brought some while after the immediate election period without there previously having been an election petition'. [423] Upon a summary conviction, the court may impose a fine not exceeding level 5 on the standard scale[424] and a person who is convicted of an illegal practice is disqualified from standing for election or taking their seat in the House of Commons for three years. If already elected, the disqualification will not 'begin for a maximum of three months while an appeal is pending, during which time the person may not perform any of their functions as a Member of Parliament'.[425]

It is important to stress that section 106 is very narrowly drafted and only covers a very singular type of deceptive representation. One reason for this is that it only applies to the personal conduct of a fellow candidate.[426] In particular, there is a distinction between 'whether the statement is one as to personal character or conduct[,] or a statement as to the political position or character of the candidate'.[427] The former is actionable and the latter is not. Personal statements relating to 'family, religion, sexual conduct, business or finances are

[416] Representation of the People Act 1983, s106(1)(b).
[417] RPA 1983, s106(1)(a).
[418] RPA 1983, s106(1)(b).
[419] RPA 1983, s106(1)(b).
[420] RPA 1983, s106(3).
[421] RPA 1983, s127, s135, s159.
[422] RPA 1983, s106(2), s160(4), (5)(b), s173(1)-(3). See also Erskine May (n 308) para 3.9; Rowbottom (n 14) 508.
[423] Erskine May (n 308) para 3.9.
[424] RPA 1983, s169 and s173. See also *DPP v Edwards* [2002] EWHC 636, [2002] 3 WLUK 551 at [4]-[13].
[425] Erskine May (n 308) para 3.9.
[426] RPA 1983, s106(1)(b). See also *Cumberland Cockermouth Division case* (1901) 5 O'M&H 155, 160,
[427] *Regina (Woolas) v Parliamentary Election Court* [2010] EWHC 3169, (2011) 2 WLR 1362 [111]. See also [107]-[111], [114].

generally likely to relate to the personal character of a candidate'.[428] Another reason is that section 106 is only applicable in cases where there has been a lie. As argued by Horder, the notion of 'a false statement of fact in relation to the candidate's personal character or conduct' notably excludes deception which is misleading. '[S]omeone might disseminate a perfectly correct claim that a candidate has been convicted of murder, whilst failing to mention that the conviction was later overturned and the candidate completely exonerated [...]'.[429] Analysing data from both the Electoral Commission and the Law Reports elucidates on this point. As depicted in Table 1 only 8 civil actions (classified as electoral petitions or interim injunctions) have been brought under section 106 in the last thirteen years. Moreover, few have been successful. Only three electoral petitions have been granted (one of which was dismissed upon appeal). Other legal recourses have proven ineffective with only one interim injunction being granted.[430]

Table 1

Case name	**Course of action**	**Outcome**
Cooper v Evans [2023] EWHC 2555 (KB)	Interim injunction	Denied
Buchan v Elliott [2022] EWHC 255 (QB)	Electoral petition	Dismissed
Swinson v Scottish National Party [2019] CSOH 98	Interim injunction	Granted
Banwait v Bettany [2018] EWHC 3263 (QB)	Electoral petition	Dismissed
Morrison v Carmichael (No 1) [2015] ECIH 71 *Morrisson v Carmichael* (No 2) [2016] SC 598	Electoral petition (The interpretation of s106 was considered over two cases).	Dismissed
Ireland v Dorries [2015] (unreported).[431] Judicially reviewed in *Parliamentary Election for Mid-Bedfordshire Constituency held on* 7 May 2015 [2015] EWHC 2781 (QB)	Electoral petition	Electoral petition was granted in the first instance. The appeal was fully granted and the

[428] ibid [112].
[429] Horder, *Criminal Fraud and Election Disinformation: Law and Politics* (n 15) 146.
[430] This was the Scottish case of *Swinson v Scottish National Party* [2019] CSOH 98, (2019) 11 WLUK 439. Here, an interim injunction was granted against the Scottish National Party to prevent them from continuing the false claim that Jo Swinson (leader of the Liberal Democrats) 'accepted a £14K donation from a fracking company', per [4].
[431] Frances Perraudin, 'Nadine Dorries accused of making false claims about opponent during election' (*The Guardian*, 10 June 2015) https://www.theguardian.com/politics/2015/jun/10/nadine-dorries-accused-of-making-false-claims-about-opponent-during-election accessed 1 January 2025.

		electoral petition was dismissed on the ground that the petition was not served in the prescribed manner or time.
Erlam v Rahman [2015] EWHC 1215 (QB) Judicially reviewed in *R. (on the application of Rahman) v Local Government Election Court* [2016] EWHC 1280 (Admin) and [2017] EWHC 1413 (Admin)	Electoral petition	Granted in part- s106 was part of the success. The appeal did not include s106.
Watkins v Woolas [2010] EWHC 2702 Judicially reviewed in *R. (on the application of Woolas) v Parliamentary Election Court* [2010] EWHC 3169 (Admin)	Electoral petition	Granted. Appeal granted in part.

[432]

Similarly, as shown in Table 2, there have only been two convictions in the last thirteen years.[433] This is despite the fact that over 817 allegations have been made to the police in these years.[434] Both of these convictions were for relatively minor infractions. One conviction was the election in Miles Platting and Newton Heath, Manchester. In this case the defendant pleaded guilty to delivering false allegations about a candidate. 'These leaflets claimed the candidate was corrupt and that he took backhanders. […] As the defendant pleaded guilty and

[432] Based on records from the Law Reports through the online databases of Westlaw, last conducted in November 2024.
Note that even if you increase the parameters of the search to extend back to 1983, there are only another two civil applications which have been brought. These are *Barrett v Tuckman* [1984] 1 WLUK 19 where the petition was denied because the statements were not proven to be untrue and *Tony Banks v Arthur Lewis* 1983 WL 880567 where the injunction granted. See also Horder, *Criminal Fraud and Election Disinformation: Law and Politics* (n 15) Ch 3.6-3.7.

[433] Admittedly, there are more cases where a conviction has been pursued, e.g., in *Pirbhai v DPP* [1995] COD 259 QBD, the conviction was upheld. Ismail Pirbhai was convicted of publishing the false statement 'Avoid Mr Straw who hates Muslim, because he is from a Jewish family and Jews are the enemy of Islam and he is a tyrant of Labour Party. No doubt he hates Muslim.' See Horder, *Criminal Fraud and Election Disinformation: Law and Politics* (n 15) Ch 3.5.
In *Director of Public Prosecutions v Dennis Edwards* [2002] EWHC 636 (Admin) the charge under s106 was dismissed. See also the unreported case of Miranda Grell where a Labour candidate was convicted under s106 because she falsely said that Barry Smith (a fellow Liberal Democrat candidate) was a paedophile and had sex with children. BBC News 'Councillor Slurred Election Rival' (*BBC News*, 21 September 2007) http://news.bbc.co.uk/1/hi/england/london/7006231.stm accessed 27 June 2024. See also Horder, *Criminal Fraud and Election Disinformation: Law and Politics* (n 15) Ch 3.7, fn 135.

[434] Electoral Commission, 'Fraud data 2010-2016' (Electoral Commission, 2023); Electoral Commission, 'Electoral Fraud Data 2017-2023' (*Electoral Commission*, 2023) https://www.electoralcommission.org.uk/search?search=fraud+data accessed 18 June 2024. Note that the data is limited to this time period, because the police and Electoral Commission only started documenting the raw data (every allegation and outcome in 2010).

had no interest in the election contest other than his payment he was fined […] £50 for making false statements about the candidate (s106)'.[435] The other conviction was the 2022 case in Bromley. The candidate informed the police that hate posters about her had been distributed in her local area.

The suspect,

> pleaded guilty to publishing a false statement of fact about the personal character or conduct of the candidate and for failing to include an imprint on the leaflets identifying himself as the printer/publisher. On 5 June 2023, he was: fined £800 (£400 for each offence)[, g]iven an £80 surcharge and [o]rdered to pay £1,825 in costs.[436]

[435] Association of Chief Police Officers and Electoral Commission, 'Analysis of cases of alleged electoral malpractice in 2010' (*Associations of Chief Police Officers and Electoral Commission* February 2011) p27.
[436] The Electoral Commission, '2022 electoral fraud data' (*Electoral Commission*, 24 February 2023) https://www.electoralcommission.org.uk/research-reports-and-data/electoral-fraud-data/2022-electoral-fraud-data accessed 25 November 2024.

Table 2

	Years										
Row Labels	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**	**2020**
106 (1) False statements as to candidates	**34**	**53**	**61**	**32**	**22**	**121**	**27**	**61**	**69**	**101**	**1**
Caution		1			2	1					
Conviction	1										
informal advice given	6	6									
Locally resolved			2	2	1	13	5	4	7	6	
No Further Action - closed on CPS advice	1	1									
No further action - no offence	18	27	45	22	19	72	15	32	43	64	
No further action - no or insufficient evidence	1	5	8	4		27	2	24	19	31	1
No further action - undetectable	3	1				5					
No Further Action- no reason given		2					1				
Other		7					1	1			
Outcome data unavailable	4	3	6	4		3	3				
Grand Total	**34**	**53**	**61**	**32**	**22**	**121**	**27**	**61**	**69**	**101**	**1**

Row Labels	2021	2022	2023	Grand Total
106 (1) False statements as to candidates	**71**	**66**	**98**	**817**
Caution				4
Conviction		1		2
informal advice given				12
Locally resolved	11	13	9	73
No Further Action - closed on CPS advice				2
No further action - no offence	40	30	73	500
No further action - no or insufficient evidence	20	22	16	180
No further action - undetectable				9
No Further Action- no reason given				3
Other				9
Outcome data unavailable				23
Grand Total	**71**	**66**	**98**	**817**

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[437] Note that this is based on raw data from the Electoral Commission. Table 2 is a streamlined version of that data, where inconsistencies in data labelling have been resolved by grouping. For detail of the groupings see below.
The labels: 106(1) false statement as to candidates, 106 False statement as to candidates and 106 (1) False statements as to candidates **have been grouped as 106 (1) False statements as to candidates**.
The labels: No further action -no offence, no further action not an RPA offence, no further action not RPA offence **have been grouped as no further action – no offence.**
The labels: No further action- no evidence, no further action - insufficient evidence (to proceed), no further action – insufficient evidence, No further action- No evidence, **have been grouped as no or insufficient evidence**.
The labels: Outcome data not available and outcome data unavailable, **have been grouped as outcome data unavailable**.
The labels: No further action- closed on CPS advice and No further action – closed on CPS advice have been grouped as **No further action – closed on CPS advice**.
The labels: No further action - undetectable and no further action – Undetectable **have been grouped as no further action – undetectable.**
The labels: No further action and no further action -no reason given **have been grouped as no further action -no reason given.**

An overview of the data depicts a picture of numerous failed attempts to utilise section 106. The obvious question is why is this the case? Now, the electoral data does not document the reason for why the allegation does not meet the requirements. The data simply shows that the leading reason for why criminal action is not pursued, is due to the allegation not meeting the requirements of section 106. In fact, 500 of the total allegations were documented as such.[438] A close legal analysis of the Law Reports provides more explanation, and a possible answer. Exploring the case law and identifying a more conclusive reason for the disparity, helps to pin-point the weakness in this mechanism and informs my recommendations of reform.

Now, some of the lack of use of s106 is somewhat inevitable. What I mean by this, is that s106 is designed to be a very high standard. For one, it is an illegal practice, so any action needs to meet the standard of being beyond reasonable doubt.[439] Of course, interim injunctions only need to put forward a successful '*prima facie* case that the statement […] would tend to lower […] [a candidate's] reputation in the estimation of reasonable readers',[440] but for most of the legal actions a higher standard need to be met. This naturally limits the number of actions which can progress.

However, much of the failure rests with the personal/ political distinction. Throughout the case law, courts are emphatic that the statements have to be personal, 'for example, [relating] to his family, religion, sexual conduct, business or finances are generally likely to relate to the personal character of a candidate'.[441] Certainly, the civil actions brought under s106 show a trend of candidates trying (and failing) to bring an action under s106 where the claims are more political in nature.

The two successful electoral petitions (the cases of *Watkins v Woolas* and *Erlam v Rahman*) have hinged upon the fact that they are deeply personal allegations. Both cases related due to the deeply personal nature of the false statements (racist behaviour). In *Watkins* there were allegations that Mr Watkins: was 'wooing the extremist vote',[442] condoning threats on his opponent,[443] and reneging on his promise to live in the constituency.[444] Similarly, in *Erlam*,

[438] Based on filtering the Electoral Commission data category No further action - no offence.
[439] *Watkins v Woolas* [2010] EWHC 2702, (2010) 11 WLUK 181 [48], [55].
[440] *Swinson v Scottish National Party* [2019] CSOH 98, [2019] WL 06352757 [13].
[441] *R. (on the application of Woolas) v Parliamentary Election Court* [2010] EWHC 3169 (Admin), [2012] QB 1 [112].
[442] *Watkins v Woolas* (n 439) [64]-[84].
[443] ibid [132]-[183].
[444] ibid [107]-[114]. See generally [207]. Note, that this particular statement was held to be political and not personal, upon appeal in *R. (on the application of Woolas) v Parliamentary Election Court* (n 441) [117]-[119]. Woolas was granted a judicial review, but the finding that the election was void was upheld.

there were allegations that Mr Erlam was 'encouraging extreme racists such as the so-called English Defence League ('EDL')'.[445]

A similar theme can be seen in *Buchan v Elliott,* where Mr Buchan launched an electoral petition on the basis that Mr Elliott had falsely claimed that Mr Buchan had voted in favour of granting planning permission for a housing development. This was held to be an activity where the candidate was acting on the public's behalf. This was characterised as political, not personal act.[446]

As put by Judge Kramer in paragraph 55 of his judgment,

> It is axiomatic that the exercise of a vote in committee is a political act. The councillor is discharging a political function. Mr Buchan, had he been there, would not have been given the opportunity to vote because he was exercising a right vested in him as a member of the public, but because he was an elected representative of his ward. This was not his personal business.[447]

A final example in which this can be seen is in *Banwait v Bettany* where, again, the focus was on the personal/ political distinction. A fake party leaflet was obviously deemed to be a political, not a personal matter, so section 106 did not apply.[448]

Setting aside the electoral petitions and focussing on interim injunctions establishes a similar theme. Even in the cases concerning applications for interim injunctions, the success or failure hinged upon the content of the statements. Take, for instance, the case of *Cooper v Evans*. In this case, Mr Cooper was applying for an interim injunction against the Labour party advertisement that Eddie Hughes (a Conservative MP) was engaging in 'dodgy deals' with Mr Cooper. The injunction was denied on the ground that the statement was political not personal. In fact, when delivering their judgment, Mr Jay said, '[t]he real sting of the article is that it was alleging that the claimant and Mr Hughes had come to an arrangement of dubious merit […] My overall evaluation is that this sting as I am describing it[,] falls on the political rather than the personal side of the dichotomous line […]'.[449] Conversely, in *Swinson v SNP*

[445] *Erlam v Rahman* [2015] EWHC 1215, (2015) 4 WLUK 473 [111]. See also [447]-[450].
[446] *Buchan v Elliott* [2022] EWHC 255 (QB), (2022) 1 WLUK 443.
[447] This followed the position of the *Cumberland Cockermouth Division case* (1901) 5 O'M&H 155. Here, voting not to send money and supplies to support the Crown during the Boer War was treated as political conduct.
[448] *Banwait v Bettany* [2018] EWHC 3263 (QB), (2018) 11 WLUK 499.
[449] *Cooper v Evans* [2023] EWHC 2555, (2023) 10 WLUK 113 [25].

Jo Swinson was successful in obtaining an interim injunction. Afterall, she was accused of taking donations in relation to fracking.

What an analysis of the case law indicates is that the success of the petition or application is very much dependent upon the subject matter of the statement. Interestingly, there is no mention of the type of deception being a problem. Certainly, the case law points towards the issue being with the subject matter and not the lying/ paltering distinction[450] and all but one of the unsuccessful electoral petitions have failed on this ground.[451] Thus, one way to increase the uptake of this mechanism is to redraft the legislation to include statements which are personal and political. It would also be beneficial to include other types of deceptive representations within the threshold. I fully admit that the Law Reports do not suggest that this is part of the applicability problem. However, on a conceptual basis and with a view to treating all deceptive representations the same (i.e. a lie or a palter etc), it is worthwhile expanding the illegal practice to include these types of claims.[452] Afterall, regardless of whether the statement of fact is false or misleading, it has the same potential to cause harm. As such, I posit that the construction of section 106 is problematic. Moreover, I recommend that it is redrafted to collapse the distinction between personal and political, as well as, lies and palters. False *political* claims against a fellow candidate should be included, as well as misleading representations. This would be beneficial from a conceptual and practical standpoint.

My purpose in Chapter 5 was to critically assess the final third of the framework. Understanding the theory underpinning each mechanism as well as monitoring their performance, has exposed their flaws. Thus, providing a means with which to diagnose the weaknesses in the specialist regulation but also to suggest how they can improve. I conclude that most of these mechanisms are deficient, both in terms of coverage (their design) and implementation.

My recommendations are as follows:

- Introduce controls to ensure that breaches of Ministerial standards are recognised and sanctioned.

[450] See, for instance, *Banwait v Bettany* (n 448), where a candidate lied and said another candidate was lying about where they lived. This was held to be something which was political because the locality of an area was with the aim of the candidate having an electoral advantage. See also, *Morrison v Carmichael* [2016] SC 598.
[451] See Figure 1.
[452] See Chs 1 and 2 of this thesis.

- Redraft section 106 of the Representation of the People Act 1983 to demolish the personal/ political distinction, and, the focus on false statements of fact alone. Misleading statements of fact should also be included within the scope.

Reflecting on deceptive representations to the public

From a theoretical and functionalist analysis of the third part of the regulatory framework, it is evident that there are major flaws. Most of the regulatory force for discouraging or recognising and sanctioning deceptive representations to the public resides with the specialist mechanisms. These tend to be mandatory and enforceable but are also niche. I recognise the limitations of these mechanisms and offer solutions to mitigate these issues. However, even if my recommendations are taken on board, these mechanisms will only ever cover very specific types of representations i.e., those made by Ministers or those made about a fellow candidate.

The obvious problem is that there is nothing in place to recognise Westminster politicians making deceptive political representations to the public more generally. This has led to Westminster politicians effectively being able to make these representations to the public without fear of repercussions. Instances such as Johnson's misleading claims on post-Brexit NHS investment[453] or Blair's claim in relation to Iraq's WMD's[454] are illustrative of just how much Westminster politicians are able deceive and do so on important and topical issues. All this indicates a collective failure of the current regulatory framework to address this type of representation. I argue (and will elaborate on this in far more detail in Chapter 6) that these instances warrant recognition and sanctioning. In this sense, I posit that this particular class of deception justifies regulation which is enforceable and mandatory. The framework needs to be developed further to actually coerce this type of political behaviour.

Conclusion

My aim in Part 2 of this thesis was to critically assess the regulatory framework, which has been informed by theoretical and functionalist analysis. My findings can be categorised into three broad themes, which correspond with the three parts of the framework. I began with the broader mechanisms which underpin all political conduct. The Principles of Public Life and the self-correcting public discussion do discourage or mitigate the impact of deception. Whilst they are not *that* successful in these tasks, their limitations need to be taken into

[453] Asthana (n 8). See also, Good Morning Britain, 'Boris Johnson Stands by £350m Brexit NHS Claim' (*Good Morning Britain*, 27 April 2017) https://www.youtube.com/watch?v=KoHRCAdsF8I accessed 31 May 2024.
[454] (n 6 and n 7). See also Ch 1, s3 of this thesis for an explanation for how these are deceptive.

account. Afterall, they are supporting mechanisms, encouraging changes in social practices but never designed to be a sufficient response on their own.

My main focus and the real strength behind the regulation is with the specialist mechanisms. These mechanisms tend to be enforceable and thus actually recognise deceptive representations and sanction those who make them. The second part of the framework (those operating in the parliamentary context alone) are somewhat successful. I admit that there are issues with how these mechanisms are used, but modifications could be made to address these flaws with relative ease. By comparison, those which operate in the public context are more deficient. The situation is more complicated with these mechanisms because there are flaws with the coverage provided and implementation. As such, a more radical overhaul of these mechanisms would be required.

What is a particularly concerning, is that there is a class of deceptive representations which justifies recognition and sanctioning. Westminster politicians are able to make deceptive political representations to the public without fear of repercussion. What we need and what I will argue for in the third and final part of this thesis, is a new mechanism. Specifically, I advocate for a new criminal offence.

Part 3: TOWARDS A NEW CRIMINAL OFFENCE

In the third part of this thesis, I finalise my argument in favour of substantial reform. I have already diagnosed weaknesses with the mechanisms in our current regulatory framework and suggested a package of reforms. However, I also advocate for more radical reform, recommending the introduction of a criminal offence to cover deceptive representations which are made by Westminster politicians to the public. This particular class of representations warrants recognition as a problem and should be accompanied by sanctions to reflect this. I suggest that the appropriate means to do this is through criminalisation.

My purpose in these final three chapters is to progress from the identification that there is a problem with what is currently being done and move towards a practical suggestion of substantial reform. I argue that a new criminal mechanism is necessary and offer an indication of how it could be expressed in legislation (Chapters 7 and 8). With this view I begin with Chapter 6 where I make the case for criminalisation. Then, in the latter chapters I switch to a pragmatic perspective, suggesting how this offence could be implemented- both in terms of drafting the actual legislation and introducing legal penalties.

Chapter 6: A new enforceable and mandatory mechanism

The whole thrust of my argument in Part 3 is that there is a collective failure by the mechanisms in the framework to recognise and sanction a particular type of deceptive representation. This raises a number of questions: the first of which is why does this class of representations warrant recognition and sanctioning? The second of which is what form should this new mechanism take? Of course, potential avenues include: self-regulation through the use of a parliamentary committee, bestowing powers on a guarantor institution (such as the Electoral Commission or Integrity and Ethics Commission) or the use of legal tools. Discussing the various regulatory options, aids understanding of the nature of the problem. Throughout this chapter I draw on criminal law theory to put forward an argument of why this issue warrants regulation beyond what the generalist mechanisms offer. In particular, I put forward an argument for why we should utilise the criminal law, as opposed to other enforceable regulatory and legal tools.

Deliberating the options

To facilitate a discussion and comparison of the regulatory options, I use Duff's theory of deliberation. In *The Realm of Criminal Law*, Duff puts forward a theory which sets out a structure for how deliberations on criminalisation should and do take place. I use this theory as an apparatus for guiding my discussion.[455] My rationale for using this model is two-fold. One, Duff's model is based on liberalism and is thus consistent with my regulatory threshold (as outlined in Chapter 2). What makes Duff's theory preferable to others who also have liberal models, is that he has a deep appreciation for the fact that the criminal law is just one type of response. He acknowledges and welcomes the fact that there are a multitude of options- all of which should be considered. In this sense, he appreciates that criminal law should only be used when it is appropriate to do so and should not be the default option. It is the comprehensive and inclusive nature of Duff's approach which makes it appealing. By using Duff's approach to work through comparative analysis, I will have a complete and comprehensive assessment of all the options. The goal behind using this methodology, is that my decision in favour of criminalisation will be more secure and justified.

[455] R A Duff, *The Realm of Criminal Law* (Oxford University Press 2018) 298.
Note that this is a separate model to what I use for regulation. The qualities of wrongdoing and harm justify us enacting regulations discouraging, or constraining conduct but this is a separate model to what I use for criminalisation. Both, however, are consistent with liberalism.

A public wrong

Duff's theory can be broadly distinguished into two parts. The starting point is Duff's master principle (which he defines as a public wrong). It is at this point that it becomes acceptable to intrude upon the liberty or privacy of those concerned. This gives us a good but not sufficient reason to justify criminalisation.

The idea of a public wrong, is not new. William Blackstone, for example, explores it.

> The distinction of public wrongs from private, of crimes and misdemesnours from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemesnours, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity.[456]

He continues;

> If I detain a field from another man, to which the law has given him a right, this is a civil injury, and not a crime; for here only the right of an individual is concerned, and it is immaterial to the public, which of us is in possession of the land: but treason, murder, and robbery are properly ranked among crimes; since, besides the injury done to individuals, they strike at the very being of society; which cannot possibly subsist, where actions of this sort are suffered to escape with impunity.[457]

It is important to stress that Duff's appreciation of the public wrong principle is not new, rather his interpretation and use of it is. Duff objects to Blackstone's definition, particularly the focus on the need for harm to the wider public. The problem with Blackstone's interpretation is that it is underinclusive and neglects the fact that acts which victimise individuals are also public wrongs (and can be criminal acts).[458]

Duff comments*;*

> The most obvious examples of criminalizable wrongs, from a perspective focused on public wrongs and civil order, are those whose only direct victim is the polity as a whole, or its citizens collectively. [However, w]hen a wrong has an identifiable

[456] William Blackstone, *Commentaries on the Laws of England Book IV* (Ruth Paley ed, Oxford University Press 2016) p3.
[457] ibid.
[458] Duff (n 455) 76-79.

> individual victim, it might not be at once obvious how it violates the polity's civil order (unless it is also likely to cause wider fear and anxiety, for instance)[. W]e might wonder why it should count as the polity's public wrong, rather than as the victim's wrong—a wrong for the victim to choose to pursue, or not, through the civil courts.[459]

On this point Duff is referring to acts like rape or murder which harm individuals, and the wider citizenry is not an identifiable victim. Thus, to have an accurate interpretation of a public wrong, Duff turns away from both a stringent focus on the impact that the act has on wider society and Blackstone's definition. Instead, he uses a definition based on what the public should be concerned with (what he defines as a wrong which also violates a polity's civil order).[460] It is something that is the collective business of the polity, which we have the standing and potentially the responsibility to respond to.[461]

Based on this account, it is fairly obvious that deceptive representations which are made to the public are a type of public wrong. These representations have significant implications for the public as a whole and have the potential to invoke broader democratic issues. Therefore, this is a matter which is not just in the public realm but something which we as citizens take an interest in and have a right to intervene. These kinds of deceptive representations are not just exploitative of a power imbalance between the public and the politicians, but have the potential to influence how the public makes decisions about political matters. Again, how the public makes decisions on political issues (which then influence their life) is something which is the public's business. On this note, obvious parallels can be drawn here with behaviour that we already recognise as worthy of criminalisation and matters of public concern. As a state and society, we recognise other instances of deception (such as theft or fraud) are criminal acts. More importantly, we already do so in relation to other deceptive representations (as with section 106).[462] As such, it is not much of a leap to suggest that if these are also recognisable as public wrongs, then deceptive representations to the public are too.

[459] ibid 299.
[460] ibid 277 and Ch 2.
[461] ibid 279.
[462] RPA 1983.

Criminalisation or another response

Yet, just because behaviour is a public wrong does not mean that we have a conclusive reason to criminalise. While it being a public wrong provides a good reason to criminalise, it is just a starting point. The principle is thin in the sense that it leaves room for further deliberation on what kinds of claims must be made to support a criminal proposal. This brings us to the second part of Duff's theory, which progresses from asking whether there is a good reason to criminalise (is it a public wrong); to whether we *should* criminalise. Now this part of Duff's theory is much more fluid and essentially asks us to consider whether it is important to criminalise as opposed to responding in another way. This could involve: doing nothing, restorative justice (a 'publicly organized (and funded) system of mediation, negotiation […]'),[463] profession-specific disciplinary procedures, a formal body or inspectorate to enforce standards; private law, and preventative measures (like Anti-Social Behaviour Orders (ASBO), and the Terrorism Prevention and Investigation Measures (TPIM)).[464]

Of course, there is good reason to implement some sort of response (as opposed to doing nothing). Foremost, these representations pose a significant democratic threat. Second, they are not being held to account through the current system. Perhaps if informal norms worked i.e., it was a social norm not to engage in this deception, and doing so resulted in being informally and effectively held to account, then there may not be a call for a formal response.[465] If, say, the generalist mechanisms worked well, then there may not be a need for imposing a mechanism which recognises the breach and holds Westminster politicians to account.

Certainly, the generalist mechanisms have their place. Voluntary and unenforceable measures can be effective when those who are being regulated are willing to co-operate and follow them. Yet, that is not the situation which we find ourselves in. Political practice has shown that politicians are not willing to stop making deceptive representations. Indeed, the generalist mechanisms were in place when Boris Johnson was engaging in deception on covid-19 social distancing breaches and when Tony Blair was making representations on WMD's. Rather, than just discouraging good behaviour we need a mechanism to help ensure it. So, we need to use a mandatory and enforceable mechanism, which is supported by the

[463] Duff (n 455) 280.
[464] ibid Ch 7.
[465] ibid 281-282.

generalist mechanisms.[466] In the words of Julia Black, the 'form [of the regulation] may have to vary depending on the attitude of the regulatee towards compliance',[467] which is something we need to take heed of.

This leaves us with; two questions. One, would another non-legal enforceable measure be appropriate and sufficient? Two, if this is not the case, would this be the case for private law? For the purposes of this inquiry, I will focus on the three enforceable measures in Duff's model which are actually practicable and appropriate for this context. By this, I mean that I exclude restorative justice i.e. mediation and negotiation, and, preventative measures. Neither of these are really practicable for the type of behaviour in which I am discussing.

The first question Duff poses is whether we could use other non-legal alternatives to formally mark and condemn deceptive representations to the public. To an extent I can admit that there are other enforceable rule-based measures which impose less drastic penalties and less censure. One potential option would be to use methods for upholding standards in the workplace or broader profession. For the political context, this would be the use of a parliamentary committee to investigate and sanction allegations.

The most obvious way forward would be to expand the scope of an existing committee e.g., the Standards Committee or the Privileges Committee. The other is to create a new parliamentary committee entirely. Either way, this would likely mirror the investigative and enforcement powers available to pre-existing committees. So, such a committee would (if it followed the Standards Committee model) likely have the power to open their own investigations and impose light political sanctions, with harsher sanctions like suspension being dependent on the House passing the motion.

This approach is attractive in the sense that there is a benefit to allowing the House to address its own conduct. Members of the profession 'may be best placed to evaluate arguments and disputes based upon their own specialist knowledge of the field'.[468] With that being said, self-regulation does have limits, and it does not help to create an image of independence. For

[466] Dale A Nance, 'Guidance Rules and Enforcement Rules: A Better View of the Cathedral' (1997) 83(5) Virginia Law Review 837, 858-862.
[467] Julia Black, 'Critical Reflections on Regulation' (London School of Economics and Political Science 2002) https://eprints.lse.ac.uk/35985/1/Disspaper4-1.pdf accessed 29 October 2024.
[468] Benyon, Denver, and Fisher (n 305) 393.

instance, Dunleavy and Weir charge it with creating a culture of self-preservation or a club ethos with those who are supposed to be enforcing the standard doing so leniently.[469]

Another option would be to use what Duff terms another formal body to enforce standards.[470] In this context, this would most likely be an external and independent body (a guarantor institution).[471] Such an institution has statutory footing, and is bestowed with the power under primary legislation to create regulation or even legislation which protects or effectuates the content and impact of the norm it is trying to nurture. For example, by respecting/ educating/ nourishing the norm (a form of primary duties).[472] Additionally, a guarantor institution has the power to redress breaches of the norm (secondary duties).[473]

It is important to stress that a guarantor institution is different from both an ordinary regulator and an integrity institution (which are both also possible options for addressing deceptive representations). A guarantor institution is bestowed with both primary and secondary duties, so has the power to nurture the norm as well as acknowledge any breaches. It is on this basis that it differs from an integrity institution (like an ombudsoffice) which just has secondary duties to acknowledge breaches.[474] Unlike an integrity institution, both ordinary regulators and guarantor institutions have primary and secondary duties. What differs is the 'status of the underlying norms they seek to effectuate as well their own status as constitutional institutions […] guarantors need to be independent. This requirement of independence in turn requires guarantor institutions to be constitutionally entrenched'.[475]

As Khaitan puts it, a guarantor institution is something which is entrenched and effectuates norms which have a constitutional character.[476] Ordinary regulators, by contrast, are either; not constitutionalised, not entrenched as institutions, or are entrenched constitutionally but the underlying norm they protect can be changed easily by the government of the day.[477] In

[469] Patrick Dunleavy and Stuart Weir, 'Sleaze in Britain: media influence, public response and constitutional significance' (1995) 48(4) Parliamentary Affairs 602, 614. See also ibid 394.
[470] Duff (n 455) 285.
[471] Tarunabh Khaitan, 'Guarantor institutions' (2021) 16 Asian Journal of Comparative Law S40, S42. Khaitan defines a guaruntor institution as 'a tailor-made constitutional institution, vested with material as well as expressive capacities, whose function is to provide a credible and enduring guarantee to a specific non-self-enforcing constitutional norm (or any aspect thereof)'.
[472] ibid S45-S53.
[473] ibid S45, fn 19 citing Luigi Ferrajoli, *Principia Iuris: Teoría del Derecho y de la Democracia, vol 1* (Trotta 2011) 637–8.
[474] ibid S49. Per Khaitan, an '[i]ntegrity institutions only perform secondary duties, those that only kick in when primary duties have already been breached (although, occasionally, they may also be mandated to nourish the norm)'.
[475] ibid S50.
[476] ibid S50-S51.
[477] ibid S51.

other words, a guarantor institution has a constitutional norm which they are protecting and they have an independence guaranteed by their entrenchment. Institutions which qualify as guarantors include 'electoral commissions, human rights commissions, central banks, knowledge institutions (such as statistics bureaus and census boards), probity bodies (such as anti-corruption watchdogs, information commissioners, […] [and] broadcasting regulators […]'.[478]

The point I am making here, is that whilst ordinary regulators or integrity institutions are potential options for regulating this issue, of the three, a guarantor institution is the most appealing. It is able to more comprehensively nurture and protect the norm in question due to its primary and secondary duties,[479] and, has greater guaranteed independence[480] through 'the entrenchment of non-partisanship, independence, mandate, budgets, staffing, and other such features which governments of the day are likely to want to undermine'.[481]

While I can readily appreciate their appeal, I strongly disagree with using either of these options to respond to deceptive representations. To be sure, they would be appropriate for addressing wrongs which do not have the same magnitude. If the behaviour was a technical violation, it would be appropriate for them to be marked and censured as a milder wrong.[482] Deceptive representations to Parliament would fall under this category because they are less exploitative and there is less of a power imbalance between the deceiver and recipients. To be sure, deceptive representations to Parliament are a public wrong but they are a milder form of wrong, compared to their public counterpart.

Deceptive representations to the public are not just professional wrongs or minor violations- they are deeply significant public wrongs. For one, they are exploitative and take advantage of the recipients being less equipped to challenge deception. Two, they pose a significant threat and endangerment to the public's political preferences and the direction of wider democracy. These are issues which any ordinary citizen could be subject to, and should be safe from.[483] As a society, there is a collective interest and right in protecting ourselves from this exploitation and interference with our democracy. My point is that if either of these

[478] ibid S41.
[479] cf with an integrity institution e.g., ombudsoffices.
[480] cf with an ordinary regulator e.g., Ofgem, Ofcom.
[481] Tarun Khaitan, '*A Fourth Branch of the State?* On Constitutional Guarantors in the UK' (*UK Constitutional Law Association,* 30 March 2023) https://ukconstitutionallaw.org/2023/03/30/tarun-khaitan-a-fourth-branch-of-the-state-on-constitutional-guarantors-in-the-uk/ accessed 10 July 2024.
[482] Duff (n 455) 285.
[483] Duff (n 455) 284.

routes were used, it would not properly reflect the magnitude of the wrong or harm in public deceptive representations. In fact, it would be an inappropriate response which is weak and disproportionate.

Having rejected these two responses on the basis that something stronger is needed which better reflects the magnitude of this public wrong, we are left with the legal options. This brings us to Duff's next question; could private law be used to address the public wrong?[484] Traditionally, the law has tended to resolve issues of deceptive behaviour with two different routes: criminal and tort. If we look at offences of fraud,[485] theft,[486] bribery[487] and misconduct in public office, it is obvious that one of these approaches is criminalisation. On the other hand, tortious liability is another solution, (as seen with false representation)[488] in which individuals can use to bring against others who have deceived them.

While I recognise their use in this context, I have two reasons for arguing that criminal law is the appropriate response. One, on normative grounds and the other on practical. It is fairly obvious that there is a normative distinction between criminal and private law. Criminal law is concerned with whether there has been a culpable wrong. So, an act has been committed but the person is also deemed morally responsible and worthy of blame. As a result, action is brought on behalf of the polity and tends to involve harsher sanctions e.g., a criminal record and sanctions like imprisonment.[489] By contrast, private law is still concerned with wrongdoing but looks at harm instead of culpability. As opposed to sanctions, there is a focus on compensation and the individual answers to the plaintiff, not the state.

To determine which response is most appropriate, Duff suggests that we must answer a number of questions,

> [We need to ask] whether it should be left to the victim to decide whether and how far to pursue it (whether to sue, whether to settle the case without securing an admission of liability, whether to enforce a judgment in her favour); or is it a kind of wrong that the polity should make its own, thus both sparing the victim the burden of pursuing the case herself, and (potentially) depriving her of the power to drop it? Should the law's focus be only on whether the complainant was wrongfully harmed by the

[484] ibid 287.
[485] Fraud Act 2006, s1.
[486] Theft Act 1968, s1.
[487] Bribery Act 2010, s1.
[488] *Derry v Peek* (1889) 14 App Cas 337 (HL).
[489] Duff (n 455) 281.

> defendant; or on whether the defendant culpably wronged the complainant? Should a verdict against the defendant lead only to victim-focused damages or reparations; or should it lead to a punishment that marks (as is often said) the 'debt' that the defendant owes to 'society'?[490]

Using the normative differences between criminal and private law to influence my argument, I suggest that deceptive representations to the public should be subject to criminalisation. First off, politicians who engage in deceptive representations should be recognised as culpable. They have not just wrongfully-harmed the public, they have gone beyond this into culpable-harm. The politicians who engage in these representations hold positions of trust and responsibility. When they make these representations, they are exploiting their position to abuse the power imbalance in the relationship that they have with the public. The forethought and manipulation are indicative of acts which are not just harmful wrongs, but ones which are worthy of blame. To such a degree that they should be formally marked as such by the criminal law.[491]

Second, criminal law accurately captures the social nature of the act.[492] Private law uses a plaintiff-based approach, which relies on private citizens to bring causes of action. This is an important point to raise because private law fails to appreciate debts that are owed to society as a whole, as opposed to specific individuals. I argue that deceptive representations strike at the heart of society and democracy and as such the debt is owed to society (represented by the state). While the representations are made to individuals, they have a broader significance. It is important not to under-emphasise how much impact these representations can have on the public and the ramifications to democracy. Thus, I suggest that those who make these representations should be answerable to the polity as a whole, not just the individuals who can bring a claim. Certainly, the normative characteristics of criminal and private law provide good reason to turn to criminalisation. Private law would simply not accurately capture the normative characteristics in these deceptive representations. It does not convey the level of censure or authoritative and categorical guilt needed to reflect this act.

In addition to the normative reasons, there are practical reasons for turning to criminal, as opposed to private law. Foremost, the criminal law has a more transparent process and there are appeal provisions in place for contesting guilt. On a more secondary basis, tortious

[490] ibid 288.
[491] ibid 293-294.
[492] ibid.

liability raises some logistical concerns, such as questions regarding who would bring the cause of action. Due to the fact that torts place the onus on private citizens as opposed to the state, it poses a significant financial barrier to the pursuit of a legal remedy (although I admit, that this objection could be relatively easily mitigated if there was a singular claim, coordinated across multiple parties,[493] which would dissipate the cost of hiring legal representatives and the time required from private citizens).

Additionally, tort claims are essentially unrestricted meaning anyone can bring an action against another. This has the potential to lead to a floodgate of cases. Say for instance, that we introduce a tort for generalist political deceit, and a politician disseminates their deceit on social media. Potentially, this could lead to millions bringing action against them, and 'subject the defendant to "liability in an indeterminate amount for an indeterminate time to an indeterminate class'"[494] (a crushing liability). This is something which would overwhelm and slow down the legal process something, which the courts have emphasised should be avoided. Unlike tortious claims, most criminal proceedings rely on the CPS to bring actions on behalf of the public. Whilst members of the public do have a residual power to bring private prosecutions, this is very rare, and for the most part discouraged.[495] The decision to bring action being made by a public body is significant. There is more control over the number actions which can be brought (avoiding the floodgate issue) because the CPS tends to be more selective in the actions brought.[496] Seen through a practical lens, there are good reasons to utilise the criminal law as opposed to private law.

The aim with using Duff's theory of deliberation was to comprehensively discuss and compare the different responses which we could deploy to address deceptive representations to the public. I used this theory as an apparatus for guiding my discussion of the various options[497] and worked through the steps to substantiate the argument that we should utilise the criminal law. Having arrived at the conclusion that the criminal law is the most

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[493] Owen Fiss, 'The Political Theory of the Class Action' (1996) 53(1) Washington & Lee Law Review 21, 24.
[494] *Alcock and Others Appellants v Chief Constable of South Yorkshire Police* (1992) 1 AC 310 (HL) 364-365 (Parker LJ) citing, *Ultramares Corporation v Touche* (1931) 255 NY 170, 179 (CJ Cardozo). See also Hamiisi J Nsubuga, 'Towards a Tort of Political Negligence: Political Deceit, Political Misrepresentation and the Brexit Conundrum' (*International Law Blog*, 7 January 2019) https://internationallaw.blog/2019/01/07/towards-a-tort-of-political-negligence-political-deceit-political-misrepresentation-and-the-brexit-conundrum/ accessed 17 July 2024.
[495] *Jones v Whalley* [2006] UKHL 41, (2007) 1 AC 63 [16]. The case concerned an assault which had been settled by the CPS with a caution. A private prosecution was then brought.
[496] Kenneth W Simons, 'The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives' (2008)17 Widener Law Journal 719, 719-720.
[497] Duff (n 455) 298.

appropriate response, I can now reflect on the potential benefit of using it. By this I mean that it has potential for not just being a suitable expression and response to this behaviour, but may have the effect of deterring it.

A potential deterrence effect

An added benefit to using the criminal law may be a reduction in the number of deceptive representations.[498] As already mentioned, the criminal law is expressive and symbolic- it is after all the most severe expression of societal disapproval. The criminal law achieves this through a systematic and holistic reflection on the behaviour, beginning with the stigmatisation associated with the act. The act of criminalisation is a declaration that the state sees it as wrongful and society recognises the severity of being labelled a criminal (e.g., having a criminal record). Being labelled a criminal is something which needs to be disclosed in certain formal contexts (e.g., employment and visa applications), something which is not required from other actions, whether it be civil law or other regulation.[499] Of course, the punishment itself then acts as a severe form of censure.[500] While other political and legal mechanisms do have sanctions attached (e.g., typical political sanctions involve a formal reprimand, suspension, or loss of pay and civil remedies involve damages) they are generally not as costly as criminal sanctions which tend to involve a fine or imprisonment. My point is that the criminal law has a social significance and resonance[501] which other mechanisms do not carry. It sends a powerful message that the conduct will not be tolerated and that if someone engages in this behaviour then they will be labelled a criminal.

In this sense, a response which uses it could be forward-looking as well as backward-looking. That is to say it could proportionately punish the behaviour and act as an effective deterrence. What I mean by this, is that the cost of being labelled a criminal and the actual sanctions imposed should mean that it has a significant cost. The deterrence model is based on rational cost-benefit analysis e.g., if you increase the cost of something less of it will be consumed. So, if you make a behaviour more costly to engage in less of it will occur[502] because the

[498] ibid 295. Note that Duff argues that we 'should not take punishment to be the focus of criminal law, or the main point of criminalization […] However, insofar as we can justifiably attach such consequences, whether penal or non-penal, to conviction for a criminal offence, they can generate reasons for criminalization: one reason for criminalizing a type of public wrong, rather than opting for some other kind of response, is that this will make such consequences available'.
[499] A P Simester and Andreas von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart Publishing 2011) 4.
[500] ibid 5.
[501] Simester and von Hirsch (n 499) 4, 212.
[502] Gordon Tullock, 'Does Punishment Deter Crime?' (1974) 36 The Public Interest 103, 105.

benefit of engaging in the behaviour is outweighed by the burdens of potentially being caught and punished.[503] If we draw on this reasoning then it is natural to turn towards the more costly mechanism of a criminal offence for political deceit, compared to say regulation through a parliamentary committee or an ordinary regulator. In turn, this should reduce the amount of political deceit that occurs. The main attraction of using this model, is that it works to prevent the behaviour from occurring in the first place, and as a result is forward-looking.[504] The fact that people are often unwilling to change their mind once they have formed a political opinion means that it is logical to try and pre-empt it: preventing the behaviour from happening and the harm before it occurs. Of course, we need to impose consequences which reflect the gravity of one's political deceit[505] (retribution) but this may have the added benefit of changing future behaviour. This is particularly appealing as we are looking to protect the public's ability to form political preferences and engagement in democratic procedures.

Now one may counter this, with the argument that deterrence theory is not that successful, drawing on empirical studies to do so. Take for instance, Anderson's survey into male prisoners and the factors influencing their offending. Based on data from 278 interviews of male inmates at two medium-security state prisons and one county jail from 1997-99, Anderson concluded that most criminals do not contemplate the potential effect of the criminal behaviour before engaging in it. He notes that '76% of active criminals and 89% of the most violent criminals either perceive no risk of apprehension or are incognizant of the likely punishments for their crimes'.[506] The issue is that this theory relies on individuals making rational decisions. Their rational decision-making was generally infringed by two reasons. One, some were uninformed about the costs of their behaviour, others were impervious to the costs because of their lack of cognisance e.g., drug, rage, psychosis, or heat of the moment behaviour. The deterrence-effect was therefore lost.[507]

While I recognise this counter-argument, there is evidence to suggest that the success of deterrence theory varies by context. Certainly, there is a propensity for it to be more effective in cases of minor or administrative crime when individuals undertake rational choice theory

[503] Thom Brooks, *Punishment: A Critical Introduction* (2nd edn, Taylor & Francis Group 2019) 45.
[504] ibid 44.
[505] ibid 48-49.
[506] David A Anderson, 'The Deterrence Hypothesis and Picking Pockets at the Pickpocket's Hanging' (2002) 4(2) American Law and Economics Review 295, 295.
[507] ibid 303-304.

before the act i.e. weighing the risks up against the benefits. Dölling et al's meta-analysis of 700 studies, notes the effect of the deterrence model varies by type of crime. They note that 'statistically significant estimations [are] […] to be found [in minor crimes like] […] traffic offences, whereas the deterrence hypothesis is rarely confirmed in the case of more serious offences'.[508] They attribute this to the role of rational choice, which is more prevalent in minor offences. Major crimes are often characterised by expression e.g., emotion and spontaneity which often do not give the opportunity for rational thinking and a risk assessment.[509] Similar findings can be seen in Abramovaite et al's[510] analysis of police forces and the reduction of theft, burglary and violence in England and Wales. Yes, increasing the certainty of punishment (measured by increased police detections) was associated with a reduction in non-expressive crimes like theft and burglary, but it did not have the same effect on violent crime. '[V]ariation in the celerity of sanction has a significant impact on theft offences but not on burglary or violence offences. Increased average prison sentences (severity) reduce burglary only'.[511] Thus, it is fair to say that deterrence-effect is questionable for influencing certain types of behaviour.

Yet, deceptive representations are not crimes characterised by emotion or spontaneity so they are an act which would naturally lend themselves towards a risk assessment. Further, once the politician engages in the risk assessment there are a number of factors that would colour their perception. First, a politician is likely aware of the risks and penalties attached to the offence e.g., likely punishment, so will be well-informed of the potential costs and fully understand the implications of engaging in the behaviour and getting caught.[512] Second, politicians have a high social and economic status which should mean that they have more to lose if they engage in criminal acts.[513] Those 'who receive relatively few rewards from society, whether [it be] economic or social, would tend to place a greater value on the potential rewards for criminal activity'.[514] Conversely, those who receive more rewards will perceive 'greater

[508] Dieter Dölling, Horst Entorf, Dieter Hermann and Thomas Rupp, 'Is Deterrence Effective? Results of a Meta-Analysis of Punishment' (2009) 15 European Journal on Criminal Policy Research 201, 215. See also 203.
[509] ibid 215. See also Anderson (n 506) 298, 301-304.
[510] Juste Abramovaite, Siddhartha Bandyopadhyay, Samrat Bhattacharya, and Nick Cowen, 'Classical deterrence theory revisited: An empirical analysis of Police Force Areas in England and Wales' (2023) 20(5) European Journal of Criminology 1663, 1663.
[511] ibid.
[512] Paul H Robinson and J M Darley, 'Does Criminal Law Deter? A Behavioural Science Investigation' (2004) 24(2) Oxford Journal of Legal Studies 173, 176.
[513] Michael R Geerken and Walter R Gove, 'Deterrence: Some Theoretical Considerations' (1975) 9 Law Society Review 497, 498, 507.
[514] ibid 508.

informal costs […]'[515] from engaging in the behaviour such as loss of status and prestige. The political profession aligns with the latter and will mean that they potentially have a lot to lose from engaging in criminal behaviour. In particular, the publicity that is associated with the role, and the long-term effect on their career and livelihood that being caught may have[516] are particularly notable costs and should act as a significant deterrent to those considering engaging in it.

I admit that the deterrence-effect may be reduced once a person of high socio-economic status is convicted of the offence. This is evident in Weisburd et al's 1995 study into 742 offenders convicted of white-collar crimes between 1976-78.[517] In this study, harsher sanctions like imprisonment had no major effect on reoffending[518] however, this is likely because the costs of being caught become less significant once there has been that first conviction. Their reputation or employment prospects, for instance, will have already been damaged. My point is that a conviction of this nature would likely be career-ending, so there would be limited potential for the costs becoming less significant, or repeated offending. Thus, the deterrence effect should work, reducing the number of politicians committing the offence and making deceptive statements to the public.

My aim in this chapter was to put forward an argument in favour of criminalisation. I fully recognise that there are a number of potential regulatory options available, but I favour a criminal offence. My primary reason for this is that it is the normatively appropriate response. This behaviour is serious and is worthy of the normative characteristics and expressive qualities that come with criminalisation. It is also possible that criminalisation may have the added benefit preventing the democratic implications before they occur.

The goal with this chapter is to create a bedrock which I can build upon Chapters 7 and 8. Having set out the argument that the criminal law should be introduced, I move on to elaborating on how criminal liability could be introduced. I begin by suggesting the type of deceptive representations which are made to the public that should be subject to criminal liability, and in Chapter 8 I turn to exploring the type of criminal penalties which should be attached to the offence.

[515] ibid 508.
[516] ibid 503-509.
[517] The study assessed the effect imprisonment on recidivism over a 10.5 year period. Prison and non-prison groups were compared. The groupings were based on factors that led to their prison sentence.
[518] David Weisburd, Elin Waring and Ellen Chayet, 'SPECIFIC DETERRENCE IN A SAMPLE OF OFFENDERS CONVICTED OF WHITE COLLAR CRIMES' (1995) 33 Criminology 587, 587, 593-597.

Chapter 7: The features of a new offence: considering the threshold for criminal liability

With my argument for criminalisation laid out, I can now move towards considering at what point we should impose liability. I recognise that it is beyond what I can undertake in this thesis to offer a complete draft and defence of the legislation, but what I can do is put forward an argument of what we should be seeking to criminalise and how we could incorporate these ideas into an offence. In this chapter, I make the argument in favour of a new criminal offence for deceptive representations which are made by Westminster politicians towards the public. Specifically, I make the case for criminalising those instances which are indicative of greater culpability and potential for harm (for ease, I term this class of representation as the most egregious instances). To do this, this chapter is structured in two. I begin by setting out a case for why we should only be concerned with the most egregious instances. I then turn to considering how this could be interpreted on a statutory basis.

Criminalising deceptive political representations which are made to the public

In my view the remit of the criminal offence should be limited to instances which are indicative of the greatest culpability and potential for harm (hereafter referred to as the most egregious deceptive representations). By this I mean instances which are similar to Boris Johnson claims over EU membership during the Brexit campaign[519] or Tony Blair's claims over Iraq having WMD's.[520] Another example, would be Suella Braverman's misleading claims over immigration.[521]

I will discuss which features capture this egregiousness in the second section of this chapter but in very brief terms these are misleading and false representations which have additional attributes. On a very basic level the representation must be made by a Westminster politician and the recipient must be the public (or at least the politician should have the knowledge that it will be or will likely be disseminated to the public at a later point). Furthermore, the representation must be material, unjustifiable and the deceiver must make the representation, either knowing that it is false or doing so recklessly. These five features are indicative of the deceptive representations which are so egregious that they warrant the imposition of criminal liability. It is these very features which I suggest should form the basis of the offence.

[519] (n 8 and n 9).
[520] (n 6 and n 7).
[521] HC Deb, 7 March 2023, vol 729, col 152. See also (n 12 and n 13).

I offer a four-fold rationale and defence for using this as the point for criminal liability. The crux of my argument is that this is a good method for creating a narrowly drafted offence. In turn, I suggest that a narrowly drafted offence which is based around egregiousness will raise fewer objections, such as concerns over free speech or politicisation of the judiciary.[522]

Free speech obligations

Foremost, I am driven by free speech concerns. Concerns over free speech are often the leading objection to imposing criminal liability on this type of speech.[523] In particular, there are concerns that such an offence would not be compatible with the UK's international obligations. These obligations seek to uphold the value of free political speech and a judgment of incompatibility would certainly indicate a failure to respect the value of free expression.

I recognise the value of free speech, but also suggest that criminalising the most egregious deceptive representations is likely to be compatible with these obligations. Under Article 10 of the ECHR there is a general guarantee afforded to free expression, and political expression is guarded even more fervently. For political expression there is even less capacity for interference and this is reflected in ECtHR case law. Traditionally, the court has been very reluctant to grant interferences, offering protection to an entire spectrum of political speech from information or ideas which are favourably received to those which are indifferent and even to those which offend, shock or disturb.[524] As such, not only have unassuming types of political speech been protected (such as ideas which challenge the current institutional order), but also more controversial and offensive types such as where a political applicant engaged in hateful, hostile or offensive rhetoric.[525]

More importantly for the purposes of this thesis, ECtHR jurisprudence supports the fact that Article 10 protection extends to making false political claims. The pertinence of this is clearly illustrated by *Salov v Ukraine.* In this case Mr Salov (the applicant) had disseminated incorrect information about the alleged death of a presidential candidate. Accordingly, he was

[522] Note that Horder argues that we should be tolerant of what he terms political viewpoint information. In particular, he offers a number of reasons for why we should not criminalise such speech, which I will address in this chapter. For full detail see, Jeremy Horder, *Criminal Fraud and Election Disinformation: Law and Politics* (n 15) Ch 1.
[523] E.g., ibid Ch 1.1 and 1.2.
[524] *Eğitim ve Bilim Emekçileri Sendikası v Turkey* (n 133) para 67, citing *Handyside v United Kingdom* (n 133) para 49, and *Jersild v Denmark* (n 132) para 37.
[525] Cf *Eğitim ve Bilim Emekçileri Sendikası v Turkey* (n 133) paras 70-74 with, *Jersild v Denmark* (n 132); *GÜNDÜZ v. TURKEY* App no 35071/97 (n 135); *Erbakan v Turkey* (n 135).

found to have breached Article 127 of Ukraine's Criminal Code by interfering with 'electoral rights, or […] with the activity of an electoral commission, for the purpose of influencing election results […]'. When the ECtHR considered the case, such an interference was found to be a violation of Article 10.[526]

I argue that the Court would likely not reach a similar conclusion if the UK decided to implement a criminal offence for the most egregious deceptive representations. In fact, the reasoning behind the decision in *Salov,* suggests that the problem was somewhat due to the nature and characteristics of the deception itself, as opposed to the regulation of political deceit more broadly. The court seemed to have no issue with the fact that the state had satisfied the first two limbs of the test for legitimate interference under Article 10(2) and the issues with compatibility came further on.

For instance, the first part of the test was easily satisfied. The Court found that the legislation under Article 127 was sufficiently foreseeable and clear so as to allow an individual to see the consequences of their behaviour.[527] Second, the ECtHR affirmed that safeguarding against false or misleading political information fell under a legitimate aim.[528] Specifically, of protecting the public's free will and engagement with the democratic processes (such as choosing a presidential candidate).

While the first two limbs of the test were satisfied with relative ease, the Court judged that Ukraine had failed to meet the final part of the test. The interference failed to be necessary in a democratic society and proportionate to the aim pursued. In relation to necessity, the Court drew particular attention to the nature of the speech in question, noting that the information was not produced or published by the defendant. Instead, it was: a personalised assessment, had limited impact, and lacked evidence of being made with deceptive intention.[529] All these characteristics indicated that the statement had minimal impact (harm) and that Mr Salov was not blameworthy. These characteristics in conjunction with the fact that Article 10 does not prohibit discussion or the dissemination of information (even if it is strongly suspected to be untrue), meant that there was no need for the interference. Aside from the issues with necessity, the sanctions imposed were seen as disproportionate to the aim pursued. In

[526] *Salov v Ukraine* App no 65518/01 (ECtHR, 6 December 2005) paras 10-32.
[527] ibid paras 108-110.
[528] ibid paras 101 and 110. See also *AHMED AND OTHERS v THE UNITED KINGDOM* App no 65/1997/849/1056 (ECtHR, 2 September 1998) para 52 where the Court stressed the importance of ensuring the free will of the people during elections and the need to protect democratic society from interferences.
[529] *Salov v Ukraine* (n 526) paras 113-116.

particular the nature and severity of the penalties imposed far outweighed the aim of ensuring the democratic process.[530] In this case, Mr Salov was given a sentence of five years (which was suspended for two), a fine, and annulment by the Bar Association of the applicant's licence to practise law.

Now it is important to stress that I agree with the Courts approach in *Salov*. For that particular case and speech, the measure was unnecessary and the sanctions imposed disproportionate. However, this case does indicate potential for criminalisation. The judgment suggests that there may be circumstances in which political deceit *may* in fact be criminalised, and done so in a way which is compatible with Article 10(2). Of course, the issue of proportionality may be fairly easily resolved by introducing an offence with less severe sanctions e.g., not imprisonment (I will discuss this further in Chapter 8). The issue of necessity, however, requires more work.

I fully admit that not all low value speech (including false or deceptive political representations) justifies criminalisation. Nevertheless, the Court's approach may be different if there was a change in the nature of the deceit e.g., it was indicative of greater culpability and had certain qualities which exacerbated its threat of harm. Indeed, in the judgment the lack of these qualities was noted. For instance, the Court noted that Mr Salov had made a personalised assessment, the statements had limited impact, and there was a lack of evidence of deceptive intention. Whilst this is something which was not met by the facts in *Salov*, the reasoning suggests that there are factors which may sway the Court's assessment.[531]

The point to be taken is the offence would need to be more discerning with what it addresses compared to *Salov*. This is something which I take heed of and incorporate into my offence. My proposed scope for criminal liability is narrowly construed and only seeks to address the instances of deceit which are the most egregious (those which indicative of greater culpability and have the potential for the most harm to be caused). Thus, this offence is more likely to satisfy the requirement of necessity. Even though the ECtHR has previously not viewed interferences with similar speech as compatible with Article 10, there is reason to argue that compatibility is possible, particularly when a more narrow and carefully construed offence is imposed.

[530] ibid paras 110-113 and 115.
[531] ibid paras 113-116. See similar points being made about a more discerning threshold in the US context, Staci Lieffring, 'First Amendment and the Right to Lie: Regulating Knowingly False Campaign Speech after United States v. Alvarez Note' (2012-13) 97 Minnesota Law Review 1047, 1061-1076.

Aside from addressing the concern surrounding compatibility with our free speech obligations, I have broader reasons for turning towards narrowly drafted criminal liability which is based around egregiousness.

The legislative problem

One reason is that it would mitigate some of the issue with what I term the legislative problem. Per the UK's legislative process, we are in a somewhat difficult situation whereby we are reliant on the very people the legislation would be restricting to pass the offence. I admit that traditionally Parliament has been unwilling to support the passage of similar legislation. For instance, there have been attempts to pass Bills making it illegal for politicians to make deceptive statements (the Elected Representative (Prohibition of Deception) Bill was introduced in 2006 and 2022 and both times the Bills failed to get a second reading). While I admit that there will be a degree of self-interest to overcome, there is reason to believe that Parliament could support a new and different offence. A narrower type of liability has this appeal- it poses less of a threat or restriction on their behaviour compared with something which targets a broader type of deception. It would also be reserved for the most egregious instances, meaning it would not be used widely. I posit that politicians are more likely to overcome their self-interest and pass the legislation if the deception being targeted is a small subset and the offence is also narrowly construed.

While the appeal of the offence is important, it is also worth noting that Parliament can set aside its self-interest. What is particularly indicative is the recent move by the Welsh government in which they commit to make lying in politics illegal.[532] Although what this will entail is unknown (the legislation has not been drafted) the prospect that politicians would be willing to commit to an Act to criminalise this behaviour is realistic. Setting aside these more specific reasons, it is important to stress that British politicians are answerable to the public. If the public feels that their current representatives are not serving their interests, then politicians can lose political power at the next election. Therefore, if enough public pressure is exerted and expressed in favour of a Bill to address this issue, then politicians would be forced to support it because a failure to do so would risk their political power.

[532] Steven Morriss, 'Welsh government commits to making lying in politics illegal' (*The Guardian*, 2 July 2024) https://www.theguardian.com/politics/article/2024/jul/02/welsh-government-commits-to-making-lying-in-politics accessed 3 November 2024.

Judicial politicisation

By extension, a narrowly construed offence would also placate concerns of judicial politicisation. As in the argument that creating a criminal offence to address political deceit would encourage the judiciary to over-step their bounds and become involved in political matters, when these institutions should be kept separate. Horder, for one, makes such an argument, stipulating that the courts may not be best institutionally placed to decide on such claims. 'The delicate constitutional balancing act involved was recognised […] when the general authority to adjudicate in cases of election fraud, corruption and intimidation was first transferred from a Committee of five MPs (who tended to vote on partisan lines), to a judge of the superior courts'.[533]

In fact,

> [w]hen consulted about taking over such a responsibility from Parliament, in a letter of 6 February 1868 to the Lord Chancellor, Chief Justice Cockburn complained that: The decision of the Judge given under such circumstances will too often fail to secure the respect which judicial decisions command on other occasions. Angry and excited partisans will not be unlikely to question the motives which have led to the judgment. Their sentiments may be echoed by the press. Such is the influence of party conflict, that it is apt to inspire distrust and dislike of whatever interferes with party objects and party triumphs.[534]

While this objection can be readily appreciated, what I am advocating for is a narrow offence. It would only involve expanding the judiciary's role in addressing political behaviour to a small degree. Indeed, we already have a number of criminal provisions which each regulate certain behaviour from our political representatives and public figures but these are all narrow in scope. Again, I refer to section 106 of the Representation of the People Act 1983 as well as other offences relating to bribery (such as section 2 of the Bribery Act or section 113 of the RPA 1983) and various provisions which relate to election expenses.[535] Moreover, we already have criminal offences for promulgating false information (as with section 179 of the Online Safety Act 2023) but again this is narrowly drafted.

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[533] Jeremy Horder, 'Criminal law at the limit: Countering false claims in elections and referendums' (n 195), 433. The power was transferred through the Election Petitions and Corrupt Practices at Elections Act 1868.
[534] Jeremy Horder, *Criminal Fraud and Election Disinformation: Law and Politics* (n 15) 433 citing, *R (on the application of Woolas) v The Parliamentary Election Court* (n 427) [23].
[535] RPA 1983, s72-90D.

My point is that the law already addresses other political issues as well as false or misleading information, and has not been brought into disrepute. Limiting the scope of the offence to the most egregious representations limits the expansion of judicial purview to a very small degree, and thus not does not undermine judicial independence.

One may respond to this and ask would the offence have much of an impact. I completely acknowledge that the offence is quite narrow and would have limited applicability. It is however, important to clarify the extent of the narrowness. First, I am not suggesting that an offence should be introduced which is as narrowly drafted as section 106 currently is. As in, dependent on demonstrating a number of very specific contingencies: e.g., a certain time-period, a certain type of deceptive representation, a particular subject etc. Such an approach to drafting would mean the offence would have very little coverage, prosecutions would be unlikely and, the deterrence-effect would be diminished. Thus, while I am advocating for a narrow offence, it is imperative to stress that it is by no means as narrow as section 106 with a plethora of very specific and exacting requirements. The moderately narrow approach which I am taking, however, is something that I view as a strength as opposed to a limitation. I am deliberately not proposing something that would be used frequently. Its purpose is not to address deceptive representations more broadly. Rather, it is more narrowly drafted so as to only address the most egregious representations and the most straightforward cases. So, in my view it is right that this offence would have limited use. This is actually beneficial and would help to not encourage a culture of secrecy and lack of transparency.[536]

Enforceability challenges

Another potential objection is that the criminal justice system raises certain enforceability challenges. For instance, the CPS requires there to be a realistic possibility of conviction and it to be in the public interest before proceeding with prosecution.[537] Further, even if they do decide to progress with prosecution, court proceedings can take a long time by which point the damage is done. Again, I recognise that this is a valid point. However, this seems to be a natural limitation of using the criminal justice system to address any type of behaviour. While these are issues with its operation, these are widespread issues with the criminal justice system. It does not mean that we should not introduce new criminal offences simply because the threshold is high and the system is slow. It is also worth emphasising that I am not

[536] ibid Ch 1.1.
[537] ibid Ch 1.6, particularly the reference to the fact that the similar New Zealand's Electoral Amendment Act 2002, s81 has not had any prosecutions.

imposing something which would produce a disproportionate strain on the system. The whole point of the offence is to introduce something which will be used relatively sparingly. As such, it is very unlikely that if the offence is introduced, that we will end up with a watershed of cases, overly-burdening an already burdened system.

A final broader concern could be over potentially vexatious or frivolous complaints. It may, for instance, over-burden the police. Although they have specialist departments such as those which address election-based offences, they are under resourced and placing this burden on them may create questions on their political affiliations. For these reasons I suggest using a separate investigating body, specially dedicated to investigating complaints. In this sense, I take a similar position to the Institute for Constitutional and Democratic Research in their White Paper on honesty in Welsh politics.[538] The idea is that to avoid vexatious or frivolous complaints, an independent body like the Parliamentary and Health Service Ombudsmen could be used to undertake a preliminary investigation, determining whether there has likely been an offence before handing the findings over to the CPS.

In conclusion, these are my justifications for taking this approach and my hope is that this would placate some of the frequently cited objections to criminalising this type of deceptive representation. This leads me to my next section which focuses on ascertaining what the most egregious deceptive representations to the public are. Essentially which features point towards higher culpability and harm, and how could these be incorporated into a new criminal offence. Put simply, I am arguing where criminal liability should be introduced and how it could be done.

Expanding on the proposal for a new offence

As said above, there are five features which capture the most egregious instances of deceptive representations which are made to the public. These are; a blameworthy state of mind, the political role of the deceiver, the deceit being made to the public at large or any section of, the deception being a matter of material public interest, and it being unjustified. I will explore each of these in turn.

Feature 1: A blameworthy state of mind: knowing or reckless deception

At the heart of deceit is the supposition that it should be something which is a conscious decision. In a sense, the deceiver should have knowingly and made the choice to try and

[538] Institute for Constitutional and Democratic Research (n 303) p22 para 38.

deceive another. I do not dispute this. As I explored this issue in-depth in Chapter 1, I will not delve into the philosophical side of a blameworthy state of mind in too much depth. Instead, I will restate the linguistic analysis and then move on to exploring how this state of mind could be reflected in the statutory drafting.

Language is a social construct, and as a society we have shared intuitions and associations with the term deception. Specifically, we dislike deception-[539] it is a negative behaviour which not only invites reproach and condemnation, but we actually blame the deceiver. Logic dictates that if we need to assign blame, then the deceiver must have done something which is worthy of blame. In practical terms, the deceiver must have made a decision to deceive, something which is indicated by a discrepancy between what the deceiver presents and what they know or believe.

If we work on the premise that deception does require there to be the presence of a conscious decision to be deserving of blame, then the natural question that follows is how does this manifest? On a legalistic basis, the law permits intention being based upon actual knowledge that they are presenting something false or misleading as well as an awareness that they likely are (recklessness).

Of course, we can point to very recent instances of this, like the National Security Act 2023. In Schedule 2 section 11 of the Act, a person commits an offence if they (when under an order from the court) (a) 'make a statement which they know to be false or misleading in a material particular, or (b) recklessly make a statement which is false or misleading in a material particular'. Equally, we can see this evident in more established legislation such as in The Fraud Act 2006, Sch 1, s31 and the Theft Act 1968, s15 (the latter of which was repealed). Both define deception as 'any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person.' The point is that from a legal standpoint regardless of whether someone knows that what they are representing is false or misleading, or, knows that there is a likelihood of the representation being so, they are both forms of deception. I support this approach and suggest that there are at least two key reasons for defining deception as a state of mind which includes deliberate and reckless intent.

[539] Michael P Lynch, 'Deception and the Nature of Truth' (n 34) 197-198. Thomas L Carson, *Lying and Deception: Theory and Practice* (n 33) 148. For further detail on the definition of deception see Ch 1.

First, it makes fits with my conceptualisation of the term, and specifically the theme of blame. If our social understanding of deception means that it needs to be something which invites reproach and blame, then there needs to be some sort of intention on the part of the deceiver. There must be a deliberate attempt to cause another to have or maintain a false belief. In other words, the deceiver must have made the conscious decision to try and deceive, by presenting something which they believe to be false. Thus, it stands to reason that; deceptive intent would not only include knowing intention but also recklessness (knowing that there is a risk that what you are inducing another to believe is false but doing so anyway). Although the nature of the decision to deceive varies, the decision itself is there. There is an awareness that what they are presenting is false (or at least likely is) and the decision has been made to convey it. The very existence of this decision at all is sufficient to qualify as a form of deceptive intent and be worthy of the blame that we intuitively associate with deception.

Conversely, it is that lack of a presence of the decision which makes forms of lack of intent like carelessness or indifference not sufficient. In both of these cases, the so-called deceiver is not actually intending to deceive- they have not made that conscious decision. Instead, they are unaware or ambivalent to what the situation is (whether it be truth or falsity). Although these are obviously disregarding the truth, if we follow our linguistic intuitions about the term, they cannot be treated as deception.

Aside from being in-keeping with the notions of blame which we associate with this term, qualifying deception in this way has logistical benefits. It in some way lowers the standard, making the offence less rigid and easier to prove. As put by Glanville Williams in his work on the development of recklessness, '[s]ubjective recklessness is sometimes harder to establish than intention; but sometimes it is easier, since it does not (like intention) require proof of purpose, or of knowledge of the certainty of the consequence'.[540] He continues, drawing up the striking coal miner case of *Hancock* to make his point.[541] In broad terms, this case concerned coal miners who had thrown a concrete block at a taxi. This had resulted in the driver's death. The determinative question was whether this qualified as murder. In other words, did they have the intention and foresight needed to qualify for murder?

As put by Williams they,

[540] Glanville Williams, 'The Unresolved Problem of Recklessness' (1988) 8 Legal Studies 74, 75.
[541] *Hancock* [1986] 455.

> may or may not have intended to kill their working colleague, but they certainly intended to put him into great peril and were reckless as to killing him. […] In a-case like this, it may be hard for a jury to decide whether the attacker intended to hit the victim, but it is easy for them to decide that he wanted at least to give the victim a fright by a narrow miss, and in so doing knowingly took a risk.[542]

The argument that Williams is making, is that recklessness can be easier to prove than actual knowledge and of course, the same logic applies to proving instances of deception. For example, it would be harder for the prosecution to prove that a politician deliberately intended to cause or maintain a false belief. However, it would be easier if there was a degree of flexibility and recklessness was also part of the standard. So, say that the politician knew there was a likelihood that what they were saying was false or misleading but made the representation anyway.

Yet, it is precisely this reason which gives rise to the obvious counter argument. That is, having a more inclusive threshold for the state of mind may be less appealing for politicians and we can suppose that they may be deterred from passing the legislation. Of course, recklessness does present a greater encroachment on their behaviour. It would be unsurprising if this did not invoke a resistance to passing legislation. While I can understand the concern against including recklessness, it is not something which I regard as significant. It is important not to overstate how much more inclusive the threshold would be if it included recklessness. Yes, having recklessness does make the offence more applicable, but I argue that it would not overly encroach on behaviour. A politician would still have had to actually make the decision to deceive, so it is not as if false or misleading representations which were made due to a mistake or lack of care would be sufficient.

Unlike the first feature which is more concerned with pin-pointing the culpability and blameworthiness, the second and third features grapple with the types of deceptive representations which cause higher levels of harm and indicate greater culpability. In my account, there are two requirements for this. One, the deceiver needs to be a Member of the House of Commons or Lords or a candidate standing to be an MP. Two, the recipient needs to be the public at large or any section of the public.

[542] Williams (n 540) 75.

Feature 2: The deceiver must be a Member of the House of Commons; a Member of the House of Lords; or standing as a candidate to be a Member of Parliament

Standard accounts of democratic participation recognise the importance of various elites in shaping the political opinions and preferences of the public. 'Citizens have clear incentives to take political cues from those more knowledgeable, typically experts or elites whose views are conveyed by the media'.[543] The elites which carry this influence are a 'wide range of individuals and organizations, including politicians, political officials, policy experts, interest groups, religious leaders, and journalists'.[544] While all elites have a certain level of influence, there is particular reason to defer to politicians. Unlike other public figures and organisations, they have the unique position of not only being professionals in the political field but also being informed and party to the inner workings of policy. Consequently, they are perceived as being more credible, meaning the public more inclined to listen to them. Due to the influence their position carries and the presumption that they will have a higher level of knowledge, their deceptive representations carry greater weight. They are more likely to be listened to and believed. If, say, a Minister makes a false or misleading claim about foreign policy, we can safely assume that they are going to have more sway than a celebrity. Accordingly, the information imparted be treated with greater reverence. The logical conclusion is that a politician is going to cause more harm.

At this point one may assume that I am proposing that all politicians should qualify for this type of criminal liability. I should stress that this is not the case because whilst I am concerned with the role and potential for harm, I am also looking at its relationship with culpability. There are certain types of politicians which have a greater culpability due to the nature of their role. What I am suggesting is not just distinguishing politicians from the broader category of elites, but also certain types of political roles. What I propose is a further demarcation based on roles which have not only have an obligation to act on the public's behalf but also those who have a very strong obligation not to engage in deceptive representations.

As said at the start of this thesis, the political sphere relies on the vesting of power through a chain of delegation. The basic backbone of the chain is that power is delegated from the

[543] Gilens and Murakawa (n 164) 15.
[544] ibid 16.

public (i.e. voters) to Parliament, from Parliament to the government and from the government to bureaucrats.[545]

I suggest that we should be imposing criminal liability on those who are in Parliament and Government. So, what I envision as being included under this are Members of either the House of Commons or House of Lords, and candidates standing for election as an MP. There are good reasons for my focus on these types of political roles.

First, these roles tend to indicate greater culpability which is attributed to their position in the chain of delegation. These roles have a stronger nexus to that initial delegation of power from the public, i.e.., the public conferring power on elected representatives.[546] Of course, those further down the chain (i.e. civil servants and special advisors) should not be making these representations, but they are not sufficiently culpable as to justify criminal liability. In contrast, those at the start of the chain have the closest connection to the public's delegation of power, and are under the strongest obligational force not to deceive them. Intuitively speaking, we expect more of those who occupy these roles, compared to say civil servants or special advisors. Thus, when they do make deceptive representations, they are more blameworthy.

I do not however end my reasoning here. Westminster politicians who hold parliamentary and Governmental roles also tend to carry greater responsibility and influence (i.e. power) compared to other bureaucratic roles. We are more inclined to listen to those who occupy these positions, because we assume from their role, that they are privy to the inner working of policy. Thus, their deceptive representations have the potential to cause greater harm.

Feature 3: The deception should be made to the public at large or any section of the public
The third feature pertains to the recipient of the deceit. My position is that deceptive representations need to have a large reach. Of course, a deceptive representation to a singular member of the public is morally objectionable, and has the potential to raise very limited democratic harms. However, the harm is always going to be limited and individualistic. To really elevate the level of harm, the deception needs to give rise to the potential for the democratic harms to collectivise. Essentially, what there needs to be is a large audience.

The connection between increasing the circulation of false or misleading information and the rise in harm is undisputed. Anecdotally, we can point to famous instances throughout history.

[545] Strøm (n 17) 262. See also, Bergman, Müller, and Strøm (n 18) 257-259.
[546] Strøm (n 17) 266.

In Monika Hanley and Allen Munoriyarwa's seminal work charting the development of fake news, they note several examples whereby increased circulation has led to a greater impact. One of the earliest examples they recall is the bizarre and untrue stories 'circulated during Emperor Ramesses II's campaigns in Egypt (1303 BCE) against the Nubians, Syrians, and Libyans […] One such piece of damaging news was that the Emperor's army had been defeated in battle by Sherden sea pirates. The fake news story nearly caused mass panic and alarm in the Kingdom'.[547] Another more recent example, are the stories of atrocities which appeared in the media prior to the US entry in World War 1.

They note,

> that when the Lusitania sank in 1915, a new wave of propaganda and disinformation arose. Of the most circulated fake news stories was one of a mutilated Belgian baby, purposefully harmed by German soldiers. This story was unique as it became transoceanic, spreading across America as well as France, appearing in Le Rive Rouge with photos allegedly depicting Germans eating the hands of the baby. Despite the implausibility of the survival of these handless babies and children, many claimed to have seen them first-hand. Other stories included a nurse mutilated by German soldiers, crucified Canadian soldiers, as well as some of the first instances of doctored photographs (Ponsonby 1929). In the last months of 1914, the attention of citizens was turned towards Russia, with the idea that their soldiers passed through Great Britain on their way to the Western Front. Despite being false, this rumo[u]r spread around the country with myriad reports of citizens spotting Russian soldiers (Ponsonby 1929). These reports were published by The Daily News, The Daily Mail and others.[548]

On a more quantifiable basis, Interpol confirmed that the increased circulation of false information related to Covid-19 could spread broader social harms such as disorder and panic, as well as financial harms like fraud. In a Global Cybercrime Survey, Interpol conducted a global survey into criminal threats during Covid-19. 48 countries responded to the survey and Interpol noted an increasing amount of misinformation and fake news, 'which

[547] Monika Hanley and Allen Munoriyarwa 'Fake News Tracing the Genesis of a New Term and Old Practices', in Andreas Fickers, Valérie Schafer, Sean Takats, and Gerben Zaagsma (eds) *Studies in Digital History and Hermeneutics Volume 4* (de Gruyter 2021) 158-159.
[548] ibid 163.

contributed to anxiety in communities and in some cases facilitated the execution of cyberattacks'.[549]

The point to take from these examples and studies is that there is a relationship between circulation and harm. Accordingly, if we are seeking to impose criminal liability for the most harmful deception, then we need to include some sort of standard in the offence which reflects the greater number of recipients. One way we could quantify this in the offence would be to use an approach like that of s2(1) Contempt of Court Act 1981. This provision imposes strict liability on those who make publications on active court cases 'addressed to the public at large or any section of the public'.

Using such legislation as a template is attractive. First off, the behaviour the Act is addressing has a broad-based similarity with what I am concerned with (they are both forms of communication). While the legislation itself does not define what the public at large or any section of the public is, the common law has developed an interpretation. Thus, the second benefit to using this as a template, is that the common law is well-developed. This legislation has had the benefit of being in operation for over 40 years, meaning there is a wealth of case law which has been developed and refined over time. As such, it establishes a clear interpretation which we can use to draw conclusions from.

The statute is relatively open-ended and has allowed the common law to develop on what this means. The result is that liability has been imposed for publications which are not just disseminated on a national scale but also regionally and sometimes on even smaller scales than this. Of course, there are cases like *Attorney General v MGN*[550] where the publication was to a section of the public i.e., to a large region. In this case, there were 144,000 copies of the article in the Yorkshire edition of the Daily Mirror, in addition to 30,000 being circulated in the Lancashire. Similarly, in *Yaxley-Lennon*[551] a live stream to 250,000 (with a viewing of 3.5 million) was sufficient dissemination to qualify. Nevertheless, there is also flexibility in the application of this standard and the publication can have a much smaller reach but still qualify for the strict liability. For instance, in *Re Lonhro,*[552] The Observer published an article

[549] Interpol, *Cybercrime: Covid 19 Impact* (Interpol 2020) 4-5 https://www.interpol.int/content/download/15526/file/COVID-19%20Cybercrime%20Analysis%20Report-%20August%202020.pdf accessed 28 November 2024.
[550] *Attorney General v MGN* (2009) EWHC 1645 (Admin), [2009] WL 5641056 [15].
[551] *Attorney General v Yaxley-Lennon* (2019) EWHC 1791 (QB), [2020] 3 All ER 477 [41].
[552] *Re Lonrho Plc. and Others* [1989] 3 WLR 535. Although contempt of court proceedings failed in this case, this was to do with the lack of impediment or prejudice that the publication had on the course of justice, not the number of copies circulated.

commenting on and containing details of the inspector's report of the House of Fraser (a company which was being acquired). In this case the circulation was much smaller but 3000 members of the public was sufficient for the Act. Obviously, the downside of an approach which utilises judicial discretion as opposed to legislative specificity is that it can create uncertainty. However, this uncertainty can be placated by drawing on an established area of common law such as this. Thus, I would interpret the part of my proposed offence which is centred around the public, in a way which is consistent with section 2 of the Contempt of Court Act 1981.

I do however, posit that there should be two exceptions to the general necessity of there being a large circulation. One, where the transaction is singular but the politician knew that it would then be (or would likely be) disseminated more broadly. The obvious example to this, is in a press or media context. A politician may deceive a singular journalist in an interview, but this should still qualify for liability because they would be aware that the deceit would then be disseminated more widely. Again, similar logic can be applied to a press release. Yes, the primary communicative transaction may be between a politician and a room full of journalists, but the politician is aware that the representation will then be conveyed to the public more widely.

Two, if the politician uses an agent e.g., an agent to convey their deception to avoid liability. Anecdotally, we can point to examples where politicians have done this- such as when Priti Patel used a spokesperson to address the press and deny allegations of bullying.[553] If there was not some sort of provision prohibiting this it would give rise to a loophole in which a politician could use a spokesperson to deliver the deceit.

Feature 4: A matter of material public interest

With the fourth feature I tease out what I mean by the most egregious content. I posit that there are certain types of deceptive political representations which have a greater significance and potential for harm. A politician saying my favourite type of coffee is a latte is obviously insignificant, compared to saying that we are following a particular foreign policy when we are not. On a related note, it is important to recognise the public and private life distinction.

[553] E.g., Priti Patel used a spokesperson to deny allegations of bullying, Rajeev Syal, 'Pressure mounts on Priti Patel to quit amid fresh bullying claims' (*The Guardian*, 2 March 2020) https://www.theguardian.com/politics/2020/mar/02/cabinet-office-to-investigate-priti-patel-bullying-claims accessed 19 October 2023.

For instance, a politician engaging in deception and claiming that they have a particular sexuality when they do not, is not something which justifies criminal liability.

The question which naturally follows, is how do we incorporate these ideas into a benchmark for a criminal offence. The obvious suggestion would be to use a standard of whether the matter is of public interest, but this could lead to a relatively loose interpretation, imposing criminal liability for deceptive representations on topics which do not have the potential to cause significant harm (such as matters relating to a politician's private life or trivial issues). Something further is needed to help safeguard against a generous interpretation of public interest and prevent an overextension of the offence.

Now, that is not to say that we should abandon the whole idea of a threshold based on public interest all together, but we need to modify it to make it a more discerning threshold. To remove the potential for inclusion of politician's private lives and trivial matters, I propose raising the bar by combining public interest with materiality. Materiality has often been included in offences relating to deceptive statements such as, false accounting or false statements by company directors.[554] In broad terms, 'the deception must [judged to] be material to V's decision to transfer money or property to D, or provide services to D etc', [555] playing a material role in the victim's decision making. It needs to have an objective significance, in the sense that but for the deception the victim would not have made a certain decision: the truth would have been a deal-breaker.[556]

The jurisprudence on false accounting, elaborates on what the test involves. As per *R v Mallett*[557] and *R v Lancaster,*[558] such a test relies on whether the matter is objectively significant or important. In fact, in *Lancaster*, Lord Justice Toulson noted that in *Mallett* 'the judge directed the jury that "false in a material particular" meant false in an important respect; something which mattered. The Court of Appeal approved the direction'.[559]
He continued, the 'test is objective, although it would not be helpful to the jury to use that term. A less lawyerish way of expressing it is to say that it is for the jury to judge for themselves, on the particular facts of the case, whether they regard the omission as

[554] Theft Act 1968, s17(2), s19 both reference a 'material particular'.
[555] Matthew Gibson, 'Deceptive Sexual Relations: A Theory of Criminal Liability' (2020) 40(1) Oxford Journal of Legal Studies 82, 87.
[556] Gibson (n 615) 97.
[557] *R v Mallett* [1978] 1 WLR 820.
[558] *R v Lancaster* [2010] EWCA Crim 370, (2010) 1 WLR 2558.
[559] ibid [24].

significant'.[560] It ultimately depends on the nature and the context of the subject matter.[561] If we combine the materiality test with public interest, the threshold should be more discerning. Although the public may be interested in knowing the truth about a politician's private life or their coffee, it is unlikely that these are matters which are objectively significant to the public's political preferences and democratic engagement. Thus, such a threshold would help to safeguard against an overly-inclusive criminal liability.

Feature 5: Justifiability

The fifth feature I put forward is that the deception must be unjustifiable. Most standard accounts of political deception, accept that there must be some sort of accommodation for justifiability. Such an idea has a well-established pedigree in philosophical literature. Indeed, it is evident in Plato's account of the body politic in 381 BC, with reference to the need for noble lies (when deception is necessary for the public's own good).[562] Similarly, we can see it in modern accounts such as Derek Edyvane's analysis of democratic deceit. While Edyvane concedes that as a general rule such deception strikes at democracy and good governance, he emphasises that there are times it is needed 'precisely in order to preserve democratic institutions and the security of citizens'.[563] Or, as put by Bakir and McStay, there are instances 'where truth would threaten political stability, [such as] the safety of an army, [or] a diplomatic negotiation […]'.[564]

Anecdotally, we can point to examples where in fact deception has been justified. Consider, for instance, John Major's government and the approach he had to the conflict in Northern Ireland between the Provisional IRA and Loyalists. In response to the ensuing hostility and violence, then-Prime Minister, John Major said that he was unwilling to negotiate. In his address in 1993 at the Lord Mayor's banquet, he stipulated that parties 'cannot enter the political process until it has renounced violence for good and demonstrated that that is its policy'.[565] Nonetheless, it later emerged that this was just a façade, and behind the scenes Major had authorised secret talks (even though there had not been an end to violence). This

[560] ibid [30].
[561] ibid [30].
[562] Plato, *The Republic* ((Harry Desmond, Pritchard Lee and Melissa Lane, Trans.) Penguin Classics 2007).
[563] Edyvane (n 2) 311.
[564] Vian Bakir and Andrew McStay, *Optimising Emotions, Incubating Falsehoods* (Palgrave Macmillan 2022) 72.
[565] 'Mr Major's Speech to the Institute of Directors in Belfast – 30 March 1994' (*John Major Archive*, 30 March 1994) https://johnmajorarchive.org.uk/1994/03/30/mr-majors-speech-to-the-institute-of-directors-in-belfast-30-march-1994/ accessed 3 January 2024.

ultimately led to a ceasefire.[566] In these circumstances, I can think of at least two reasons why the deception would have been justified. One, it is likely that the deception was necessary to continue democratic negotiations- they were able to negotiate without external pressure, which was probably necessary due to the level of animosity between both parties. Two, it would likely have been done to prevent protests against the negotiations. There had already been a great deal of violence leading up to the negotiations, so it would likely have been seen as justified. If there was not the presence of these factors then the justification might not be there.

If we proceed on the basis that the most egregious deceptive representations are unjustified then we need to also reflect on how this could be reflected in a criminal offence. Broadly speaking, there are two options available: one a set of prescribed circumstances in which deception is permissible and two a more open-ended test. In my view there is good reason for turning to the latter option. In the past there have been attempts to introduce prescribed criteria. The Elected Representatives (Prohibition of Deception) HC Bill (2022-23) [120] (hereafter referred to as the 2023 Bill) was based on such a strategy. In broad terms, it proposed making it unlawful 'for an elected representative acting in that capacity to make a public pronouncement which they know to be misleading, false or deceptive'.[567] Aside from defences relating to a unblameworthy state of mind, it only provided one defence; that it be in the interests of national security.[568]

I foresee major problems with this approach. First, it is too rigid and may leave justified examples of deception outside of its remit. It is doubtful that our example with John Major and the IRA would be included, because it is unlikely that it would be classed as national security. Such an exclusion seems intuitively problematic because it was necessary for achieving peace in the UK. Of course, you could create a set list of criteria which makes it justifiable e.g., in the interests of national security, democratic negotiations, public safety etc. However, I wonder how suitable and workable this would be because the political sphere is constantly evolving and fast moving. Unexpected situations arise constantly, and while in the drafting process we may put forward circumstances which we foresee as justifiable at that moment, these may very quickly become out of date. Second, a set of criteria may hamper our politicians from doing their jobs, under fear that an otherwise justified deceptive

[566] Peter Oborne, *The Rise of Political Lying* (Simon and Schuster 2005) 18.
[567] 2023 Bill, cl 1(1).
[568] 2023 Bill, cl 6(d)

representation would not be treated as such because the law is inflexible. I admit that there certainly could be efforts to mitigate this, such as through detailed legislation to try and minimise ambiguity[569] or statutory guidance which points to a set of typical circumstances in which political deception may be justified. Nevertheless, I would still suggest constructing the actual offence around some sort of open-ended test of justifiability for the reasons above.

Similar to the test for materiality, I would base justifiability on an objective, not subjective test. In this sense, the offence would mirror the way that the law developed in regards to dishonesty, departing from a subjective threshold to one which is objective. As per, *Ivey v Genting Casinos*,[570] the 'fact-finding tribunal had first to ascertain the actual state of the individual's knowledge or belief as to the facts. The question whether the conduct was honest or dishonest was then to be determined by applying the objective standards of ordinary decent people'.[571]

There are good reasons for following the *Ivey* model. Foremost, this reduces the potential for one politician who is fixated on an issue or who has tunnel vision from perceiving the deceptive representation to be justified when in fact most people in the same situation would not. Second, there is a broad similarity between behaviour which is dishonest and behaviour which is deceptive (in the sense that they are both duplicitous and underhand). As such, we can say that this is an established area of criminal law, which lends itself to deceptive representations. Accordingly, I propose something to the effect of whether the representation was justified should be determined by applying the objective standards of reasonable people.

My proposal for criminal liability is based on the following features:

- The deceiver must have known that their representation was false or misleading, or, knew that this was likely.
- The deceiver must be a Member of the House of Commons, the House or Lords or a candidate standing as an MP.
- The deception should be to the public at large or any section of the public.
- The deception must be a matter of material public interest, as determined by the standard of a reasonable person.

[569] E.g., like the Theft Act 1968 s1-6.
[570] *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)* [2017] UKSC 67, affirmed as now being the criminal law approach in *R v Barton (David)* [2020] EWCA Crim 575.
[571] *Ivey v Genting Casinos* (n 570) [2018] AC 391 [74].

- The deception must be unjustified, as determined by the standard of a reasonable person.

These five features are ultimately where I argue that criminal liability should be imposed, and I have also offered some suggestions on how these principles could be incorporated into a new offence. Having elaborated on the five features which I chose to use, I will turn to the features which I rejected.

Rejected features

There are two key features which I intentionally leave out of my proposed offence. The first is the distinction between the personal and professional spheres. The second is the idea of collective responsibility.

Distinguishing between the personal and professional spheres

The most obvious proposed feature is that there should be some sort of demarcation between the public and private spheres through a focus on the professional role.

Indeed, there is some precedence for this. One of the attempts to use the criminal law was a private prosecution brought forward by Marcus Ball to prosecute Boris Johnson under the offence of misconduct in public office. In broad terms, this offence is committed when a public officer who is acting as such, 'wilfully neglects to perform his duty and/or wilfully misconducts himself, […] to such a degree as to amount to an abuse of the public's trust in the office holder, […] without reasonable excuse or justification'.[572] Simply put, this offence is used to punish corrupt abuse of public power, or 'gross neglect in failing to comply with the core duties […]' of office.[573] Traditionally, this has been used in the most egregious situations where public officials have abused their positions, like when prison officers have brought items (including legal drugs) into a prison[574] or police officers misusing investigation photographs.[575] What is important to stress, is the offence had never been posed as having potential for addressing deceptive representations which are made by our politicians. However, in 2019 Marcus Ball made the case that Boris Johnson had 'misrepresented or twisted statistics in the public domain so as to score a political advantage', thereby, abusing public trust in his political office. [576]

[572] *Attorney General's Reference (No 3 of 2003)* [2004] EWCA Crim 868, [2005] QB 73 [61].
[573] *Regina (Johnson) v Westminster Magistrates' Court* [2019] EWHC 1709, (2019) 1 WLR 6238 [33].
[574] *R v Youngman (Hayley)* [2016] EWCA Crim 2224, (2016) 12 WLUK 596.
[575] *R v Collins (Darren)* [2022] EWCA Crim 742, (2022) 4 WLR 99.
[576] *Regina (Johnson) v Westminster Magistrates' Court* (n 573) [5].

I do not dispute that using this offence to address this issue has appeal, but there is a significant problem with the emphasis on the misconduct needing relate to the professional role. The public official needs to be acting in their role[577] when engaging in the misconduct, something which has always been interpreted as requiring a close nexus between the alleged misconduct and the exercise of powers and duties. As established in *R v Quach*, 'the kernel of the offence is that an officer, having been entrusted with powers and duties for the public benefit, has in some way abused them, or has abused his official position'.[578] The crux of this, is that there needs to be very close proximity between the misconduct and the role.

I can appreciate what this provision is doing. It is essentially to trying to limit the offence to the role, thereby creating a narrow and strict interpretation of the professional role. However, a feature tying deceptive representations to the political role is not appropriate. And as I suggested earlier on in this chapter, an effective demarcation between significant and insignificant matter can be done through other means. Deceptive representations which are made by politicians are typically separate to the role and responsibilities they have as a public official. I concede that there is a somewhat loose connection in the sense that the political role may carry certain influence, and by association may offer opportunities in which to make their representations (e.g., press interviews, public campaigns, social media followings). However, in making these deceptive representations they are not misusing or abusing their duties or powers. They may hold the role whilst simultaneously making the representations but they are distinct entities. Such a conclusion was similarly reached in *Johnson v Westminster Magistrates Court.*

As put by Lord Justice Rafferty and Justice Supperstone;

> [i]t was not sufficient to say that he made the statements when in office as an MP and/or Mayor of London […] That does no more than conclude that he occupied an office which carried influence. This ingredient requires a finding that as he discharged the duties of the office [,] he made the claims impugned. If, as here, he simply held the office and whilst holding it expressed a view contentious and widely challenged, the ingredient of 'acting as such' is not made out.[579]

[577] ibid [29].
[578] ibid [30] (Rafferty LJ Supperstone J) citing *R v Quach* [2010] VCSA 106, 27 VR 310 [41].
[579] ibid [29] (Rafferty LJ Supperstone J).

Of course, if Johnson had made deceptive representations about the mayoral budget and was actually siphoning off expenses, then this would likely be deemed sufficiently connected with the role. Nevertheless, deceptive representations to the public simply do not have the requisite proximity. My point is, that as a result this should not be included in the offence.

Individual versus collective responsibility

The second feature which I intentionally exclude from my proposed offence is the idea of collective responsibility. Again, this is a rational proposal and there is a basis for putting it forwards. The most obvious example of this is the Iraq War and the UK government's September 2003 dossier. The dossier was disseminated to the public. It put forward an assessment of Iraq's activities prior to the UK sending its military.

The dossier made a number of claims including;

> [a]s a result of the intelligence we judge that Iraq has: continued to produce chemical and biological agents; military plans for the use of chemical and biological weapons, including against its own Shia population. Some of these weapons are deployable within 45 minutes of an order to use them […] [Iraq has] command and control arrangements in place to use chemical and biological weapons […]; [they have] developed mobile laboratories for military use, corroborating earlier reports about the mobile production of biological warfare agents; pursued illegal programmes to procure controlled materials of potential use in the production of chemical and biological weapons programmes. [580]

The implication from these assessments is that they are based on accurate and credible evidence. However, as the House of Commons Foreign Affairs report noted '[t]here was, […] no indication of the scale and scope of Iraq's […] arsenal of chemical and biological weapons [in the evidence]'.[581] Thus, the assessment was misleading and exaggerated. If this statement is deceptive, the question which then follows is who is at fault. Indeed, one could argue that the fault cannot easily be attributed to a single person.

> The process for compiling and approving the dossier involved a number of people as well as the JIC and the intelligence agencies, including the Prime Minister, Foreign Office Ministers, Special Advisers and officials. But apart from the foreword, the

[580] *Iraq's Weapons of Mass Destruction: The Assessment of the British Government Executive Summary* para 6, cited in, House of Commons, *Foreign Affairs - Ninth Report* (2002-3) para 32.
[581] *House of Commons, Foreign Affairs - Ninth Report (2002-3)* para 32.

> document—including the executive summary—was written by the Chairman of the JIC, and it was he who signed it off. Although there has been much press speculation on this point, no substantiated evidence has been put before us that Mr Scarlett or any other senior intelligence official dissented from the contents of the dossier; indeed, the bulk of the evidence is to the contrary.[582]

To a degree I can appreciate that there is a collective responsibility. By this I mean that members of a group have performed destructive actions, as a group. Obviously, there has been a joint-effort in putting together the dossier and I do not want to diminish the fact that there is a degree of blame and responsibility which should be shouldered by all of those involved. However, that is not to say that all participants are equally responsible and to blame. In fact, there is a significant normative and practical difference between performing destructive actions as members of a group and acting on its behalf. Similarly, there is a difference between merely contributing towards the draft of the deceptive representation and actually being the one to present it. The one who is making the representation is taking ownership for it. They are making the impression that it is their own view and giving the public something to rely on. On a consequentialist basis, if they had not taken on that role then representation would not have had any effect. Unless someone is actually willing to take that step and make the representation, then the public will not be misled.

Of course, one could respond to this point with could we not have collective responsibility with the one making the deceptive representation having lead liability. This is more attractive than across-the-board equal criminal liability. The problem with this approach is that it presumes that those who contribute towards the drafting of a deceptive representation have sufficient culpability to warrant criminalisation. In my view their actions are simply not enough. Again, it is important not to understate the disparity between those who contribute towards destructive behaviour and the ones who go further and act on their behalf. In the same vein, there is a fundamental difference between those who draft and the one who actually goes further and presents it. Consequentially-speaking the harm would never occur without the representation being presented. It is more difficult to say the same for those who contribute towards it. We can also make similar points in relation to responsibility and blameworthiness. Thus, I argue that there is not sufficient culpability for those who draft the representation to be subject to criminal liability. That is unless they have also made the

[582] ibid para 28.

representation. Accordingly, I suggest an approach which is based on individual criminal liability.

The overarching argument that I am making in this chapter is that the most egregious deceptive representations should be used to guide the imposition of criminal liability. The first section of this chapter set out the reasons for why we should use this to determine liability, whilst the second section sought to elaborate on what it was. I not only set out what the features for the most egregious deceptive representations are but I have also offered an indication of how they could be incorporated into an offence. Having set out what I think should be subject to criminal liability, I will now turn to considering the different types of sanctions which could be associated with such an offence.

Chapter 8: A model for sanctioning: Which sanctions should be attached to the offence? How should we determine whether to impose greater or lesser sanctions?

To offer a comprehensive indication of criminal liability, it is important to not just put forward a provisional offence but also include a model for sanctioning. Identifying which sanctions should be attached to the offence and determining when it is appropriate to use them is particularly key. With the aim of accomplishing these tasks in mind, this chapter is based around two sections. I begin by putting forward the preliminaries in the model for sanctioning, asking which sanctions should be attached to the offence and justifying my choices. I then turn to the substance of the model, setting out the factors which influence culpability and harm and offering an indication of how we should use these factors as a guide for determining how severe the penalty should be. This task involves a great deal of practical analysis. I draw upon three real-life examples which I suggest would meet the components of the offence, and use them to extract the factors. In doing so, I ask which factors make the deceiver more or less culpable and the representation have more or less potential for harm. With the sanctioning model complete, I conclude by applying my analysis and putting forward an argument for the kind of sanction that I would impose on each example. Thus, giving an indication of how such an offence could work in practice.

The sanctions

The natural starting point for the sanctioning model is to begin with the preliminaries. Simply put, which sanctions should we be attaching to the offence and what severity should they be? My model is centred around two themes. First, sanctioning for this offence should be individualistic (i.e. only one penalty should be imposed at a time). Second, the penalties should be lower to middling severity, such as low-level fines, community orders or disqualification for standing as an MP/ sitting in the House of Commons or Lords. If harsher sanctions were used (i.e. imprisonment) or multiple penalties were issued together, this would likely be excessive and disproportionate, raising significant issues with our international free speech obligations.

Certainly, my approach is informed by ECtHR jurisprudence, particularly on its approach to criminalising political speech. The landmark case of *Salov v Ukraine*, is a primary example, demonstrating how the excessive and disproportionate sanctions can influence the ECtHR

assessment of whether the interference is legitimate. To reiterate, Mr Salov was given a sentence of five years (which was suspended for two), a fine, and annulment by the Bar Association of the applicant's licence to practise law.[583] The ECtHR regarded the nature and severity of the penalties and their cumulative effect, as heavily disproportionate to the aim pursued.

Similar findings can be seen in *Ceylan v Turkey*. In this case, a Turkish national and president of the petroleum workers union wrote an article in which he spoke about state terrorism against Kurdish people. Charges were brought under the Turkish criminal code for inciting public hatred and hostility. Mr Ceylan was convicted and the sanctions imposed were a 'one year and eight months' imprisonment[,] […]a fine of 100,000 Turkish liras […] [and], as a result of his conviction, the applicant lost his office as president of the petroleum workers' union […]'.[584] Again, the nature and severity of these sanctions were deemed to be excessive and disproportionate to the aim pursued.

From a jurisprudential analysis, it is evident that sanctioning political expression should be approached with care. While there is a need for caution, putting moderation and proportionality at the forefront of our approach to sanctioning should resolve these issues. Based on the pitfalls in the previous case law, I posit that we should inform our sanctioning model with two themes. First, we should introduce criminal sanctions which are less severe (i.e. not imprisonment) and second, not impose a cumulation of penalties.[585]

The obvious objection to drafting the model in this way, is that this will mean that the offence has a diminished deterrence-effect. Afterall, if you attach sanctions which are less severe, then the risk assessment will be skewed.[586] Rationally-speaking, if the consequences of being convicted are less costly it is likely that more people will see the benefit of doing the behaviour as outweighing the reward. While the validity of this objection can be readily appreciated, it is important not to understate how significant a conviction is in its own right. It is important to recognise that a conviction carries a significance and resonance, which other types of regulation do not have and this is completely separate to the actual sanction imposed. Although sanctions which are less severe will slightly diminish the deterrence, the potential

[583] *Salov v Ukraine* (n 526) para 115.
[584] *Ceylan v Turkey* (n 132) paras 37-38.
[585] Cf the above cases with *Stoll v Switzerland* App no 69698/01 (ECtHR, 10 January 2007) whereby a fine of 800 Swiss francs was deemed a proportionate measure. In this case, the applicant published articles critiquing the negotiations on how to handle compensation due to Holocaust victims for unclaimed assets in Swiss bank accounts. The applicant was fined for publishing official deliberations.
[586] Afterall, one of the benefits of criminalisation is the potential deterrent-effect. See Ch 6 of this thesis.

of being charged and convicted of a criminal offence should be a significant disincentive. Thus, the deterrence-effect should still be applicable. With this in mind, my model is comprised of three distinct less severe penalties: fines, disqualification and community orders.

Fines

Fines are a useful penalty, imposing a tangible and financial cost for the prohibited behaviour. Per sentencing guidelines, a fine can start off as low as 50% of an offender's weekly income (band A) and increase to 700% (band F). Concerns about excessiveness and disproportionality direct me against imposing such a broad range, and instead I limit the fines to the weakest types: bands A-C. In other words, the fine is either 50, 100 or 150% of the offender's weekly income. I would however, impose a cap (as is the case in section 106), where the fine can only be a maximum of £5000.[587] This is with a view to creating an ECHR compliant sanctioning model.

There is potential for the suitability of fines to be questioned, in particular one could ask will the effect of a fine be disparate, and be a more significant imposition for parties which have fewer resources.

As put by the Institute for Constitutional and Democratic Research,

> [A] fine will not offer a genuine deterrent because (as in the case of Michelle Donelan), politicians fund these from state resources of donations. It also creates an imbalance because parties with sufficient funds will, in essence, be able to "price in" fines. The politicians with the biggest donors would be able to, in effect, "pay to make false or misleading statements". This will benefit, in particular, populist parties funded by billionaires.[588]

While the validity of this concern can be appreciated, it overlooks the fact that a sanctioning model can be pluralistic. Of course, if this was the only sanction available then it may have an asymmetric effect, creating a culture where the parties with more resources could effectively pay their way to making these representations. Nevertheless, it is important to stress that this is not the sanctioning model which I am advocating for. Fines are just one of three possible sanctions which could be imposed and the judge has discretion over which to

[587] RPA 1983, s169. See also Sentencing Act 2020, s122.
[588] Institute for Constitutional and Democratic Research (n 303) p24 para 44.

choose. If it does look like a party would be willing to absorb the cost and a fine would not be meaningful, then other sanctions should be chosen.

Disqualification from standing as a Member of Parliament or sitting in the House of Commons or House of Lords for three years

While I envision fines to be the starting point, the second and third penalties should be reserved for offenders where fines would be inappropriate, or for those who are more culpable and had greater potential for harm. The second penalty which I posit should be attached to the offence is disqualification from standing as an MP or sitting in the House of Commons or House of Lords.[589] As seen with section 106, this penalty is used to penalise poor conduct during campaigning and potentially could be used beyond this context.[590] The benefit of this sanction is that it creates a genuine disincentive, which is unaffected by the resources of the party. The individual, themselves, has to make the decision of whether the professional limitation is worth the risk.

The obvious question is what length of time should the disqualification be: should it mirror the illegal practice model and be three years? My answer is yes, and my rationale for this is two-fold.[591] Foremost, there is a broad similarity between section 106 and my proposed offence in the sense that they both address deceptive representations which are made by politicians. Thus, the two offences are also comparable in terms of culpability and potential for harm. Moreover, as my aim is to put forward a proposal which is ECHR compliant, it makes sense to impose the lower-level sanction of a three-year restriction as opposed to a longer disqualification period.

Community orders

The final penalty in my sanctioning model is community orders, which again should be reserved for circumstances where the nature of the offender's position mean that a fine or disqualification is inappropriate or the culpability and harm direct towards the imposition of a more severe penalty. Unlike the other two penalties, community orders are relatively simple and the same graduations exist regardless of the offence.

The lowest community order involves imposing one of the following requirements: 40-80 hours of unpaid work, a curfew requirement (e.g., up to 16 hours per day for a few weeks), or

[589] E.g., House of Lords Reform Act 2014, s2 and s3.
[590] Institute for Constitutional and Democratic Research (n 303).
[591] Cf with corrupt practices (like bribery or treating) set out in the RPA 1983, s160(5). For these, the disqualification period is five years.

an exclusion requirement for a few months or a prohibited activity requirement.[592] This then increases to a medium level community order which could involve any appropriate rehabilitative requirement or requirements. Such as, 80-150 hours of unpaid work, a curfew requirement for example up to 16 hours per day for 2-3 months, and an exclusion requirement of about 6 months.[593] A high-level community order could impose: a prohibited activity requirement, appropriate rehabilitative requirement/s, 150-300 hours of unpaid work, a curfew requirement for example up to 16 hours per day for 4-12 months and an exclusion requirement lasting in the region of 12 months.[594]

Rejected sanctions

Having set out the preliminaries of my sanctioning model, I will briefly reflect on the penalties which I excluded. In doing so, I offer further justification for my approach. From the offset, I explicitly rejected attaching prison sentences to this offence (on the basis of free speech concerns). There are, however, other less severe penalties which I could have incorporated and would have likely been ECHR compliant. One such example is a mandatory public correction or retraction, made at the offender's expense (a similar proposal has recently been put forward by the Institute for Constitutional and Democratic Research in their White Paper on the matter).[595] While I can appreciate the attraction of this penalty, particularly from the view-point of politicians, a mere retraction is not an appropriate and proportionate response. Of course, it inflicts some minor emotional costs, perhaps embarrassment at having to retract or has some professional implications, however, it seems an insufficient response for deceptive representations which are indicative of higher levels of culpability and potential harm. Even though I argue for a model of sanctioning which is less severe, it is important to still reflect the gravity of the behaviour in question. Inflicting minor emotional or professional costs does not achieve this.

Another alternative would be to trigger a potential recall of the MP (similar to the Recall of MP's Act 2015, s1), but there are a number of issues with this. Foremost, there is a degree of uncertainty because there is no guarantee that an MP will actually being recalled- the decision

[592] 'Theft - General' (*Sentencing Guidelines*) https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/theft-general/ accessed 3 November 2024. See also 'Communication network offences (Revised 2017)' (*Sentencing Council*) https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/communication-network-offences-revised-2017/ accessed 3 November 2024.
[593] ibid.
[594] ibid.
[595] Institute for Constitutional and Democratic Research (n 303) p20-21. Note, that this proposal uses the correction notice as a way of avoiding legal sanctions.

ultimately remains with the constituents. Theoretically, a politician could make a deceptive representation and not be subject to any sanction other than a conviction. Again, this does not convey the gravity of the behaviour. A potential solution to ameliorate the uncertainty would be to impose this sanction in conjunction with another. Yet, this would be troubling and err into the dangerous territory of being excessive and disproportionate. Another more practical limitation, is that this penalty has limited applicability and it would only be an option for sanctioning Members of the House of Commons. Due to practical and conceptual concerns, I exclude both of these sanctions from my model.

With the preliminaries undertaken and the scale of sanctions sketched out, the next task is to proceed to the substance of the model. As in, offering guidance on how to determine which penalty is appropriate. The rest of this chapter is based on practical analysis in which I compare three examples which I suggest would satisfy the threshold for criminal liability. I begin by contextualising my data and establishing why my examples are relevant. I then move on to identifying the factors which influence culpability and harm, proceeding to using them to create sanctioning guidance.

Determining which sanction to impose

Selecting the data

Although there will always be an element of bias because the data is cherry-picked, I have mitigated the bias by choosing three examples which offer a fair representation of deceptive representations. I have sourced examples, which are reflective of different circumstances e.g., deceit from different political parties, leaderships, and time periods. Of course, there is sourcing limitation because I can only use examples from representations which have been exposed as being deceptive, but this is unavoidable due to the nature of the research.

My sample of data is comprised of three examples, which are listed below.

Example 1: Suella Braverman and Immigration

Example 1 relates to Suella Braverman and her use of asylum figures. On the 7th March 2023, Braverman presented the Illegal Migration Bill (a Bill which proposed stricter immigration policies) to the House of Commons. In doing so, she claimed that '[t]here are 100 million people around the world who could qualify for protection under our current laws. Let us be clear - they are coming here'.[596] A similar claim based on this was then made on the 8 March

[596] Illegal Migration Bill 7 March 2023, vol 729, col 152.

2023, to the Daily Mail and again on Good Morning Britain.[597] It is important to stress that the original claim made in the House of Commons is and should not, be subject to criminal liability, rather my focus is on the subsequent instances.[598]

Her claim was based on the United Nations High Commissioner for Refugees' (UNHCR) estimate in the *Global Trends: Forced Displacement in 2022*[599] report, that, as of May 2022 the number of people forcibly displaced worldwide had exceeded 100 million. Her omission of relevant information (i.e. that most of the people who are displaced will not come to the UK) exaggerated concerns surrounding immigration, to imply that the 100 million people were attempting to reach the UK.[600] In fact, the latest official statistics from the government show that there were 45,755 people detected arriving by small boats in 2022, nowhere near 100 million.[601]

Example 2: Tony Blair and the Iraq War

Example 2 relates to Tony Blair and the Iraq War. Now, as with example 1, there are a number of instances where this claim was made, however, for the sake of simplicity and the experiment, I am focussing upon Blair's interview with David Frost on BBC Breakfast in 2003. In the interview, Blair implied that there was strong and credible evidence that Iraq had WMD's. Specifically, he said;

> [w]hat we have is the intelligence that says that Iraq has continued to develop weapons of mass destruction; that what he is doing is using a whole lot of dual-use facilities to continue to develop weapons of mass destruction; and what we know is there is an elaborate programme of concealment which is pushing this stuff into different parts of the country. […].[602]

'What was not mentioned […] were the qualifications and conditions that the various JIC assessments had attached to them, which meant that statements made with certainty could not

[597] Braverman, SUELLA BRAVERMAN: The British people have had enough of migrants pouring over the Channel... That's why stopping the boats is my top priority' (n 414); Good Morning Britain, 'On what planet is that likely and how is that not inflammatory language?' (n 13).
[598] Adam Forrest, 'Suella Braverman again rebuked by stats watchdog for saying 'millions of migrants' could come to UK' (*Independent*, 10 May 2023) https://www.independent.co.uk/news/uk/politics/suella-braverman-migrants-millions-small-boats-b2336373.html accessed 9 April 2024.
[599] UNHCR UN Refugee Agency, *Global Trends: Forced Displacement in 2022* (UNHCR, 14 June 2023).
[600] Smith, 'Who are the 100 million displaced people Suella Braverman said could qualify for UK protection?' (n 13).
[601] Alistair Carmichael, 'Letter from Alistair Carmichael MP to Sir Robert Chote – displaced people' (*UK Statistics Authority*, 10 March 2023) https://uksa.statisticsauthority.gov.uk/correspondence/letter-from-alistair-carmichael-mp-to-sir-robert-chote-displaced-people/ accessed 7 January 2024.
[602] BBC, 'Breakfast with Frost' (n 6).

be supported by that kind of evidence'.[603] What Blair was doing was excluding relevant information, and implying that the evidence was more reliable than it actually was. While there was evidence suggesting that Iraq had WMD's, Blair failed to outline its limitations or explain that there was cause for reasonable doubt.[604]

Example 3: Boris Johnson and the Brexit campaign

The final example is more recent and relates to the 2016 Brexit campaign. As part of the campaign Boris Johnson made a number of statements including: 'we send the EU £350 million a week […]'.[605] The figure is technically true but it misses out important information. The implication was that this figure was a net gain, when in fact it 'did not take into account the rebate or other flows from the EU to the UK public sector […]'.[606] Even when it was described as misleading by the UK Statistics Authority,[607] Johnson continued to make the claim such as in a Telegraph article.

Now my argument is, that each of these examples is relevant and falls within the class of criminal liability, as per my proposed offence. As a starting point, I need to consider the parties involved and the circumstances under which the representations were made. The first question which needs to be answered is do the politicians qualify as deceivers? This is straightforward because all three were MP's when making the deceptive representations.

The question which follows is, was the representation made to the public or any section of the public? Again, the answer is yes. All three of these representations were made on national and well-known media outlets. In particular, examples 1 and 2 were each made through the media and to a large reader or viewership. The average viewership for Breakfast with Frost was 1.2 million[608] and Good Morning Britain tends to have over 600,000.[609] Example 3 was also widely disseminated on social media, as part of a national campaign. If we measure each of these according to common law interpretation of the same phrase in section 2 of the Contempt of Court Act 1981, it is clear that these satisfy this part of the test. Jurisprudential

[603] Liaison Committee, *Oral evidence: Follow up to the Chilcot Report* (n 7) Q12.
[604] Committee of Privy Counsellors, *The Report of the Iraq Inquiry: Executive Summary* (n 7) paras 513-514, 540 and 796.
[605] Asthana, 'Boris Johnson: we will still claw back £350m a week after Brexit' (n 8).
[606] Office for National Statistics 'Leave campaign claims during Brexit Debate' (n 9).
[607] UK Statistics Authority, 'UK Statistics Authority statement on the use of official statistics on contributions to the European Union' (n 245).
[608] BBC News, 'Breakfast with Frost' (*BBC News*) http://news.bbc.co.uk/1/hi/programmes/breakfast_with_frost/738216.stm accessed 22 September 2024.
[609] Tom Bryant, 'Good Morning Britain closing gap on BBC Breakfast thanks to 'super-group' of presenters' (*Mirror*, 22 January 2023) https://www.mirror.co.uk/tv/tv-news/good-morning-britain-closing-gap-29021821 accessed 22 September 2024.

analysis shows that dissemination to an audience of as little as 3000[610] is sufficient, so a much larger circulation would easily pass this part of the test.

The third question that needs to be answered is do the deceivers have a blameworthy state of mind? I posit, that an analysis of the circumstantial evidence, suggests that they all had a knowledge that what they were presenting was false or misleading but chose to do so anyway.

First, let us consider the Braverman example. There is evidently a disparity between the UN statistic of 100 million people being displaced around the world, and the amount of people who are actually wanting to or are likely to come to the UK.[611] Whether this qualifies as being deception hinges upon whether she knew or knew that it was likely that what she was saying was misleading. My suggestion is based on contextual evidence, but I suggest that she was aware.

One, she held the role of Home Secretary -it is part of her role to be attuned to issues relating to national borders, which logically would involve being informed of relevant reports and findings, particularly ones which she would later go onto use in her speeches. Two, within the interview on Good Morning Britain, she demonstrated a thorough understanding of the statistic. For example, she refers to how it is reflective of those who are displaced for a number of reasons e.g., persecution, conflict or environmental factors.[612] If she had just used the statistic in passing, and had not contextualised it or devoted so much time to it, then you could potentially make the argument that she was not aware of what it meant and did not intend to deceive. However, her explanation of the UNHCR report [613] suggests a deeper understanding of the statistic. Three, when challenged on the figure, there was no apology or acknowledgement that she used it improperly and in fact, she continued to use it throughout the interview. Thus, I argue that she was aware that her use of the statistic was misleading and that she was intentionally trying to deceive the public.

Similarly, I argue that Blair's claim over the evidence that Iraq had WMD's was also knowingly deceptive. Contextual evidence suggests that Blair knew the limitations of the

[610] *Re Lonrho Plc. and Others* (n 552).
[611] Braverman, SUELLA BRAVERMAN: The British people have had enough of migrants pouring over the Channel... That's why stopping the boats is my top priority' (n 414); Good Morning Britain, 'On what planet is that likely and how is that not inflammatory language?' (n 13).
[612] Adam Forrest, 'Suella Braverman again rebuked by stats watchdog for saying 'millions of migrants' could come to UK' (n 612).
[613] UNHCR UN Refugee Agency, *Global Trends: Forced Displacement in 2022* (n 598).

intelligence and its uncertainty. The interview occurred in January of 2003, but the evidence as of September 2002 did not support these conclusions.

In particular the Committee of Privy Councillor's report into the Iraq Inquiry held in paragraph 540 that,

> [t]he assessed intelligence had not established beyond doubt that Saddam Hussein had continued to produce chemical and biological weapons. […] [Whilst] Iraq had the means to deliver chemical and biological weapons […] [the Joint Intelligence Committee] did not say that Iraq had continued to produce weapons. [614]

These findings are supported by John Chilcot's report into the same issue. When giving evidence to the Liaison Committee he said,

> [w]hat was not mentioned in the dossier, or in his parliamentary speeches, were the qualifications and conditions that the various JIC assessments had attached to them, which meant that statements made with certainty could not be supported by that kind of evidence.[615]

These retrospective inquiries, indicate that the evidence was far from certain, and that there was a discrepancy between what Blair was presenting the evidence to be and what the reality was.

In terms of the third example with Boris Johnson, it is much easier to say that he was engaging in deception because he had been informed by the UK Statistics Authority that he was wrong, but continued to make the claim. [616]

The fourth point to consider is whether any of the examples would be classified as material matters of public interest. Would the reasonable person find these instances of deception significant to their democratic decision-making (i.e. political preferences or procedural engagement)? All of the examples are matters of material public concern, because they are matters of policy. Both foreign or domestic policy is inextricably linked to how the country is functioning and something which have social, physical and financial implications for the public. On an objective basis, these matters (and by extension the deception) have an

[614] Committee of Privy Counsellors, *The Report of the Iraq Inquiry: Executive Summary* (n 7) para 540.
[615] Liaison Committee, *Oral evidence: Follow up to the Chilcot Report* (n 7) Q12.
[616] UK Statistics Authority, 'UK Statistics Authority statement on the use of official statistics on contributions to the European Union' (n 245).

influential bearing on how people made democratic decisions. An application of the objective standard, indicates that this part of the test would be satisfied.

The final point to consider is was the deception justified. Taking into account what each politician knew at the time, would a reasonable person find the deception justifiable? I would argue that the answer is a resounding no.

First, let us consider Braverman's misleading immigration claim. It is difficult to see why this would be objectively justifiable. Her purpose in making the representation was likely to garner public support for the Illegal Immigration Bill which is a poor reason for making the deception. Even if this was a good reason for making a misleading claim, the reasonable person would likely deem the deceit as unnecessary for achieving the result. Afterall, her misuse of the statistic was exposed the next day, and the Bill was still passed.

Blair's deception over Iraq's WMD's is also unjustified. Based on retrospection, we can assume that Blair was attempting to raise awareness that Iraq was a potential security threat. This was likely part of a bigger foreign policy goal to use deploy the military. The assumed premise, is that Blair needed the public's support for his foreign policy plans and presenting the evidence as more certain than it was, was necessary to gain it.

There are two issues with this interpretation, one, being that the deceit was needed to gain public support (there is nothing to say that if he had been honest about the evidence that the public would not have reacted in a similar way), and two, that public support was needed to proceed with the policy. The latter is particularly persuasive, as circumstances suggest that this is not the case. While in 2003, 54% of people supported the Iraq war,[617] this is quite a narrow margin and hardly indicative of an overwhelming public opinion. My point is, that it is unlikely that he was that concerned with public opinion, because if this was the case, it is unlikely that he would have entered the war based on that narrow majority. Thus, Blair's misleading claim, like Braverman's was also not justified.

As with the other two examples, I suggest that Johnson's deceptive representation over EU membership was unjustified and would fail to meet the objective standard. There was no pressing need for him to make the claim about EU spending. In fact, he made the claim in the

[617] Based on an average of 21 YouGov polls conducted between March and December. Joanna Morris, 'Iraq War: 20 years later, what do Britons think about the conflict?' (*YouGov*, 20 March 2023) https://yougov.co.uk/politics/articles/45444-iraq-war-20-years-later-what-do-britons-think-abou accessed 9 April 2024.

lead up to a referendum where the public having an awareness of the facts is vitally important. As such, I propose that the objective person would not see the circumstances as justifying the deceptive representation. Having contextualised the samples of data and justified their relevance, I can now examine them and extract the factors which influence culpability and harm.

Which factors influence culpability and harm?

Although all three of these examples would meet this standard, that is not to say that the behaviour is equal. In fact, there are a number of different factors, which aggravate or diminish the severity of the deception involved. Extracting these factors is important, because it will provide more guidance for determining the severity of the sanction. To extract these, I examine these examples in light of criminal principles: the culpability of the offender and the harm caused.

Reach and frequency of the deceit

When examining each of the three examples, the factor which is the most prominent is reach and frequency i.e., not only how many people are recipients to the deceit, but also how often the deception was made. In example 1, for instance, Braverman's immigration claim was only made on two occasions: once in the Daily Mail article and then again on Good Morning.[618] In this regard, it is worth noting that the deceit was made in a relatively small time-span, as both of these occasions were on the morning of the 8 March. By contrast, in examples 2 and 3, the deceit was made a number of times over a longer time-period. Although there is no record of the exact number, it is widely accepted that the claims were repeated, and over a considerable period of time e.g., months or years. Blair, for instance, continues to claim that the intelligence proved that Iraq had weapons of mass destruction,[619] and Johnson made the claim about £350 million on several occasions in May 2016 (even after the UK Statistics Authority had identified it as being a misleading figure)[620] and defended it

[618] Illegal Migration Bill 7 March 2023, vol 729, col 152.
[618] Good Morning Britain, 'On what planet is that likely and how is that not inflammatory language?' (n 13); Braverman, SUELLA BRAVERMAN: The British people have had enough of migrants pouring over the Channel... That's why stopping the boats is my top priority' (n 414).
[619] Luke Harding, 'Tony Blair unrepentant as Chilcot gives crushing Iraq war verdict' (*The Guardian*, 6 July 2016) https://www.theguardian.com/uk-news/2016/jul/06/chilcot-report-crushing-verdict-tony-blair-iraq-war accessed 11 April 2024.
[620] UK Statistics Authority, 'UK Statistics Authority statement on the use of official statistics on contributions to the European Union' (n 245).

up until September 2017.[621] Additionally, Boris Johnson's claim was circulated widely on social media.[622]

There is a considerable difference in reach and frequency between example 1 and examples 2 and 3. Intuitively-speaking, this is deeply influential because a larger reach and greater frequency is indicative of the politician having a greater culpability and provides the representation with the potential to cause more harm. Foremost, deceit which is made over a longer time-period and on multiple occasions is indicative of a higher level of culpability. As opposed to the deceit being momentary lapse in judgement, someone is having to commit to it and is continuously propagating the idea that their deceit is the truth. This is indicative of a higher level of planning and sophistication.

Second, deception which is maintained over a longer time-period corresponds with an increase in the amount of harm experienced. While some instances of deception are only heard once and may be quickly forgotten,[623] those which are repeated are far more convincing. As a result, the ones which are repeated are more likely to give rise to misperceptions and cause harms.[624] Such a link is well established within the literature on cognitive reasoning.

The seminal work on this issue was established by Harsher et al who conducted a study into truth and repetition.[625] Participants were asked to read various statements and then rate their validity. This continued over several weeks and some statements were repeated. The results showed that participants tended to believe repeated information more than novel information. Harsher et al ascribe this to the fact that a greater frequency confers greater validity.[626] Similar findings can be found elsewhere in the literature. This is apparent in those who undertake more theoretical work (such as Alter and Oppenheimer)[627] as well as those who

[621] Asthana, Asthana, 'Boris Johnson: we will still claw back £350m a week after Brexit' (n 8).
[622] ITV News, 'Boris Johnson insists Brexit can still deliver £350 million a week for the NHS' (*X*, 16 September 2017) https://x.com/itvnews/status/908844080926519297 accessed 14 January 2024, referring, to Boris Johnson, 'Boris Johnson sets out Brexit vision but insists he's 'all behind' May' (*ITV News*, 16 September 2017) https://www.itv.com/news/2017-09-16/boris-johnson-insists-brexit-can-still-deliver-350-million-a-week-for-nhs accessed 14 January 2025.
[623] This is similar to the fade factor in contempt of court.
[624] Raunak M Pillai and Lisa K Fazio, 'The effects of repeating false and misleading information on belief' (2021) 12(6) WIREs Cognitive Science 1, 1.
[625] Lynn Hasher, David Goldstein and Thomas Toppino, 'Frequency and the conference of referential validity' (1977) 16 Journal of Verbal Learning and Verbal Behavior 107–112
[626] ibid 107-112.
[627] Adam L Alter and Daniel M Oppenheimer, 'Uniting the tribes of fluency to form a metacognitive nation' (2009) 13(3) Personality and Social Psychology Review 219, 221-223.

undertake cognitive studies (Reber and Schwarz,[628] and Unkelbach et al).[629] Across these works there is a consensus that there is a general connection between the frequency of a message and how convincing it is. Although there are differences in opinion over why this is the case (e.g., whether it be that the information has a degree of familiarity,[630] or is easier to process and understand,[631] or even has convergent validity (repeated information may be misattributed to multiple sources resulting in the perception that a claim is commonly agreed upon)), the connection between repetition and the strength of the belief is undisputed.[632]

Another reason to attribute repetition with more harm, is that it provides the deception with greater exposure. A larger number of recipients also leads to an increase in those who will believe the deception. Even if the proportion of people who believe it is the same, the number of people who do is higher when the audience is larger. As a result, the harm will be far more prevalent in the latter scenario compared to the former.

Time-period

Aside from the reach and frequency of the deceit, there is also something to be said for the context in which it is made. We can intuitively pin-point a difference between example 3, where the deceit was made in the lead-up to the Brexit referendum, with examples 1 and 2, which were in an every-day or ordinary contexts. I suggest, that this intuition can be explained through the difference in the contribution towards actual or intended democratic harm.

Across any time period, deceptive representations have the potential to undermine the public's capacity to effectively engage in expressing democratic preferences. As I argued in Chapter 2, deceptive representations provide an inaccurate knowledge basis, which people use to inform their decision-making. This then impacts how they engage in all democratic procedures. While I maintain that deceptive representations are a broader problem which requires a comprehensive response (e.g., not just limited to the electoral context), I recognise that in the electoral or referendum context there is a greater potential for harm.

[628] Rolf Reber and Norbert Schwarz, 'Effects of perceptual fluency on judgments of truth' (1999) 8(3) Consciousness and Cognition 338, 338-339.
[629] Christian Unkelbach, Alex Koch, Rita R Silva, and Teresa Garcia-Marques, 'Truth by repetition: Explanations and implications' (2019) 28(3) Current Directions in Psychological Science 247, 248.
[630] Hal R Arkes, Catherine Hackett, and Larry Boehm, 'The generality of the relation between familiarity and judged validity' (1989) 2(2) Journal of Behavioral Decision Making 81–94.
[631] Alter and Oppenheimer (n 627) 221-223; Reber and Schwarz, (n 628) 338–339.
[632] Hal R Arkes, L E Boehm, and G Xu, 'Determinants of judged validity' (1991) 27(6) Journal of Experimental Social Psychology 576–605.

Elections or referendums are unique in the sense that they have formal and institutional democratic procedures (i.e. they involve voting). These have a greater persuasive force on the direction of governance, compared to informal democratic procedures (forms of active citizenry such as protesting or petitioning).[633] Institutional procedures are more representative, so everyone who is entitled to is able to vote. Informal procedures lack an institutional framework, so will generally have limited participation. Accordingly, they are less representative of the people's will, and less compelling. Moreover, institutional procedures have a clear output which is a clearly communicated expression of will. The nature of voting is relatively simple; there are choices put forward and each individual can select their preference. In other words, it takes the preferences of each citizen and aggregates them into a social preference.[634] Such a process is not available in informal procedures because there are no safeguards to ensure that everyone's voice has equal standing or ensures that clear options are put forward. These characteristics establish institutional procedures as being more persuasive to the Government, and as a result, have greater democratic significance. Logic suggests that if these procedures are more significant, then the political deception which is disseminated before them has the potential to do more harm. Therefore, this is a factor which should be taken into consideration when considering the nature and severity of penalty imposed.

Motivation

The final factor which I extract from my data pertains to the motivations of the politician. Although it is not an easy task to determine the motivations of an individual, courts do undertake this task frequently, when deciding sanctions for other offences. Based on circumstantial evidence e.g., evidence from governmental meetings, previous actions and history, I suggest that there is a clear difference in the motivations of the politicians involved. It is likely, that Blair had some sort of positive motivation for making the deception about Iraq having WMD's. Whether it be wanting to prevent their use (as per what he publicly presented) or to prevent human rights abuses, it is likely that he was motivated by public good. This mitigates Blair's culpability, particularly how much we blame him. By contrast, it is likely that Johnson was motivated by selfish reasons e.g., to further his political career. In turn, this acts as an aggravating factor, because his deceit is less redeemable.

[633] Such a position is reflected in constitutional theory. E.g., the Salisbury Convention ensures that the Lords do not try to vote down at second or third reading of a Government Bill mentioned in an election manifesto.
[634] Thomas Christiano, 'Voting and Democracy' (1995) 25(3) Canadian Journal of Philosophy 395, 395-396.

Professional role and influence

Although not prevalent within any of the examples chosen, there are two other factors, which I suggest are highly influential. One, is the type of political role. Specifically, I distinguish between those in Government, and other politicians who qualify for the offence. This is based on the fact that those in Government carry more power and influence. As a result, their representations are more credible and carry greater weight.

Say for instance, a member of the opposition lies and tells everyone to withdraw money from their bank because we are in a financial crisis, versus a Minister. Although the same deceit, it would have very different consequences. The Minister's claim would be more harmful, because it is likely to be given greater exposure by the press and be assigned greater credibility from the public. A Minister will be viewed as privy to the events going on currently in the political domain or kept in the loop. By contrast, a member of the opposition would not have as much inner knowledge or power. Such a factor will be influential in the public's assessment of whether the deceit is true and consequently on the harms which can arise from the deceit. Alongside, influencing the amount of harm which can arise, it is also important to note that it also plays a part in culpability. Those, in Governmental positions have greater responsibility- they are being entrusted with more political power in which to serve the public. Consequently, they are more blameworthy than those who hold non-governmental positions.

The other factor which I suggest would be influential would be whether the politician has influenced others into propagating the deceit. An individual who uses others to create a wider network of deceit is far more culpable than doing it by themselves. By creating a broader scheme, they are indicating a greater level of planning and sophistication. They also bear greater blame for corrupting others.

Having extracted the factors which aggravate the seriousness, I can now consider how these factors can be interpreted to create sanctioning guidance. To do this, I will engage in two-step analysis: first considering how the culpability and harm can be categorised into different levels. I will then apply these to my samples, suggesting what class each example should be assigned and how these should correspond with sanctions. It is worth noting that some of the factors were influential on both the harm and culpability, and so arise in both categorisations.

Difference in culpability is typically based on the way in which the offence was carried out (the level of involvement and planning from the offender).[635] Applying these ideas of culpability, I put forward the following factors: the reach and frequency of the deceit was made, the number of victims, the motivation of the offender, political position, and whether the offender involved others. If we take inspiration from these factors, we can now apply them to creating high, medium and low thresholds of culpability.

For an assessment of high culpability, I suggest, the following characteristics are present:

- The politician engages in frequent deceptive representations over a sustained period of time.
- Makes the representations to the public at large.
- Involves others through pressure or influence.
- The politician is likely motivated by personal, political financial gain and holds a position in Government.

Based on how the sentencing guidelines treat medium culpability I would define this threshold as:

- Having factors from both the higher and lower categories which neutralise each other.
- Or, the offender's culpability falls between the factors as described in highest and lower.

For an assessment of lower culpability:

- The deceiver is involved through coercion.
- There would be a smaller number of victims (e.g., the deception being directed towards a section of the public as opposed to the public at large).
- The representation would be a one-off occurrence.

[635] Sentencing Council, 'Bribery' (*Sentencing Council*, 1 October 2014) https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/bribery/ accessed 11 September 2023; Sentencing Council, 'Fraud' (*Sentencing Council*, 1 October 2014) https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/fraud/ accessed 11 September 2023; CPS, 'Misconduct in Public Office' (*CPS*, 7 July 2023) https://www.cps.gov.uk/legal-guidance/misconduct-public-office#:~:text=Misconduct%20in%20public%20office%20(%E2%80%9CMiPO,of%20the%20public%20office%20held accessed 14 September 2023.

- The deceiver is likely not motivated by personal, political or financial gain, and the deceiver having limited awareness or understanding of their offence.
- They would likely hold a non-governmental position.

This, is how I would create the first step towards determining the seriousness of the offence.

The second step, involves looking at the level of harm. Typically, the sentencing guidelines tend to be fairly vague in relation to defining harm (e.g., the actual or intended impact). However, based on my analysis of the samples above, I can propose three aggravating factors which indicate the level and type of harm: mode of dissemination of the deceit, the political role, and the electoral time-period. I can also suggest how these may present themselves, in relation to the categories of harm.

I propose the following three categories: highest (category 1), medium (category 2), and low (category 3) harms. Based on the above analysis, I define the highest level of harm as having the potential to contribute towards significant harm. Of course, this cannot be easily measured but I foresee typical indicators of intended or actual harm.

For the highest level of harm:

- The deception is disseminated to the public at large e.g., through social media or a press interview.
- The deception precedes an election or referendum.
- The deception occurs on numerous occasions and over a sustained period of time.

For medium level harm:

- There is dissemination to the public at large, but a lack of mass circulation is present.
- The representation may be repeated but will not be said very frequently or over a sustained period.

For lower-level harm there would be where there may be evidence of some intended or actual harm but it would likely be minimal.

- The communicative transaction is smaller e.g., between a politician and a section of the public
- The deception is not repeated.

Application to Examples 1, 2 and 3

Providing practical guidance on how the severity of the deceptive representation can be measured, has provided useful practical guidance. Now, I will apply these categories to my examples and consider how this would correspond on my scale of sanctions. In doing so I determine the type of culpability and harm they should have. For the purpose of logical analysis, I will discuss each example in turn.

Example 1

From a culpability perspective, I suggest that Braverman's deception falls within the medium category. Whilst there are indicators higher culpability, most of these are neutralised by indicators of lower culpability. Of course, there are several factors which aggravate her culpability: Braverman was addressing the public at large through the television interview on Good Morning Britain (a television programme which has national coverage and a large number of viewers) and she held a position of governance as Home Secretary. However, the deceit was not over a long time-period, and only made on two public occasions in a 24-hour time-period, meaning there is no evidence of a high-level commitment to the deceit or prolonged planning. It should also be noted, that there is no evidence of Braverman coercing others into propagating the deceit (although if there was, this would aggravate her culpability). Due to the fact that only two indicators of the high-level culpability are evident, and there are factors which mitigate her culpability, I suggest a medium classification.

From a harm-based perspective, I would suggest a classification of medium-low level harm. Most of the factors, point towards a lower level of harm. Obviously, it should be noted that, Braverman was addressing a large section of the public so there is an aggravating factor present. She did also repeat the deceit. However, it was only repeated publicly on one more occasion, very shortly after her initial claim. The deceit was also not made in an electoral or referendum context. Both of these factors offset and neutralise the indicators of a higher-level harm, suggesting a medium categorisation. Based on my analysis and in light of the scale I have put forward, I would suggest that my assignment of Braverman's deceit as demonstrating medium culpability and medium harm, would correspond with a band C fine.

Example 2

Again, the first step, is to consider Blair's culpability, which I suggest warrants a high-level classification. Almost all the aggravating factors of this category are present in Blair's deception over the evidence of WMD's. For instance, he maintained the deceit over a number

of years, and made it on a number of occasions. Even defending his interpretation of the intelligence in the Iraq inquiry. The deception was addressed to the public at large via the BBC (a national television programme, with a large number of viewers), and when he originally made it, he was the Prime Minister. The only mitigating factors, is that he was likely motivated by concern for the public good and he did not force others to promulgate the deception.[636] Despite this, the fact that the majority of factors are present, mean that I would still class Blair as having a high-level of culpability. In particular, the fact that he continued the deceit over several years, is a very weighty factor because it indicates a deep commitment.

The second step, is to consider the amount harm that was intended or actually occurred. Unlike with the culpability, I would deem this to be the medium level. The decision to enter the Iraq war more broadly resulted in serious collective harm e.g., social division -with 1.5 million people protesting the decision to enter more generally,[637] and physical harm from those who were part of the military intervention. Yes, these can be attributed to the broader issue of entering into a war with Iraq but Blair's deception over the certainty of the evidence likely still contributed towards these issues. Due to its contributing role in this broader harm, I suggest that the deceit specifically should be classed as medium level harm. Thus, for Blair, I suggest that based on this classification, a conviction under the offence would warrant the use of a medium level community order, or even disqualification.

Example 3

Finally, for Johnson's deceit over EU statistics, I suggest a classification of both high-level culpability and harm. Now Johnson not only addressed the public at large through his support and propagation of the Brexit campaign, but also made the deceit on a number of occasions, even after the UK Statistics Authority had identified it as being a misleading figure. While there is no publicly available evidence to suggest that Johnson involved others in the deceit, almost all the other indicators of a high level of culpability are present. Based on his previous behaviour, e.g., prior to the Brexit campaign, Johnson had been a supporter of the EU,[638] it is

[636] Committee of Privy Counsellors, *The Report of the Iraq Inquiry: Volume IV* (2016, HC 265-IV) Ch 4.2. Note, that even though report noted that the some of the claims were discussed -in particular how the dossier was drafted was discussed by the Cabinet Office. However, there is no evidence that Blair coerced others into also making the representations.

[637] Tim Adams, ''A beautiful outpouring of rage': did Britain's biggest ever protest change the world?' (*The Guardian*, 11 February 2023) https://www.theguardian.com/uk-news/2023/feb/11/slugs-iraq-war-london-protest-2003-legacy accessed 13 April 2024.

[638] Nicholas Watt, 'Boris Johnson joins campaign to leave EU' (*The Guardian*, 21 February 2016)

likely that he was motivated by political interests. Additionally, the position he held at the time was indicative of greater culpability: being Foreign Secretary.

Similarly, I suggest that his deceit warrants a classification of high-level harm. Although we cannot determine how much harm the deceit specifically caused, (it would be impossible to pin-point how many people voted for Brexit because of the £350 million figure, or used this as a contributing factor in their decision-making), it is likely that it contributed towards significant harm. First, it is likely that he intended for significant harm to be caused, because he knowingly tried to disseminate misleading information in the run-up to a referendum. Second, it is likely that mass democratic harm was caused. Clarke et al's study on the Brexit campaign and voter deliberation is indicative of this.[639] The findings showed that '[m]any panellists looked to the campaign for help, at least initially. They read leaflets and newspapers, watched television and listened to the radio'.[640] The problem was, that the speculation and contradicting claims, left them feeling uninformed and the public was forced to use their gut instinct (e.g., using their beliefs and principles to guide them) and fill that deficit.[641] Thus, based on the empirical evidence, there is a strong case to be made that the deceit contributed towards significant collective democratic harm. Being able to make effective political preferences was undermined.

Such a conclusion is bolstered by indicators of high level of ham e.g., the deceit was made in the lead-up to a referendum, it was made numerous times and over a sustained period, with it being posted on social media. Obviously, what constituted as the lead-up to an election or referendum would have to be elaborated upon by a sentencing judge and potentially the common law. For the electoral period I would suggest a guide of a one-month time-frame. This is in-line with the general election timetable being 25 days, and the fact that most of the campaign material (i.e. manifestos and debates) occur in the month in the run-up to the election.[642] The referendum time-period would need to be more flexible to reflect the fact that the campaigning period can vary. My suggestion would be for the period to be classed as beginning when referendum campaigning starts and finishing when the vote has ended. I

https://www.theguardian.com/politics/2016/feb/21/boris-johnson-joins-campaign-to-leave-eu accessed 22 August 2022.

[639] Clarke, Jennings, Moss, and Stoker, (n 184) 110 -118.

[640] ibid 113.

[641] ibid 115-116.

[642] Ben Paxton, Rebecca McKee and Jack Pannell, 'General election 2024: What happens when an election is called?' (*IfG*, 24 May 2024) https://www.instituteforgovernment.org.uk/explainer/uk-general-election-july-2024 accessed 3 January 2025.

would, however, use an approach which is based on judicial judgement, as opposed to strict adherence to a specific time period to avoid arbitrary cut-off points. Regardless, Johnson's deception clearly falls within the referendum campaigning period. Thus, if Johnson had been convicted under my proposed offence, an appropriate penalty would be a high-level community order or disqualification from Parliament.

The aim of these last two chapters was to provide an outline of where I suggest criminal liability could be imposed and how it could be implemented. Whilst in Chapter 7 I provided detail on the substance of the offence, in Chapter 8 I completed the indication of criminal liability and put forward a model for sanctioning I not only used jurisprudential analysis to argue what the scale of sanctions should be, but looked at how the severity of sanction could be determined and put forward some sentencing guidance. To do the latter, I focussed on deceptive representations which would satisfy my proposed standard of criminalisation, and extracted the factors which make the deceiver more or less culpable and the deception have more or less potential for harm. I then used these to inform my suggestion of how my suggested scale of sanctions should be applied. My purpose across these two chapters was to provide an indication of how criminal liability could work if a new offence was introduced to complement the existing legal framework.

Conclusion to the thesis

While deceptive political representations have existed throughout British politics, recent scandals such as Partygate and the Brexit campaign have exposed their regular use. Their persistence in spite of the UK's regulatory framework, raises questions about the current approach, particularly in terms of what should we be regulating and how should this be done. This inquiry was structured with the aim of offering detailed analysis on a particular part of the problem: Westminster politicians. While my focus has been asymmetric, I encourage further inquiries into the other issues surrounding deceptive political representations, such as exploring how this problem manifests with other politicians and ancillary issues like distribution channels. Further examination of these issues will enrich our understanding of the nature of the problem and inform regulatory development.

This thesis used inter-disciplinary methodology, drawing upon philosophy, politics and doctrinal law to rigorously explore this issue. I began this thesis by laying the theoretical and conceptual groundwork, defining key typology and putting forward an argument for what we should be regulating. I conceptualise regulation liberally, advocating the theory that to justify regulation the behaviour must have certain qualities. In this sense, it must not just be a moral wrong (something which we ought not to do) but actually cause or risk causing harm. Using this conceptualisation as an apparatus, I identify the types of deceptive representations which warrant a regulatory response (these being, those which are made to Parliament and those which are made to the public). With the focus now solely on these types of representation, I turned towards reflecting on our approach to addressing them (either discouraging their use or recognising and sanctioning them). To achieve a comprehensive analysis, I took a dual-perspective, using theoretical and functional observations to inform my assessment of the framework and recommendations for reform.

The framework can be categorised into three parts: the generalist mechanisms, the specialist mechanisms for deceptive representations to Parliament and, the specialist mechanisms for deceptive representations to the public. My findings are somewhat mixed and there are a number of improvements which could be made to strengthen the mechanisms in the framework.

These are as follows:

- Introducing a vow to uphold the Principles of Public Life.

- Introducing a process for parliamentary correction, which can be used by ordinary peers in the House of Lords.
- Reforming how matters of privilege are dealt with to align with the Standards model.
- Only addressing the most straightforward matters of contempt with substantive motions. All other matters should be under the purview of the Privileges Committee and not dealt with by the House directly.
- Introducing controls to ensure that breaches of Ministerial standards are recognised and sanctioned.
- Redrafting section 106 of the Representation of the People Act 1983 to demolish the personal/ political distinction, and the focus on false statements of fact alone. Misleading statements of fact should also be included within the scope.

While there is a general sense of inadequacy throughout, the regulation in place for deceptive representations to the public is particularly deficient. The mechanisms are niche and only applicable to very specific types of representations, offering little coverage for this part of the issue. Even though part of the problem may be ameliorated with my suggested improvements, this part of the framework would still not be up to par. Thus, I also advocate for more radical reform to complement the existing approach. Specifically, I argue in favour of a new enforceable mechanism to recognise and sanction some of the deceptive representations which are made to the public.

Consistent with my theory of regulation in Chapter 2, my approach to criminalisation is liberal and I use Duff's model to make the argument in favour of introducing a new criminal law. While I considered a range of options, I am firmly in favour of criminalisation; it is the response which is appropriate for this type of representation. With this established, I turned to indicating how imposing criminal liability could work, paying attention to demonstrating how it could be drafted so as not to give rise to frequently cited objections, such as concerns over free speech or politicisation of the judiciary.

My proposal for criminal liability is based on the following features:

- The deceiver must have known that their representation was false or misleading, or, was aware of the likelihood that it was.
- The deceiver must be a Member of the House of Commons, the House or Lords or a candidate standing as an MP.
- The deception must be to the public at large or to any section of the public.

- The deception must be a matter of material public interest, as determined by the standard of a reasonable person.
- The deception must be unjustified, as determined by the standard of a reasonable person.

Now, I concede that there are those who will have objections to my proposal. However, my purpose has been to offer an indication of how this could work and to put forward a case as to why my approach to drafting criminal liability is appealing. To accompany the offence, I put forward a model for sanctioning, which is comprised of fines, community orders and disqualification from standing as an MP or sitting in the House of Commons or House of Lords for three years.

My hope is that as we now take the time to acknowledge the significant threat facing our democracy, we reassess our approach to addressing deceptive representations and consider substantial regulatory reform. In particular, I hope that we reconsider the feasibility and capability of using the criminal law to address deceptive representations because it has untapped potential in stemming their use in this context.

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