Liable Lies

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I Introduction

Shortly after ascending to South Africa's presidency in 2009, Jacob Zuma authorised the installation of security features at his home in Nkandla. These features were originally expected to cost about R28 million. Over the next few years, though, the government spent more than R215 million on the project, whose total cost skyrocketed to almost R250 million. This money was used to pay for more than just security features: a clinic, a gym, a swimming pool and the like. President Zuma was also aware of the project's growing scope and expense, yet failed to ask for explanations or halt the work.[1]

After complaints were lodged in late 2011, the Public Protector launched an investigation. This probe concluded in March 2014, when she issued a voluminous report more than 400 pages long.[2] This report referred to 'a license to loot situation [that] was created by government' through 'lack of demand management' for the construction.[3] The report also criticised 'a toxic concoction of a lack of leadership, a lack of control and focused self-interest'.[4] The report further found that President Zuma was 'aware of what the Nkandla Project entailed'[5] and 'tacitly accepted the implementation of all measures at his residence'.[6] However, the report did *not* conclude that President Zuma intentionally used government funds for his own benefit.

Seizing the political opportunity, the Democratic Alliance (DA) sent a text message to more than 1.5 million voters on 20 March 2014.[7] The message read as follows: 'The Nkandla report shows how Zuma stole your money to build his R246m home. Vote DA on 7 May to beat corruption. Together for change.'[8] In response, the African National Congress (ANC) filed a complaint alleging that the message violated certain provisions of the Electoral Act 73 of 1998 and the Electoral Code of Conduct (schedule 2 of the Act) banning false statements during political campaigns.[9]

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[1] See generally *Democratic Alliance v African National Congress & Another* [2015] ZACC 1, 2015 (2) SA 232 (CC), 2015 (3) BCLR 298 (CC)('*Democratic Alliance*'); Public Protector *Secure in Comfort: Report on an Investigation into Allegations of Impropriety and Unethical Conduct Relating to the Installation and Implementation of Security Measures by the Department of Public Works at and in respect of the Private Residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal Province* Report No 25 of 2013/14 (2014).

[2] See *Secure in Comfort* (note 1 above).

[3] Ibid at 39.

[4] Ibid at 422.

[5] Ibid at 423.

[6] Ibid at 63.

[7] See *Democratic Alliance* (note 1 above) at para 13.

[8] Ibid.

[9] Ibid at para 14.

After the case made its way through the High Court and the Electoral Court, the Justices of South Africa's Constitutional Court took their shot at determining whether the message was lawful. Three Justices thought it was not. In their view, the message was false because the Nkandla Report did not actually find that President Zuma 'stole' any money. Moreover, the message constituted a factual allegation rather than mere commentary (to which the statutory provisions do not apply).[10] But seven Justices deemed the message permissible. According to five of them, it was 'an interpretation of the content of the Report' rather than 'a factual assessment'.[11] According to two more Justices, the message was not false because, considered as 'an election punchline', 'some parts of the Nkandla Report … could well be construed to justify the view disseminated by the DA'.[12]

I have no experience applying South African statutes, and so do not try to second-guess the Constitutional Court's decision. Nor do I attempt to answer the lurking constitutional question: whether laws banning false campaign speech abridge the freedom of expression protected by the South African Constitution.[13] There is no doubt that laws like those on South Africa's books violate the *United States* Constitution because they criminalise false statements even if the remarks are not made with knowledge of, or recklessness as to, their falsity.[14] But American courts are exceptionally protective of speech, even untrue speech, and their balance between competing values is not necessarily the one that South African courts would strike.

Rather than comment on South African (or American) legal issues, my goal in this paper is to outline a normatively attractive regulatory framework for false campaign speech. I begin my analysis with a discussion of the countervailing policy considerations. These factors are essentially the same as the ones debated by courts in constitutional cases. But by proceeding at the level of policy rather than of doctrine, I escape the idiosyncrasies of specific decisions. I am able to take a step back and articulate first principles: on the one hand, the critical importance of political speech – and of not chilling it through excessive governmental intervention – and on the other, the worthlessness of false campaign speech, which can distort citizens' voting decisions or even dissuade them from voting in the first place.

Next, I assess South Africa's laws banning false campaign statements in light of these principles. The laws, in my view, are quite poorly drafted. They seem to extend to *all* false statements, even ones whose falsity could not reasonably have been known. Among other flaws, the laws also apply to all speakers, ignore statements' impact on their audience, authorise overly harsh penalties and are subject to manipulation. In short, the laws threaten to deter too much valuable speech in their effort to stamp out valueless lies.

[10] Ibid at para 114.
[11] Ibid at para 146.
[12] Ibid at para 203.
[13] See Constitution s 16.
[14] See, eg, *New York Times Co. v Sullivan* 376 US 254, 279–80 (1964)(barring liability for a false statement unless it 'was made with "actual malice" – that is, with knowledge that it was false or with reckless disregard of whether it was false or not').

In the heart of the paper, I then reflect on how South Africa's laws could be improved – that is, how a more appealing regulation of false campaign speech could be designed. I do so using a series of variants of the actual text message sent by the DA. These scenarios are meant to illuminate the problems with the existing laws, as well as a potential path forward. This path could include the following elements: (1) liability only for false statements made with knowledge of, or recklessness as to, their falsity; (2) liability only for statements whose falsity and effects are material; (3) liability only for candidates, political parties and political committees; (4) a usual remedy of compulsory retraction and correction; (5) a restriction of harsher penalties to false statements about election administration; and/or (6) enforcement by an independent agency responsible for initiating its own investigations.

Lastly, I respond to the critique invited by a statute with this many constraints: that, in practice, it would be close to useless, thus allowing false campaign speech to continue to inflict its insidious harms. How this sort of law would operate is, of course, uncertain. But it is hardly unusual for criminal prosecutors (or civil plaintiffs) to have to prove numerous elements in order to establish liability. The extra elements I recommend are also carefully chosen to chart a middle course between the competing values implicated in this domain. Without them, I fear that too much precious political speech would be ensnared in a regulatory web.

II Policy Quandaries

What (if anything) the government should do about false campaign statements is an extremely difficult question, one with which judges and scholars have struggled for decades. The core dilemma is that the government is damned if it does too much, and damned as well if it does too little. Do too much and speech critical to the functioning of democracy is suppressed. Do too little and speech that undermines the very foundations of democracy is permitted to flourish. As Richard Hasen has noted after surveying the American decisions: 'The clear message from the collection of cases [is] that there are important interests on both sides of the equation and that judges and others have struck the balance differently.'[15]

What exactly are these rival interests? A good starting point is the fact that all campaign speech, true and untrue, is *political* speech. For several reasons, there is probably no category of expression more worthy of protection than political expression. Political speech is how democratic societies choose their leaders and their policies. Through the interplay of countless comments by candidates, parties, interest groups and voters, politicians are elected to (or ousted from) office, and laws are proposed, deliberated, refined and enacted.[16] As Robert Post has argued,

[15] RL Hasen 'A Constitutional Right to Lie in Campaigns and Elections?' (2013) 74 *Montana Law Review* 53, 63. See also, eg, WP Marshall 'False Campaign Speech and the First Amendment' (2004) 153 *University of Pennsylvania Law Review* 285, 286 ('The concerns on both sides of the campaign speech restriction debate are particularly powerful.')

[16] As the US Supreme Court has put it: 'The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth v United States* 354 US 476, 484 (1957).

political speech is also the mechanism through which citizens come to feel that the government is responsive to their interests. Citizens' ability to voice their political views is why they think the government takes those views into account – in other words, why they think they live in a democracy.[17] And precisely because of its potency, political speech is a primary target of non-democratic regimes. These regimes know that their legitimacy, even their survival, can be jeopardised by freely expressed statements made by people free to associate with one another. That is why these regimes are so quick to wield the tools of the censor.

The next point, though, is that *lies* about politics do not serve any of these purposes. To the contrary, they subvert democratic values in at least two ways.[18] First, to the extent political lies are believed, they mean voters might choose whom to support, and society as a whole might choose which policies to enact, based on false information. Voters who would favor one candidate if they knew the truth (about the candidates' records, their plans for the future, the state of the economy, and so on) might back a different candidate due to the deception. Similarly, the complex process that eventually leads to policy adoption might produce one outcome in the presence of political lies, and a different one in their absence. As an American state court judge has written, 'lies … distort the political process through untrue and inaccurate speech that misinforms the voters and so interferes with … the orderly way that change should be effected'.[19]

Second, political lies are able not just to skew voters' decisions, but also to stop them from voting at all. Consider false statements that the election is on Wednesday rather than Tuesday, that voters' polling places have been moved, that voters lacking photo identification will be unable to vote, that authorities will arrest voters with criminal records, and so forth. These sorts of untrue claims, if credited, can do more than merely shift the preferences of the electorate. They can change who is in the electorate to begin with.[20]

Thanks to these consequences, governments have a strong interest in preventing political lies from being uttered – and, if voiced anyway, in minimising the lies' damage. In his opinion in *Democratic Alliance v African National Congress*, Justice Zondo referred to this interest as voters' 'right to vote in free and fair

[17] See, eg, R Post 'Democracy and Equality' (2006) 603 *Annals of the American Academy of Political & Social Science* 24, 27 (presenting a 'theory of the American First Amendment, which rests on the idea that if citizens are free to participate in the formation of public opinion, and if the decisions of the state are made responsive to public opinion, citizens will be able to experience their government as their own').

[18] I say at least two because observers also identify other harms that, in my view, are not caused specifically by political lies' *falsity*. See, eg, *Richert v Public Disclosure Commission* 168 P.3d 826, 844 (Wa. 2007)(Madsen J, dissenting)(claiming that political lies 'cause public suspicion of candidates and their campaigns' and 'engender indifference'); Marshall (note 15 above) at 294–95 (claiming that political lies 'lower the quality of campaign discourse and debate' and 'lead or add to voter alienation by fostering voter cynicism and distrust of the political process').

[19] *Richert* (note 18 above) at 842 (Madsen J, dissenting). See also, eg, GG Ashdown 'Distorting Democracy: Campaign Lies in the 21st Century' (2012) 20 *William & Mary Bill of Rights Journal* 1085, 1092 ('Democratic self-government is based on informed voters making choices about what is in their best interests and the best interests of the country. If they are told lies about issues and candidates, these decisions get skewed.')

[20] See Hasen (note 15 above) at 56 (noting that 'false election speech might trick voters into making a disenfranchising error, such as showing up at the wrong place to vote').

elections'.[21] 'The publication of false statements', he added, 'is inconsistent with the right to free and fair elections and is a threat to the right'.[22] American judges have characterised the governmental interest somewhat differently, in terms of electoral integrity. In the words of the US Supreme Court, 'States have a legitimate interest in preserving the integrity of their electoral processes' and in 'protecting the political process from distortions caused by untrue and inaccurate speech'.[23]

That free and fair elections and electoral integrity are valid interests, though, does not mean that governments should take any and all steps that further them. This is because there is often a thin line between political lies and political truths – between worthless and very worthy speech. Efforts to foil the former can thus easily, if inadvertently, chill the latter. Take criminal penalties for false campaign statements: an intuitive way to combat these harmful claims. The sanctions could deter certain speakers from making *true* statements, which would expose the speakers to punishment if (erroneously but plausibly) found to be false. Or consider a law banning all untrue campaign statements, even ones reasonably thought to be accurate. Again, some speakers could decide not to say true things in order to avoid the possibility of liability.

In the case law, this chilling effect is the reason most commonly given by judges for limiting governmental attempts to fight political lies. In *Democratic Alliance*, for example, Justices Cameron, Froneman, and Khampepe wrote that '[b]ecause those who speak may not know – indeed, often cannot know – in advance whether their speech will be held to be prohibited, they may choose not to speak at all'.[24] Likewise, the US Supreme Court has contended that 'a rule of strict liability … may lead to intolerable self-censorship,' and that 'we protect some falsehood in order to protect speech that matters'.[25]

But the dissuasion of valuable speech is not the only problem with overly zealous campaigns against political lies. Another objection is that many lies are immaterial, are not believed by those who hear them, or are not heard in the first place. These lies simply do not cause enough damage to warrant any governmental efforts to stop them. An American federal court recently made this point with respect to an Ohio law that applied to all false campaign statements regardless of their significance. The law improperly equated 'lying about a political candidate's shoe size' with 'lying about a candidate's party affiliation or vote on

[21] *Democratic Alliance* (note 1 above) at paras 4–5 and 46–50.

[22] Ibid at para 47.

[23] *Brown v Hartlage* 456 US 45, 52, 61 (1982). See also, eg, TR Day '"Nasty as They Wanna Be": Clean Campaigning and the First Amendment' (2009) 35 *Ohio Northern University Law Review* 647, 677 ('Preserving the integrity of the electoral process is the overarching governmental interest served by campaign speech restrictions').

[24] *Democratic Alliance* (note 1 above) at para 132. See also ibid at para 157 (noting 'the chilling effect [a stricter law] would have on all who do not know the facts with complete certainty').

[25] *Gertz v Robert Welch Inc.* 418 US 323, 340–41 (1974). See also, eg, E Volokh 'Freedom of Speech and False Statements of Fact: An Amicus Brief on the Stolen Valor Act' (2010) 6 *Stanford Journal of Civil Rights & Civil Liberties* 343, 351 ('Why would any knowingly false statements of fact be constitutionally protected? The chief reason is … . [that] [t]he risk of liability for falsehoods tends to deter not just false statements but also true statements').

an important policy issue'.[26] Analogously, Justice Breyer of the US Supreme Court has observed that most prohibitions of untrue speech 'limit the scope of their application, sometimes by requiring proof of specific harm to identifiable victims … sometimes by limiting the prohibited lies to those that are particularly likely to produce harm'.[27]

A further argument against governmental intervention in this sensitive area is that the state cannot be assumed to be neutral. It *may* be staffed by objective investigators and prosecutors who are able to divorce their partisan and ideological views from their assessments of campaign statements' accuracy. But it may also be comprised of officials who cannot fully curb their biases, and so are more likely to deem a claim a lie when it attacks their preferred party or candidate. Even worse, the government may be *overtly* tilted in a particular direction, in which case, by design, it would enforce bans on false campaign statements more stringently against disfavored actors (such as opponents of the incumbent regime). As Geoffrey Stone has warned, 'there is great danger in authorizing government' to punish political lies, 'stem[ming] from the possible effect of partisanship affecting the process at every level'.[28]

Closely related to this danger is the risk that private parties will exploit the legal process for their own ends. Assume that anyone can bring a complaint alleging that a candidate has made a false campaign statement. This ability to trigger governmental action is unlikely to be exercised only when a lie has actually been uttered. Rather, it is likely to be deployed whenever doing so is politically advantageous – for instance, in the closing days of a campaign, when it might be helpful to be able to assert that one's opponent is a liar. The assertion may well be meritless, but before its error can be shown, the election will have passed, and the damage will have been done. In the words of another American federal court, '[t]here is no promise or requirement that the power to file a complaint will be used prudently', meaning that '[c]omplaints can be filed at a tactically calculated time so as to divert the attention of an entire campaign from the meritorious task at hand'.[29]

A final point against governmental involvement is that it may be unnecessary. Private parties who are lied about may make their own statements correcting the falsehoods that have been spread about them. From this collision of truth with fiction, the former may prevail, without the government having to lift a finger. As Justices Cameron, Froneman and Khampepe wrote in *Democratic Alliance*:

[26] *Susan B Anthony List v Driehaus* 814 F.3d 466, 475 (6th Cir. 2016).

[27] *United States v Alvarez* 132 SCt 2537, 2554 (2012)(Breyer J, concurring in the judgment). See also ibid at 2547 (plurality opinion)(highlighting the distinction between speech 'shouted from the rooftops or made in a barely audible whisper').

[28] GR Stone 'The Rules of Evidence and the Rules of Public Debate' (1993) *University of Chicago Legal Forum* 127, 140. See also, eg, *Alvarez* (note 27 above) at 2553 (Breyer J, concurring in the judgment: '[T]hose who are unpopular may fear that the government will use that weapon selectively, say by prosecuting a pacifist who supports his cause by (falsely) claiming to have been a war hero, while ignoring members of other political groups who might make similar false claims.')

[29] *281 Care Committee v Arneson* 766 F.3d 774, 790 (8th Cir. 2014). See also, eg, *Corn v Lucas* 34 N.E.3d 1242, 1256 (Mass. 2015)('The risk inherent in such an environment is that an individual, unconstrained by the ethical obligations imposed on government officials, will file an unmeritorious application'.)

'An election provides great … opportunity for intensive and immediate public debate to refute possible inaccuracies and misconceptions aired by one's political opponents.'[30] Or as the US Supreme Court has put it: 'The remedy for speech that is false is speech that is true… . The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth.'[31]

But this faith in counterspeech is more than a little naïve. Private parties who are lied about may lack the time to correct the falsehoods – if, say, they are circulated close to election day.[32] Or private parties may lack the interest; they may not wish to change their campaign strategy and focus on their opponents' untrue statements rather than their own electoral platform.[33] Or, most fundamentally, private parties may lack the *ability* to persuade the public that their opponents' claims are false. It is a lovely idea that truth inevitably triumphs over fiction, but it is not a very plausible notion. Many attributes of speech other than its veracity affect its popular acceptance, so as Frederick Schauer has argued, 'placing faith in the superiority of truth over all of these other attributes … requires … an almost willful disregard of the masses of scientific and marketing research to the contrary'.[34]

As to this research, political scientists have recently begun to study political lies, and what they have found is quite dispiriting. Many voters believe the lies: that former US President Barack Obama was born abroad, that the Republican Party stole the 2004 presidential election, that President Obama's health insurance reform created 'death panels', and so on.[35] Voters' wrong beliefs are also very stable over time, barely varying across multiple survey waves.[36] And most relevant here, voters' wrong beliefs are quite difficult to dislodge through counterspeech. Corrections by an adverse party are worse than useless; in their wake, 'participants become more committed to the misinformation'.[37] Neutral corrections (by the government or the media) have only a modestly beneficial

[30] *Democratic Alliance* (note 1 above) at para 134.

[31] *Alvarez* (note 27 above) at 2550 (plurality opinion). See also, eg, *281 Care Committee* (note 29 above) at 793 ('Especially as to political speech, counterspeech is the tried and true buffer and elixir').

[32] See, eg, *Public Disclosure Commission v 119 Vote No! Committee* 957 P.2d 691, 708 (Wash. 1998)('It is indeed all too common for candidates … to make last minute charges … in a fashion calculated to forestall a reply').

[33] See, eg, M Tushnet '"Telling Me Lies": The Constitutionality of Regulating False Statements of Fact' (2011) Paper No 11–02 *Harvard Law School Public Law & Legal Theory Working Paper Series* at 23 (noting that counterspeech can result in '[m]ore harm to [the lied-about candidate] from the statement and its refutation than to the other candidate from exposure of the lie').

[34] F Schauer 'Facts and the First Amendment' (2010) 57 *University of California Los Angeles Law Review* 897, 909.

[35] See, eg, AJ Berinsky *Rumors, Truths, and Reality: A Study of Political Misinformation* (unpublished manuscript, 2012) 15, available at https://pdfs.semanticscholar.org/98e3/35c3bdd861b793d07aee277f9745beb2f7e7.pdf ('[A] large majority of the citizenry says that they believe at least one of the rumors').

[36] Ibid at 14.

[37] S Lewandowsky 'Misinformation and Its Correction: Continued Influence and Successful Debiasing' (2012) 13 *Psychological Science in the Public Interest* 106, 118. See also, eg, B Nyhan & J Reifler 'When Corrections Fail: The Persistence of Political Misperceptions' (2010) 32 *Political Behavior* 303, 304.

impact.[38] By far the most effective way for lies to be rebutted is for the original speaker of the falsehood (or a likeminded party) to retract it and to supply a new factual narrative into which the truth logically fits.[39] This is not *counter*speech, though, but rather *substitute* speech by the party who lied in the first place.

III Crafting Policy

The regulation of false campaign statements, then, is a very tricky problem. Political lies are highly corrosive of core democratic values – but governmental attempts to suppress them may also undermine democracy while trying to enhance it. How well do South Africa's laws banning false campaign statements navigate this theoretical minefield? Not very well, I'm afraid, especially if they are read literally. I first advance this argument conceptually, and then make my case (as well as potential solutions) more concrete using a series of examples.

A South Africa's Laws

Beginning with the statutory text, s 89(1) of the Electoral Act states that with respect to certain legally mandated campaign statements, '[n]o person … may make the statement (a) knowing that it is false; or (b) without believing on reasonable grounds that the statement is true'.[40] The Act's next section, 89(2), provides that '[n]o person may publish any false information with the intention of (a) disrupting or preventing an election; (b) creating hostility or fear in order to influence the conduct or outcome of an election; or (c) influencing the conduct or outcome of an election'.[41] Lastly, item 9(1) of the Electoral Code of Conduct stipulates that '[n]o registered party or candidate may … (b) publish false or defamatory allegations in connection with an election in respect of (i) a party, its candidates, representatives or members'.[42] Violations of these provisions are punishable by a fine of up to R200 000 or a prison sentence of up to ten years.[43]

On their face, s 89(2) of the Electoral Act and item 9(1) of the Electoral Code of Conduct include no mens rea requirement at all with respect to a campaign statement's falsity. In other words, the provisions seem to be satisfied as long as a statement is found to be false – even if the speaker was merely negligent as to its falsity, and indeed, even if the speaker was *not* negligent but rather reasonably thought the statement was true. By apparently imposing strict liability for political inaccuracy, the provisions threaten to produce the chilling effect that many judges and scholars have feared. They threaten, that is, to deter speakers from making both true statements and false statements that the speakers reasonably or merely

[38] See Lewandowsky (note 37 above) at 114; Nyhan & Reifler (note 37 above) at 323.

[39] See Berinsky (note 35 above) at 39 ('[I]nformation from an unexpected source … was the most effective of any rhetorical strategy in increasing the rejection of this particular rumor'); Lewandowsky (note 37 above) at 116 (emphasising 'corrections that tell an alternative story that fills the coherence gap otherwise left by the retraction').

[40] *Democratic Alliance* (note 1 above) at para 48.

[41] Ibid.

[42] Ibid at para 40.

[43] Ibid at para 127.

negligently believe to be true. These kinds of claims are not political lies, yet may be dissuaded by South Africa's laws.

The qualifiers in the previous paragraph ('on their face', 'apparently', and so on) are necessary because, in their joint judgment in *Democratic Alliance*, Justices Cameron, Froneman and Khampepe *inferred* mens rea requirements for the provisions that lacked them. '[I]t would be intolerable,' they declared, 'to say that someone can be held liable … for making a statement they reasonably believed was true.'[44] Thus 'section 89(2)'s prohibition must be read to contain a requirement of fault. The same is true for item 9(1)(b) of the Code.'[45]

Justice Zondo, on the other hand, saw nothing wrong in mandating strict scrutiny for false campaign statements: 'Even if it can be said that the applicant reasonably believed that the SMS was true', he reasoned, the applicant would still be liable 'if the information it published was false and was published with the intention of influencing the conduct or outcome of the election'.[46] For their part, Justices Van der Westhuizen and Madlanga did not reach the issue. It therefore remains uncertain whether any mens rea as to falsity must be shown for s 89(2) and item 9(1) to be violated. Obviously, if there is no such requirement, then the provisions are significantly less attractive as a normative matter.

The provisions are also less appealing to the extent they apply not just to statements of fact but to political opinions and commentaries as well. Both s 89(2)'s 'false information' and item 9(1)'s 'false … allegations' are ambiguous as to their scope. They can be read as covering only factual statements, but they can also be construed to reach certain non-factual claims. 'Allegations', in particular, is a fairly capacious term. Fortunately, a majority of the Constitutional Court agreed in *Democratic Alliance* that the provisions extend only to factual statements.[47] The danger that South Africa's laws might chill non-factual political speech – the expression of political beliefs – was thus averted.

Interpreted most charitably, then, s 89(2) and item 9(1) require the same mens rea as s 89(1) (knowledge of a statement's falsity or lack of a reasonable belief in its truth) and apply only to statements of fact. Are these limitations enough to allay the concerns that dog all governmental efforts to fight political lies? No they are not, for several reasons. First, the provisions authorise harsh criminal penalties for violators – sanctions labeled '[v]ery tough' and potentially 'calamitous' by Justices Cameron, Froneman and Khampepe.[48] Punishment

[44] Ibid at para 157.

[45] Ibid at para 158.

[46] Ibid at para 52.

[47] Ibid at para 63 ('The next question for determination is whether the prohibition in s 89(2)(c) covers an expression of opinion. In my view, it does not.'); ibid at para 144 ('[S]ection 89(2)'s prohibition does not apply to opinion or comment, but only to statements of fact'). But see ibid at para 185 ('Surely we must accept that at some stage, even a comment, value judgment or opinion can become "false"'). In my view, only statements of fact should be targeted – but these may include both explicit assertions and ones implied by claims that otherwise amount to opinions. See, eg, *Milkovich v Lorain Journal Co.* 497 US 1, 18 (1990)('Simply couching such statements in terms of opinion does not dispel these implications').

[48] *Democratic Alliance* (note 1 above) at para 129.

this severe risks chilling too much lawful speech as speakers change (or cease) their comments to avoid even the possibility of liability.

Second, s 89(2) covers any 'person' and both section 89(2) and item 9(1) extend to any campaign statement that is 'false'. The provisions therefore reach many political lies whose effects are small or nonexistent – because they do not relate to an important topic, are voiced by people lacking large audiences, or are heard by many voters but not believed. These sorts of lies do not appreciably distort electoral outcomes or discourage citizens from voting. To expose their speakers to lengthy imprisonment is thus imprudent – making a punitive mountain out of a deceptive molehill.

And third, the provisions constitute a cause of action that any wronged party (or, worse, any party that *thinks* it is or could benefit from *claiming* to be wronged) may deploy in litigation. This is not a problem if all political lies are similarly likely to prompt lawsuits and if all sides are similarly willing to go to court. But it is a serious concern if there is an imbalance along these dimensions. In that case, one camp may gain from its greater readiness to wield the provisions as a sword against its opponent. This faction may file complaints at strategically opportune moments, use the law to discredit credible allegations against it, tie up its adversary in legal proceedings, and so on.

In my view, these are the flaws in South Africa's laws that are most evident from the statutes' text. The laws have additional shortcomings, though, that are best illustrated through hypothetical scenarios rather than abstract analysis. It is to these scenarios that I now turn. They serve the dual purposes of further illuminating the laws' drawbacks and paving the way toward a more defensible regulatory framework for false campaign speech.

B Hypothetical Scenarios

1 *Mens Rea*

Scenario 1: After the publication of the Nkandla Report, the DA sends a text message to 1.5 million voters, telling them that 'the report shows how Zuma stole your money to build his R246m home'. This message is false; the report finds that President Zuma was aware of the growing scope and cost of the work being carried out at his residence, and that he should have asked more questions about the project and supervised it more closely, but *not* that he intentionally used government funds for his own benefit. However, the DA staff who sent the message subjectively believed it to be true. This is evident from e-mails they wrote to one another including comments like: 'You have to see this report. It proves that Zuma is a crook.' Additionally, a reader of the report could reasonably, or at least not recklessly, think it determined that President Zuma was guilty of theft. This is because the report referred to 'a license to loot situation', to 'a toxic concoction of a lack of leadership, a lack of control and focused self-interest', and to President Zuma being 'aware of what the Nkandla Project entailed' and 'tacitly accept[ing] the implementation of all measures at his residence'. True, if properly construed, these passages did not *actually* state that he stole any money. But it

would be reasonable, or at least not reckless, for a reader to reach the opposite conclusion.

On these facts – at least according to the statutory text and Justice Zondo's interpretation of it – s 89(2) and item 9(1) are violated. By assumption, the DA's text message is false, and it is irrelevant that the DA's staff subjectively believed it to be true and that their view was reasonable or, at worst, negligent. But for reasons that should be familiar by this point, this outcome is quite troublesome. It means that the DA's staff are liable even though their conduct, a reasonable or perhaps negligent error as to the message's accuracy, was not especially blameworthy. More importantly, it means that speakers would be deterred from making future campaign statements that they think are true and whose truth they have reasonably, or at worst negligently, assessed. Many of these statements would *in fact* be true, but some of them could be deemed false, and the strict liability for the false statements would prevent the issuance of at least some true ones.

How could s 89(2) and item 9(1) be amended to avoid these consequences? The obvious answer (and the one mandated for the last half-century in the United States)[49] is to add a mens rea requirement. A false campaign statement would then be barred only if its speaker *knew* it was false or was *reckless* as to its falsity. A reasonable or merely negligent mistake as to a statement's veracity would not result in liability. This approach would insulate speakers from punishment in situations where their behaviour was not particularly culpable. Additionally, it would reduce the chilling effect inherent in a regime of strict liability for falsity. Now as long as speakers' evaluation of a statement's truth was reasonable, or not too unreasonable, they would not have to worry about the statement ultimately being found false.

2 *Subject Matter*

Scenario 2: On the evening before 7 May 2014 election, the DA sends a text message to all *ANC supporters* whose phone numbers it happens to possess. This message reads: 'Due to technical difficulties, tomorrow's election is postponed until next week. Be smart; don't waste your time trying to vote tomorrow.' The message is false, and the DA staff that composed it knew it was false. In fact, the election will take place as scheduled.

It is obvious that the message is unlawful under s 89(2) and item 9(1). It should also be clear that it differs in several respects from the message at issue in *Democratic Alliance*, all of which render it more problematic. First, its falsity is more apparent, hinging on not the exegesis of a lengthy report but rather the timing of the upcoming election. Second, it is more implausible that the DA's staff made a reasonable, or merely negligent, mistake in drafting it. Third, because it is further removed from true campaign statements, imposing sanctions on its speakers would be less likely to deter valuable political speech. And fourth, its basic aim contrasts with that of the message in *Democratic Alliance*. That message sought to *persuade* voters to cast their ballots for one party (the DA) rather than another (the

[49] *Sullivan* (note 14 above).

ANC). But this one tries to *trick* the ANC's supporters into not voting at all. If it is believed, its effect is outright disenfranchisement, not just the presentation of one more (misleading) political argument.

For all these reasons, I think the message is especially objectionable. It is simply worse to lie about the *administration* of an election, thus potentially stopping citizens from voting, than about the candidates running or the issues featured in a race. One way to incorporate this insight, suggested by Justices Cameron, Froneman and Khampepe in *Democratic Alliance*, is to construe s 89(2) and item 9(1) as applying only to false campaign statements about election administration. In their words, the provisions' 'prohibition on false information is designed … primarily to protect the mechanics of the conduct of an election: voting, billboards, ballot papers, election stations, observers, vote counts'.[50]

Another approach, to which I am more partial, is to limit the stiffest penalties to lies about election administration. For example, these lies could trigger criminal punishment, perhaps including imprisonment, while other political lies might result only in compulsory retractions and corrections. This bifurcation would recognise the difference in kind between the harms that false campaign statements can inflict – between voter disenfranchisement on the one hand, and electoral distortion on the other. At the same time, though, this policy would continue to proscribe all political lies, thus avoiding the implicit approval of any of these destructive claims.[51]

3 *Materiality*

Scenario 3: After the publication of the Nkandla Report, the DA sends a text message to a small subset of its followers, telling them that 'the report shows how Zuma stole your money to build his R246m home'. This subset is *very* small, consisting of only a handful of DA backers. The recipients of the message also do not disseminate it further.

Scenario 4: After the publication of the Nkandla Report, the DA sends a text message to 1.5 million voters, telling them that 'the report shows how Zuma stole your money to build his R246m home'. The recipients of the message scoff at it, almost universally refusing to believe it, deeming it a political ploy by the DA, and crediting President Zuma's account of the situation. A poll later confirms that only a tiny fraction of the public thinks that President Zuma intentionally used government funds for his own benefit.

Scenario 5: After the publication of the Nkandla Report, the DA sends a text message to 1.5 million voters, telling them that 'the report shows how a clinic, a gym, a swimming pool and a bowling alley were built at Nkandla, costing taxpayers R246m'. The message is accurate as to three of the four items that were constructed, as well as the project's price tag. However, no bowling alley was built at Nkandla, and the DA's staff knew this when they wrote the message.

[50] *Democratic Alliance* (note 1 above) at para 138.

[51] For a similar proposal, see Hasen (note 15 above) at 57 ('[C]ourts should reject challenges to narrower laws that … bar false (though not misleading) election speech about the mechanics of voting').

Assuming again that the message about President Zuma stealing money is false, s 89(2) and item 9(1) are infringed in all three of these scenarios. In all three cases, 'false information' or 'false … allegations' are present, and that is enough for there to be liability. In all three cases, though, this is a vexing conclusion because, by hypothesis, none of the messages had a substantial effect. The message in *Scenario 3* was received by so few voters that, even if believed, it could not possibly have influenced the election. The message in *Scenario 4* was *not* credited by its recipients, and so could not have had an electoral impact either. And the lie in *Scenario 5*'s message – that a bowling alley was one of the features installed at Nkandla – was so trivial that it too must have been electorally immaterial.

Under these circumstances, I think it is improper for the state's legal machinery to be deployed. In criminal law terms, we might say there is no actus reus: no political lie that actually prevents citizens from voting or distorts electoral outcomes. In the language of tort law, the problem can be seen as an absence of damages – of any subversion of democratic values due to the false campaign statement. From the perspective of discouraging future behaviour as well, there is no reason to try to inhibit harmless activity. There is a strong democratic case against speech that undermines democracy, but this case evaporates when the speech does not, in fact, affect whether or how citizens choose to vote.[52]

The implication of this analysis is that South Africa's laws could benefit from the addition of a *materiality* requirement. Here I have two kinds of materiality in mind. The first relates to a statement's falsity: is the inaccuracy one that would substantially influence a reasonable citizen's exercise of the franchise or vote choice? The second involves a statement's consequences: based on the available evidence, such as testimony from those who heard the statement, media coverage of the statement and polling data, have a significant number of citizens been significantly swayed by the statement? In my view, liability should be possible only if both of these materiality criteria are satisfied. If they are not met, either the lie itself or its effects are so slight that the legal system should decline to get involved.[53]

4 *Speakers*

Scenario 6: After the publication of the Nkandla Report, John Doe sends a text message to all of his cell phone contacts, telling them that 'the report shows how Zuma stole your money to build his R246m home'. John Doe is a private South

[52] For American courts making similar arguments, see *Alvarez* (note 27 above) at 2555 (Breyer J, concurring in the judgment)(stressing the need to ensure that 'the statute does not allow its threat of liability or criminal punishment to roam at large, discouraging or forbidding the telling of the lie in contexts where harm is unlikely'); *Susan B Anthony List* (note 26 above)('Penalizing non-material statements … is not narrowly tailored to preserve fair elections.')

[53] See L Goldman 'False Campaign Advertising and the "Actual Malice" Standard' (2008) 82 *Tulane Law Review* 889, 919 ('Minor misstatements [should] not be actionable. To operate otherwise, the statute would chill speech for little or no benefit'). I confess that in proposing the second kind of materiality (of the lie's *effects* as opposed to its *substance*) I am motivated by my general preference for consequential approaches to legal doctrine. See, eg, NO Stephanopoulos 'Elections and Alignment' (2014) 114 *Columbia Law Review* 283.

African citizen. He is not a candidate for office, nor is he a party official or a member of any political committee or interest group.

Interestingly, South Africa's laws diverge as to the permissibility of this message. Section 89(2) prohibits it (still assuming it is inaccurate) because the provision states that '*[n]o person* may publish any false information'.[54] But item 9(1) does not apply to the message because it provides that '*[n]o registered party or candidate* may … publish false … allegations'.[55] John Doe is a 'person', of course, but he is not a 'registered party or candidate'.

Like South Africa's laws, I am conflicted as to which speakers should be covered by a ban on false campaign statements. On the one hand, a lie is a lie; political untruths spread by private citizens can have the same negative consequences – voter disenfranchisement and electoral distortion – as fictions circulated by conventional political actors. On the other hand, the impact of false private speech is usually fairly minor. Most private citizens have small direct audiences, and they cannot count on the media to amplify (or even notice) their comments. Additionally, the notion of the government monitoring private speech, evaluating its truth or falsity, and punishing those statements deemed to be inaccurate, is more than a little totalitarian. By doing so, the government would probably reduce the volume of untrue private speech – but only by chilling much true speech from citizens wary of risking their finances, or freedom, on their assessment of a comment's veracity.

A materiality requirement like the one discussed above would partially address these concerns.[56] Then private citizens could be sanctioned for false campaign statements only in the unlikely event that the statements included substantial inaccuracies, were heard by a substantial number of listeners, and substantially influenced those listeners' exercise of the franchise or vote choice. As a further precaution, I think it is sensible to limit liability to political parties and their officials, officeholders and candidates for office, and 'political committees' – an American term of art for individuals or entities that raise or spend at least $1 000 in connection with an election.[57] This approach would reach the speakers whose lies are most apt to corrode democratic values: conventional political actors and private actors who have thrust themselves into the political arena through their extensive campaign activity.[58] The approach would also shield ordinary private citizens from any penalty for false campaign statements. As seems appropriate in a free country, these citizens' comments would fall into a protected zone.

[54] *Democratic Alliance* (note 1 above) at para 48 (emphasis added).

[55] Ibid at para 40 (emphasis added).

[56] See Part III.B.3 above.

[57] See Federal Election Commission *Nonconnected Committees* (2008) 3. 'In connection with' is construed broadly under American law, extending to any contribution or expenditure made 'for the purpose of influencing' an election.

[58] See Goldman (note 53 above) at 921 ('A statute might limit application to advertising by candidates or political parties on the basis that their speech will be the most durable').

5 *Remedies*

Scenario 7: After the publication of the Nkandla Report, the DA sends a text message to 1.5 million voters, telling them that 'the report shows how Zuma stole your money to build his R246m home'. The Electoral Court concludes that the message violates s 89(2) of the Electoral Act and item 9(1) of the Electoral Code of Conduct. It sentences the DA staff who wrote the message to ten years in prison and a fine of R200 000.

Scenario 8: After the publication of the Nkandla Report, the DA sends a text message to 1.5 million voters, telling them that 'the report shows how Zuma stole your money to build his R246m home'. The Electoral Court concludes that the message violates s 89(2) of the Electoral Act and item 9(1) of the Electoral Code of Conduct. It publishes the following statement on its website: 'The DA's text message about the Nkandla Report is false and unlawful. Contrary to the message's allegation, the Report did not find that President Zuma stole public funds to construct his residence at Nkandla. Rather, the Report determined that President Zuma was negligent with respect to the project's scope and expense.' This statement is widely covered by the South African media for a few days.

Under South Africa's laws, all of these remedies for violations of s 89(2) and item 9(1) are permitted. Sections 96(2) and 98(b) of the Electoral Act authorise the imposition of 'any appropriate penalty or sanction' on offenders, including 'imprisonment for a period not exceeding 10 years' and 'a fine not exceeding R200,000'.[59] That 'any appropriate penalty or sanction' can be construed broadly is evident from *Democratic Alliance* itself, where the Electoral Court ordered the DA to send a new text message to the original message's recipients, retracting the allegation about President Zuma's theft.[60] If anything, for the Electoral Court to post an analogous correction on its own website is a less aggressive remedy.

That these steps are valid, though, does not mean they are prudent. In fact, for distinct reasons, I think the penalty in each scenario is quite unwise. The problem with the first punishment is obvious: it is too severe, and thus risks deterring too much valuable speech by speakers afraid that if their statements are found to violate the provisions, they will be heavily fined or condemned to a lengthy prison term. Though there is no empirical evidence on point, few speakers can be expected to be so confident in their comments' accuracy that they would be willing to wager a decade of their lives, or a decade of the typical South African's wages, on the proposition.

The difficulty with the second remedy is somewhat subtler: it is unlikely to convince many people who believed the DA's text message that the message is actually false. As noted earlier, political lies are extremely sticky. Once credited, they cannot easily be uprooted – and while a governmental correction is not the least effective form of counterspeech, it is not particularly potent either.[61] Accordingly, many people who learn about the Electoral Court's statement are likely to exhibit something like the following response, at least subconsciously:

[59] *Democratic Alliance* (note 1 above) at paras 127–28.
[60] See ibid at para 117.
[61] See notes 35–39 above and accompanying text.

'Well, of course the government isn't going to admit that President Zuma stole the people's money. The ANC runs the government, and the last thing it wants to do is embarrass the President. To be honest, that the government felt compelled to rebut the DA's message makes me think there's something to what the DA said.'

What options are left if imprisonment and fines are too harsh (at least in cases not involving lies about election administration)[62] and governmental corrections are often futile? Based on the political science evidence, my preference would be for the government to require the offending party to retract its false statement *and* to supply a new factual narrative into which the truth dovetails. This approach is effective because it causes the lie to be rectified by the very speaker who propagated it and persuaded people it was correct.[63] Here, the implication is that the Electoral Court should have added a few more sentences to the text message it proposed to make the DA send. That message could have still begun: 'The DA retracts the SMS dispatched to you which falsely stated that President Zuma stole R246m to build his home.'[64] But it should have continued (more or less): 'President Zuma knew about the cost overruns at Nkandla and should have asked more questions about them. But his conduct was merely negligent. It did not constitute theft, and the DA was wrong to say it did.'

True, this remedy is not foolproof either. Recipients of the mandated message might discount it precisely because it was commanded by the government. Speakers might also consider a compulsory retraction-cum-correction a mere slap on the wrist, and so not much of a deterrent to future political lies. Nevertheless, I do not see a better route through this difficult terrain. Penalties cannot be too severe lest they inhibit worthy speech, but they also should not be toothless. Curative statements crafted by the government and issued by the original speakers are *not* toothless (even if their bite is not as sharp as one might like), nor are they likely to have much of a chilling effect. This may be the best we can do in this area.[65]

6 *Enforcement*

Scenario 9: After the publication of the Nkandla Report, the DA sends a text message to 1.5 million voters, telling them that 'the report shows how Zuma stole your money to build his R246m home'. The ANC also sends a message to a large number of voters, stating that 'the report shows how Zuma responsibly monitored the Nkandla project and was innocent of any wrongdoing'. The ANC files a complaint alleging that the DA's message is unlawful two weeks before 7 May 2014 election. Coverage of the ANC's complaint dominates headlines until the election and drowns out the DA's efforts to convey its policy platform. The DA does not file a complaint against the ANC's message.

[62] See Part III.B.2 above.

[63] See note 39 above and accompanying text.

[64] *Democratic Alliance* (note 1 above) at para 117.

[65] If remedies are restricted to retractions and corrections (for lies not involving election administration) mens rea requirements become less important. Imposing liability on a speaker who was negligent, or even one who acted reasonably, is not as problematic if the penalty is merely more speech.

Scenario 10: After the publication of the Nkandla Report, the DA sends a text message to 1.5 million voters, telling them that 'the report shows how Zuma stole your money to build his R246m home'. The ANC also sends a message to a large number of voters, stating that 'the report shows how Zuma responsibly monitored the Nkandla project and was innocent of any wrongdoing'. Both the ANC and the DA file complaints alleging that the opposing party's message is unlawful. The courts rule in favor of the ANC's petition, ordering the DA to retract and correct its message. But they rule against the DA's petition.

Both of these scenarios are perfectly plausible under South Africa's laws. The laws allow non-governmental entities to bring complaints, and thus to activate the state's legal apparatus, at the time of their choosing. As in the first case, if one wronged party files suit but another one does not, then one political lie may be punished by the government while another falsehood is overlooked. The laws also depend on the courts for their impartial administration. But as in the second case, if the courts *are* biased, then equivalent deception by both sides may be unevenly sanctioned.

The trouble with the two scenarios should be apparent as well. In the first case, a legal proceeding unfolds against the DA but not the ANC, even though both parties (are assumed to have) made false campaign statements, thanks to the ANC's greater willingness to go to court. Moreover, the ANC's canny timing means the proceeding begins at the moment when it can do the most political damage, shortly before the election. In the second case, the inequity is even starker. Both parties are equally prepared to resort to legal remedies. But because of the courts' favouritism toward the ANC, the DA's message is penalised while the ANC's is not.

In my view, the best solution to the first problem – unfairness caused by the laws' reliance on private parties to initiate litigation – is to *remove* private parties from the enforcement process. In their place, either ordinary prosecutors, the existing Electoral Commission, or a newly created 'truth commission' could take the lead in investigating and punishing political lies. Prosecutors would presumably operate pursuant to the rules and norms of the criminal justice system. In contrast, a commission would function as an administrative body, launching inquiries and ordering retractions and corrections without involving the courts (at least at the outset). In both cases, the key point is that private parties would be unable to trigger governmental activity. Instead, such activity would occur only when deemed appropriate by the government itself. Parties' asymmetric willingness to file suit would thus become irrelevant, as would their attempts to time proceedings for political advantage.[66]

With respect to the second problem – the possibility of governmental bias – it is best addressed through a combination of structural and procedural measures. Structurally, every effort should be made to ensure the neutrality of the officials

[66] See, eg, *Pestrak v Ohio Elections Commission* 926 F.2d 573, 579 (6th Cir. 1991)(discussing 'the "truth declaring" function of the [Ohio Elections] Commission'. which 'mak[es] judgments, and publicly announc[es] those judgments to the world, as to the truth or falsity of the actions and statements of candidates and others intimately involved in the political process'); Hasen (note 15 above) at 75–76 (arguing that a truth commission is probably permissible under the US Constitution).

entrusted with probing and sanctioning political lies. The Electoral Commission, for instance, is composed of five members who lack 'a high party-political profile' and who have been appointed by the President, nominated by a committee of the National Assembly and the Assembly as a whole, and recommended by a panel made up of the President of the Constitutional Court, the Public Protector, and representatives from the Human Rights Commission and the Commission on Gender Equality.[67] This strikes me as a suitable model, though it could be improved by authorising the panel to make appointments directly, without the approval of the President and the National Assembly.

Procedurally, whichever governmental actor is responsible for combatting political lies should develop detailed internal guidelines for this task. These guidelines should cover, among other issues, under what circumstances investigations will be launched, how investigations will be conducted, what standard must be satisfied for curative steps to be ordered, and what kinds of remedies will be available. The idea here is to use an additional tool to reduce the odds of governmental partiality in this delicate domain. An appointment process as politically insulated as possible clearly promotes the goal of governmental neutrality. This aim is further advanced by limiting the discretion of the officials who end up being selected. That way even if the officials are not paragons of political detachment, their favouritism is constrained and channeled by the rigorous internal rules.[68]

IV Pointless Policy?

This series of hypothetical scenarios sheds light on what a normatively attractive regulatory framework for false campaign speech might look like. To make the proposal even more concrete, here is potential statutory language, modeled on but departing from South Africa's current laws, that could be implemented with little further revision:

No covered actor may make any materially false statement of fact with the requisite mens rea and with respect to any covered subject.

(1) A 'covered actor' is any political party or official thereof, any current officeholder or candidate for office, or any individual or entity that raises or spends at least ___ in connection with an election.
(2) A statement of fact is 'materially' false if it would substantially influence a reasonable citizen who believed it and if it is heard and believed by a substantial number of citizens.
(3) A 'statement of fact' includes any explicit or implicit factual assertion, but does not include any opinion or commentary.
(4) The 'requisite mens rea' is knowledge of, or recklessness as to, a statement's falsity.

[67] Electoral Commission Act 51 of 1996 s 6.

[68] See, eg, *Pestrak* (note 66 above) at 578 (noting that the Ohio Elections Commission 'itself determined, as a policy, to follow a "clear and convincing" standard' for imposing liability).

(5) A 'covered subject' is one that relates to the administration of an election or that tends to promote the victory or defeat of a candidate or party.
(6) The Electoral Commission has sole responsibility for enforcing this provision. Any individual or entity may bring any statement to the Commission's attention, but the Commission has complete discretion in investigating and prosecuting potential violations.
(7) A covered actor who violates this provision by making a false statement that tends to promote the victory or defeat of a candidate or party may be ordered by the Electoral Commission to issue a retraction and correction drafted and communicated as the Commission sees fit.
(8) In addition to the remedies described in s (7), a covered actor who violates this provision by making a false statement that relates to the administration of an election may be imprisoned for up to ___ years and/or fined up to ___.

I have deliberately left blanks in the handful of sections where specific numbers are required (for the amount of money that must be raised or spent for a private citizen to be covered, and for the maximum imprisonment or fine that a violator could face). These are quintessential legislative judgments as to which I have no particular expertise. The rest of the provision, though, is more or less fully specified. It includes all of the elements that seem advisable based on the hypothetical scenarios: a mens rea requirement, a materiality criterion, a restriction to politically active speakers, retraction and correction as the sole remedy for most false statements, stricter penalties for false statements about election administration, and enforcement by the Electoral Commission alone.[69]

In all of these respects, the provision differs from – and is more limited than – South Africa's existing laws. This narrower scope raises what I think is the weightiest objection to the proposal: that because of its many prongs, each shrinking the set of speakers and statements to which liability may attach, it would fail to fight political lies effectively. To flesh out the objection, imagine the universe of false campaign statements (essentially all of which is covered by s 89(2) of the Electoral Act and item 9(1) of the Electoral Code of Conduct). Now withdraw from this universe statements made without knowledge of, or recklessness as to, their falsity, statements whose falsity or effects are immaterial, statements not made by politically active speakers, and (for purposes of imprisonment or fines) statements that tend to promote the victory or defeat of a candidate or party. What is left is too little to make a difference – a drop in the ocean of political deception. Or at least so the argument goes.

The point can also be phrased in terms of the democratic goals that are present on both sides of the equation: on the one hand, the prevention of political lies that disenfranchise voters and distort electoral outcomes; and on the other, the protection of true political speech that is vital to the translation of public opinion

[69] I have identified the Electoral Commission as the governmental actor responsible for enforcing the provision for expository purposes only. A different body, such as a newly created truth commission, could be substituted for it. So could ordinary prosecutors, albeit with somewhat more revision of the proposed statutory text.

into public policy. The claim would be that the proposal I have outlined, in its zeal to protect true political speech, does not prevent enough political lies. Rather than balance the competing considerations, the proposal is tilted in the direction of deregulation, thus undermining (or at least not sufficiently advancing) the cause of democracy.

The basic reason I find this objection unpersuasive is that the above statutory language, despite its several restrictions, still reaches the most objectionable political lies. Take what may be the quintessential campaign falsehood: a knowingly untrue claim by one candidate about her opponent's past record or plans for the future. Assuming materiality, the lying candidate *would* be liable for this statement, and the remedy for the offence would take the form – a retraction and correction designed by the responsible governmental agency – most likely to undo the lie's damage. Or consider a party's deliberate spread of misinformation about electoral logistics, aimed at stopping certain citizens from voting. If material, this deception would also be unlawful, and punishable not just by more speech but by imprisonment and fines as well.

Conversely, the false campaign statements immunised by the proposal are not especially troubling. Untrue assertions whose speakers make reasonable or merely negligent mistakes as to their veracity, for example, are not outright *lies* since they lack the necessary *knowingness*. Despite their low value, these remarks are therefore not very culpable. Similarly, immaterial falsehoods are, by definition, relatively insignificant. There is thus no serious democratic injury if they are left unscathed by the legal system. And while it is possible to think of speakers who are not politically active but whose political lies are consequential, it is not easy to do so. The law already shields these speakers in practice, and the proposal simply formalises this protection.

But while the limits in the statutory language do not insulate much harmful deception, they *do* serve a range of important functions. The best known of these, of course, is avoiding the chilling of true political speech – the lifeblood of a successful democracy. The requirement of knowing or reckless falsity, the materiality criterion, the coverage of only politically active speakers, and the eschewal of most harsh penalties all aim, in different ways, to reduce the chilling that occurs. Another objective furthered by the greater sanctions for lies about election administration, the materiality criterion, and the coverage of only politically active speakers is the efficient deployment of limited state resources. Thanks to these elements, the provision focuses on the most impactful lies: those involving electoral logistics, told by political players, and whose falsity and effects are substantial. A related goal is to *counter* falsehoods as effectively as possible. According to the available political science evidence, the usual remedy of retraction and correction does exactly that. And a final object is neutral enforcement of the provision, free from governmental bias or private manipulation. This is why the role of private parties is eliminated, and structural and procedural safeguards for the responsible governmental agency are established.

I should note at this juncture that a good deal hinges on the government's impartiality.[70] If, despite the precautions that are taken, the government targets certain speakers, from certain parties or with certain ideologies, then the entire regulatory framework loses its legitimacy. It may be desirable to punish *all* sides' political lies, but there is no justification for attacking an unrepresentative subset of them. This point, though, has no more force in this domain than it does in any other prosecutorial context. We *generally* entrust the government with discretion in enforcing the law, and we *generally* are distressed if the government abuses this discretion. These concerns apply to the proscription of false campaign speech, just as they apply to every setting where the power of the state may be deployed. But they do not apply *more* urgently here than elsewhere.

I should also note that the question of how best to balance opposing democratic values is, to a significant degree, subjective. As I have explained, I think South Africa's current laws put too much emphasis on stamping out political lies, and not enough on nurturing political truths. I also think a reasonable observer, mulling the hypothetical scenarios I have outlined, would agree with me about both the laws' flaws and the potential fixes for them. But I concede I cannot prove my position with logical rigour or with empirical evidence. I admit as well that a skeptic could criticise my proposal on the same grounds on which I object to South Africa's laws – namely, that it poorly equilibrates the rival considerations, wrongly weighing the protection of true speech over the prevention of false speech. For the reasons laid out above, I strongly disagree with this criticism. But again, I cannot conclusively dismiss it.

In the end, then, I am left with my own judgement about striking the proper democratic balance, informed by the opinions of courts, the contributions of scholars and the series of hypotheticals I analysed. Is this enough to justify sweeping changes to South Africa's regulatory framework for false campaign statements? Well, the case for reform could certainly be stronger. In particular, more information about the volume of political lies, the influence of these inaccuracies, the impact of different remedies, and the likelihood that governmental actors would enforce the provision neutrally and vigorously, would be very helpful. But such data is not available, at least not in any usable form, and has never been required for policy to be revised. South Africa's *existing* laws, notably, were not enacted on anything like this basis. Rather, in this area as in many others, there is no alternative to grounding legislation in limited facts, in the arguments and conclusions of those who have previously examined the issue, and in deliberation about the circumstances in which the law could be applied. That is what the drafters of s 89(2) and item 9(1) did, and it has also been my approach – hopefully improved by the passage of time and the analysis of a wider set of materials.

V Conclusion

In *Democratic Alliance*, the Justices of South Africa's Constitutional Court divided sharply over the legality of the text message the DA sent to its supporters, ultimately

[70] A good deal also hinges on the government's *vigour* in enforcing the provision. Obviously, enforcement that is impartial but apathetic is not desirable either.

holding that the message was permissible. In this paper, I have not sought to second-guess the Justices' decision, nor have I commented on the constitutionality of the provisions prohibiting false campaign statements. Instead, I have contended that the provisions are unwise as a policy matter and sketched the contours of a more attractive regulatory framework. This framework would include more limitations on liability, including a mens rea requirement, a materiality criterion, and coverage of only politically active speakers. It would also feature retraction and correction as the sole remedy (except in cases involving lies about election administration) as well as exclusive enforcement by a governmental agency.

How would *Democratic Alliance* have come out under this approach? It would have been an easy case, notwithstanding the genuinely difficult questions of whether the text message was true or false and whether it was a factual assertion or a political opinion. First, the DA is a 'covered actor' since it is a political party. Second, the message was likely 'material' since it contained an explosive allegation (that President Zuma stole money) and was sent to a large number of voters.[71] Third, however, it seems clear that the DA's staff neither knew the message was false nor were reckless as to its falsity. Strikingly, no Justice disputed the DA's claim that it 'believed on reasonable grounds that the SMS was true'.[72] This defence is not necessarily relevant under s 89(2) and item 9(1). But it would be dispositive under my proposed framework, immunising the DA from liability.

Fourth, the message involved a 'covered subject' since it tended to promote the defeat of President Zuma and the ANC. But because the message did *not* relate to election administration, it could have been punished only through compulsory retraction and correction, not through imprisonment or a fine. And fifth, under my approach, the Electoral Commission (or other governmental agency) would have had to learn about the DA's message, investigate it and finally decide to prosecute it. The ANC could have informed the Commission about the message, but it could not otherwise have prodded the Commission into acting.

It will come as no surprise that I think this resolution of *Democratic Alliance* – a short ruling in the DA's favor, in the event the Commission decided to prosecute in the first place – would have been highly appealing. It would have avoided the chilling effect inherent in provisions that penalise speech reasonably or merely negligently thought to be true (and that lack a materiality criterion, apply to all speakers, and threaten lengthy prison terms and heavy fines). It would also have dispelled the cloud of arbitrariness that hangs over proceedings initiated by a private party, at the time of its choosing. These, of course, are precisely the benefits I have asserted for my proposed framework. In my view, they would have materialised in *Democratic Alliance* just as in any other case about purported political lies.

[71] However, evidence on the message's actual effects on its recipients is absent.
[72] *Democratic Alliance* (note 1 above) at para 51.